

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 19 December 2019

**Public Authority:** Royal College of Art  
**Address:** Kensington Gore  
London  
SW7 2EU

#### **Decision (including any steps ordered)**

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1. The complainant has requested from the Royal College of Art (the college) employment dates of a former employee. The College applied section 40(2) of the FOIA (personal information) to withhold the information.
2. The Commissioner's decision is that the college has correctly applied section 40(2) of the FOIA to withhold the information.
3. The Commissioner does not require any steps to be taken as a result of this decision.

#### **Request and response**

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4. On 5 November 2018, the complainant wrote to the college and requested information in the following terms:

*"...Could you confirm when [redacted] stopped being employed by the RCA as [redacted] And what date she stopped being employed by the college completely (if thats different to the first date)"*

5. On 4 January 2019 the college replied and said that it is withholding the requested information because disclosure would 'potentially violate the Data Protection Act'. It also said that general information about the data subject's approximate employment dates at the college are publicly available on the internet.
6. On 18 February 2019 the college conducted a review and wrote to the complainant upholding its original decision.

### **Scope of the case**

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7. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. During the course of the Commissioner's investigation the college confirmed that it has applied section 40(2) of the FOIA to withhold the information.
9. The Commissioner has considered whether the college is entitled to rely on section 40(2) of the FOIA to withhold the requested information.

### **Reasons for decision**

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#### **Section 40(2) of the FOIA – personal information**

10. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
11. In this case the relevant condition is contained in section 40(3A)(a)1. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
12. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.

13. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

### **Is the information personal data**

14. Section 3(2) of the DPA defines personal data as:

*"any information relating to an identified or identifiable living individual"*

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
17. In this case, having considered the withheld information, noting that it consists of the named individual's employment dates (who from the college's submission it is clear is a living individual), the Commissioner is satisfied that it relates to an identifiable living individual. The information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
18. The fact that the information constitutes the personal data of a identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
19. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

20. Article 5(1)(a) of the GDPR states that:

*"personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject"*.

21. In the case of an FOIA request, the personal data is processed when it is disclosed in response to a request. This means that the information can

only be disclosed if to do so would be lawful, fair and transparent.

22. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
23. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"<sup>1</sup>.*

24. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test: -

- i) **Legitimate interest test:** whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii) **Balancing test:** whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

25. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

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<sup>1</sup> Article 6(1) goes on to state that:-

*"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".*

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".*

*Legitimate interests*

26. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include the broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
27. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
28. The college initially said that section 40 of the FOIA is an absolute exemption and because of this there is no need to consider legitimate interests in disclosure. It then said that it believes the request is not in the spirit of the FOIA and therefore there is a legitimate interest in protecting the information.
29. The complainant said that he was writing an article for After the News, which, he says is an independent limited design company and that the article relates to events at the Glasgow School of Art (at the time of the request) around 2 major incidents and management activities. He also said that there is an incorrect belief that whilst at the college the data subject was held in high esteem by colleagues and when she left she went directly into other employment. He believes that she was in fact asked to leave the college and because of this there was a period between the time she left the college and took up new employment. He said that there is a legitimate interest in disclosure because if the information was released and showed that there was no gap between the time she left the college and took up new employment this would uphold her credibility and integrity.
30. In the circumstances of this case, the Commissioner accepts that there is a legitimate interest in disclosure of the requested information. She notes the requester's personal interest in the information. She also notes that although the college has failed to understand the component of legitimate interest in the consideration of lawful processing, the information relates to the data subject's end date in a particular role at the college and the date she left the college and is mindful that there is a legitimate interest in the experience of educators derived from time spent in roles and at institutions, which, could provide a greater public confidence in their knowledge and abilities.

*Is disclosure necessary*

31. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
32. In regard to the personal interest of the requester, the Commissioner does not see how disclosure of the information would provide any definitive indication of the data subject's colleagues views/opinions about her and more specifically why she left the college (including whether or not she was in fact asked to leave). The Commissioner notes that the college appears to have failed to understand the component of legitimate interest in the consideration of lawful processing. In regard to the wider interest in the time spent by the data subject in the particular role at the college and the date she left the college, it is the Commissioner's view that without also knowing the date the data subject started at the college and in the specified role, which, has not been requested in this case, it would not be possible to determine her length of service at the college generally and in the specified role and therefore disclosure is not necessary to achieve the legitimate interests identified in this case.
33. The Commissioner therefore considers that the necessity test is not met in this case and has not gone on to conduct a balancing exercise.

## Right of appeal

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34. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

35. If you wish to appeal against a Decision Notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
36. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Signed .....**

**Pamela Clements  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
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SK9 5AF**