

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 April 2024

Public Authority: West Yorkshire Combined Authority

Address: Wellington House
40-50 Wellington Street
Leeds
LS1 2DE

Decision (including any steps ordered)

1. The complainant requested various information in respect of a training contract with HyperionDev/CoGrammar ('CoGrammar'). West Yorkshire Combined Authority ('the Authority') provided most of the information, but withheld some information on the basis of section 42 (Legal Professional Privilege) FOIA. During the course of the Commissioner's investigation the Authority withdrew its reliance on section 42 and stated that the information it held, did not fall within the scope of item 11 of the request. In the alternative, it cited section 32 (court records), section 43 (commercial interests) and section 31 (law enforcement) FOIA.
2. The Commissioner's decision is that the Authority has not complied with section 1(1) FOIA in respect of item 10 of the request as it does not appear to have communicated its amended position to the complainant. He has also determined that it does hold relevant information in respect of item 11 of the request, and that it has failed to demonstrate that sections 32, 43 and 31 are engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information relevant to item 11 of the request.

4. The public authority must take these steps within 30 calendar days of the date of this decision notice. Failure to comply may result in the

Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 16 November 2023, the complainant wrote to the Authority and requested the following information:

“ Has HyperionDev/CoGrammar ever been contracted by the authority to provide a service? (for example, a digital bootcamp)

What was provided and what were the subject matters of these courses or services? (please give exact names of the subject matters of the courses, training or bootcamps)

What were the contract start/end dates?

How many people were given places on these courses?

How many people finished the courses?

What was the allocated amount paid by the authority to CoGrammar/HyperionDev for this service? Please state any tiers/markers for payment.

What was the total amount paid by the authority to VoGrammar/HyperionDev for this service? Please state any tiers/markers for payment.

Which body was providing the money which was paid, or intended to be paid, to CoGrammar/HyperionDev? i.e. who was paying for these courses?

According to the authority, did CoGrammar/HyperionDev fail to provide the service agreed? Please give details.

Has any legal action been taken? Please detail. (Where there are legal limitations please name and detail your legal representative).

Please release the communications between HyperionDev/CoGrammar and the authority (such as Head of Employment and Skills at the

authority) in relation to this, including any pre-action letters, particularly where the authority had to give any reasoning for not paying HyperionDev/CoGrammar

What processes did you use before or since the original agreement, to make legitimacy checks on HyperionDev/CoGrammar as an educational provider?

What contractual or procedural processes were employed to stop malpractice or attempted fraud by HyperionDev/CoGrammar?

Please explain any decision process for using HypeionDEv/CoGrammar given the company was not regulated by an educational body in the UK.”

6. The Authority responded on 13 December 2023. It numbered the requests 1-14 and provided details in respect of all items with the exception of items 10 and 11 which it refused on the basis of section 42 FOIA.
7. The complainant was not satisfied with the Authority’s refusal to provide the information in respect of items 10 and 11 of their request. Following an internal review the Authority wrote to the complainant on 18 January 2024. It upheld its original decision to refuse both of these items in reliance on section 42 FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 2 February 2024 to complain about the way their request for information had been handled. They were not satisfied with the Authority’s reliance on section 42 FOIA in respect of items 10 and 11 of their request.
9. As stated previously in this notice, during the course of the Commissioner’s investigation, the Authority withdrew its reliance on section 42 in respect of item 10 of the request and stated that no legal action has, or is taking place. It considered that item 11 was contingent on item 10, and argued that as there is no legal action, any correspondence between the parties is outside of the scope of that question.
10. The Authority further stated that, in the event that the Commissioner was not of the same mind, it considers that the correspondence held is exempt from disclosure under sections 32, 43 and 31 FOIA.

11. As the complainant has not complained about the Authority's responses to any other items of their request, the scope of the Commissioner's investigation is to consider the Authority's revised position in relation to items 10 and 11. Where the Commissioner decides that the information

relevant to item 11 is within the scope of the request, he will go on to consider the Authority's reliance on the exemptions at sections 32, 43 and 31 FOIA.

Reasons for decision

Section 1 – General right of access to information held

12. Section 1(1) FOIA states:

"Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Item 10

13. In respect of item 10 of the request which asked whether "any legal action had been taken", the Authority informed the Commissioner that its amended position to this question was as follows:

"No; neither HyperionDev/CoGrammar ('CoGrammar') nor the Combined Authority have issued proceedings against the other and as such no legal action has or is taking place".

14. However, the point at issue is whether the Authority has complied with its obligations under section 1(1) FOIA in respect of this item of the complainant's request.
15. The Commissioner considers that the Authority's confirmation that no legal proceedings by either party has, or is taking place, answers this item of the request. However, as he is uncertain whether this has been communicated to the complainant, he has recorded a breach of section 1(1) in respect of this item of the request.

Item 11

16. Item 11 asked the Authority to:

“...release the communications between HyperionDEv/CoGrammar and the authority (such as the Head of Employment and Skills at the authority) in relation to this, including any pre-action letters, particularly where the authority had to give any reasoning for not paying HyperionDEvCoGrammar.”

17. The Authority’s amended position to this item of the request is that as this question is contingent on item 10, and as there is no legal action between the parties, the information held is outside of the scope of the request.

18. The Authority further confirmed to the Commissioner that legal advice was sought from its legal team following receipt of correspondence from solicitors instructed by CoGrammar, and that the Authority issued a response. It added that this is why it originally refused both items 10 and 11 on the basis of section 42 FOIA.

19. The Commissioner has considered the Authority’s view that the information described above is not within the scope of this item of the request. He notes that whilst item 11 of the request is indeed in relation to item 10 of their request, the request asked for correspondence between both parties including any pre-action letters.

20. Having viewed the information, the Commissioner considers that it can only be described as communications between the specified parties in relation to the contractual obligations between them. The Commissioner does not therefore accept that this information is not within the scope of the request.

21. As stated previously, the Authority confirmed to the Commissioner that in the event that he did not accept its position on this matter, that the information was not in scope of the request, that it would rely on sections 32, 43 and 31 FOIA in respect of this information. The Commissioner has therefore gone on to consider the exemptions specified by the Authority.

Section 32 – court records

22. Section 32(1) of FOIA applies to information held by a public authority if it is held only by virtue of being contained in –

“(a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,

(b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or

(c) any document created by (i) a court, or (ii) a member of the administrative staff of a court, for the purposes of proceedings in a particular cause or matter”.

23. Courts and inquiries aren't subject to FOIA, so the authorities most likely to use this exemption are those whose functions involve regular interaction with the court system, or who are party to court, inquiry or arbitration proceedings.
24. To be caught by section 32, the information must be:
 - Contained in a type of document specified by the exemption; and
 - held 'only by virtue' of being contained in that document.
25. Section 32(1) is a class based exemption. This means that any information falling within the category described is exempt from disclosure, regardless of whether or not disclosure would, or would be likely to, cause any prejudice or harm. It's also an absolute exemption. This means there is no requirement to conduct the public interest test.
26. The exemption won't be engaged unless the court, inquiry or arbitration proceedings are already underway, or at the very least, definite steps have been taken to initiate them.
27. The Authority has stated that the issue that the correspondence relates to is still live, with the potential for either party taking legal action a possibility.

The Commissioner's position

28. The Commissioner has considered the purpose the correspondence in question was received or created for, and is mindful that the Authority confirmed:

“...legal advice was sought from the Combined Authority's legal team following receipt of correspondence from solicitors instructed by CoGrammar, and the Combined Authority's legal team issued a response.”
29. The Commissioner does not accept therefore that the disputed documents fall within the categories outlined in (a) to (c) of paragraph 22 of this notice.

30. Similarly, having considered the purpose for which the documents were created, the Commissioner does not accept that they are held 'only by virtue' of being contained in those documents.
31. The Commissioner would also point out that even if the information fulfilled these criteria, as the Authority has confirmed that neither party has instigated proceedings against the other, and as such, no legal action has, or is taking place, the information cannot engage section

32(1) as neither court, inquiry or arbitration proceedings were/ are underway at the time of the request. The Commissioner does not therefore accept that the Authority was entitled to rely on this exemption to refuse to provide this information and has therefore gone on to consider the other exemptions specified by the Authority.

Section 43(2) – prejudice to commercial interests

32. Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

33. In order for a prejudice-based exemption such as section 43 to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice, which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

Does the information relate to a person's commercial interests?

34. The Authority has not specified whose commercial interests it considers may be prejudiced by the disclosure of this information, however the Commissioner will consider it in relation to both parties (the Authority and CoGrammar).

35. The term 'commercial interests' is not defined in FOIA; however, the Commissioner has considered his guidance on the application of section

43¹, which clarifies that: "A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent."

36. The Authority considers that the information is commercial in nature as it includes details of the contract between both parties and contains performance information about CoGrammar.

37. The Commissioner accepts that the withheld information may contain commercial information.

38. The Authority has not however confirmed how disclosure would or would be likely to prejudice the commercial interests of either party. The Commissioner would expect that for section 43(2) to apply, at the very least the public authority needs to specify how disclosure of the information would or would be likely to prejudice either its own commercial interests, or those of a third party. It is not for the Commissioner to speculate regarding this.

39. Further, in terms of the commercial interests of CoGrammar, the Commissioner would refer to his guidance that where a public authority argues that the commercial interests of a third party would be prejudiced, that:

"It is not sufficient for [the PA] to simply speculate about the prejudice which might be caused to the third party's commercial interests. [It will]

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

need to consult them for their exact views in all but the most exceptional circumstances.²”

40. In this case, there is no evidence that the Authority has consulted with CoGrammar, and the Commissioner does not accept that the Authority’s knowledge of such issues would be sufficient to be relied on.
41. Based on the Authority’s failure to specify an apparent prejudice likely to result as a consequence of disclosure of the information, or confirmation

of whose commercial interests it considers would, or would be likely to be prejudiced from disclosure of the information, the Commissioner is not satisfied that the Authority has demonstrated that the information has fulfilled even the first criteria of the prejudice test outlined in paragraph 33 of this notice for section 43 to be engaged.

42. He has therefore concluded that the Authority was not entitled to rely on section 43(2) to refuse the requested information.
43. As the Commissioner is not satisfied that section 43(2) is engaged, it is not necessary for him to consider the public interest test. He has however gone on to consider the final exemption cited by the Authority - section 31 FOIA.

Section 31(1) - the prevention and detection of crime

44. The Authority has cited sections 31(1)(a), (b), (c), (g) and (h) with the two latter subsections in conjunction with section 31(2)(a) and (b).
45. Section 31(1) and the relevant subsections state:

“(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(a) the prevention or detection of crime.”

(b) the apprehension or prosecution of offenders,

² <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

(c) the administration of justice,

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2).

(h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of His Majesty's prerogative or by virtue of powers conferred by or under an enactment.

46. Sections 31(2)(a) and (b) state:

“(2) The purposes referred to in subsection 1(g) to (i) are -

(a) the purpose of ascertaining whether any person has failed to comply with the law,

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper, “

47. Section 31 is a prejudice based exemption and is subject to the public interest test. This means that not only does the information have to prejudice one of the purposes listed, but it can only be withheld if the public interest in the maintenance of the exemption outweighs the public interest in disclosure.

48. As section 31 is another of the prejudice based exemptions, in order to be engaged, the criteria outlined in paragraph 33 of this notice under the analysis for section 43, must also be met for this exemption.

49. The withheld information in this case consists of eight documents, all of which have been provided to the Commissioner for his consideration.

The applicable interests

50. The first point for the Commissioner to consider is whether the arguments provided by the Authority relate to the relevant applicable interests.

51. The Authority did not provide any arguments or evidence in support of its view that disclosure would, or would be likely to prejudice any of the applicable interests outlined in paragraph 33 of this notice.

52. The Commissioner cannot take on face value mere assertions that the applicable interests outlined by the relevant subsections are engaged. It is the duty of the public authority to explain why they apply and to demonstrate that the exemption and subsections are engaged. On the basis that the Authority has failed to provide such information, despite being provided with sufficient opportunities to do so, the Commissioner has no option but to conclude that none of the relevant subsections of section 31(1) are engaged in respect of the withheld information.
53. As the Commissioner has concluded that section 31(1) is not engaged, there is no need for him to go on to consider the public interest test.

Other matters

54. On receipt of a complaint under section 50 FOIA, the Commissioner contacts the public authority requesting full details and arguments regarding any exemptions it has relied on in its response to the request for information. It is the public authority's responsibility to provide full details in support of those exemptions.
55. The Commissioner would also point out that his correspondence confirms that the public authority has one opportunity to provide its full response. The Commissioner is therefore concerned with the standard of the response he received from the Authority in respect of this complaint and the lack of representations in relation to its application of any exemptions in this case. He trusts that it will endeavour to provide more detailed submissions in future.

Right of appeal

56. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

57. 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.
58. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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