

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 March 2023

Public Authority: Council for the Curriculum, Examinations & Assessment

Address: 29 Clarendon Dock
Clarendon Road
Belfast
BT1 3BG

Decision (including any steps ordered)

1. The complainant has requested from the Council for the Curriculum Examinations & Assessment (CCEA) correspondence between named individuals, minutes and notes regarding staffing and other operational matters. The CCEA provided some information but other information was withheld under sections 36, 40(1), 40(2), and 41 of FOIA.
2. The Commissioner's decision is that section 36 of FOIA has been cited correctly and that the public interest lies in maintaining the exemption. The CCEA was also entitled to withhold personal data under section 40 of FOIA. On the balance of probability, he has decided that the CCEA does not hold any further information. However the CCEA breached sections 10(1) of FOIA.
3. The Commissioner does not require any further steps.

Request and response

4. On 11 March 2022, the complainant wrote to the CCEA and requested information in the following terms:

“(2) In addition I am requesting a Freedom of Information request on all items concerning CCEA staffing and other operational matters from 21 April 2021, including:

a. All correspondence from the Chair to the recruitment agency and Council members involved in the recruitment of Temporary Director of Curriculum and Assessment, plus the CCEA staff, on the appointment process for the Temporary Director of Curriculum and Assessment, from advertisement to appointment.

b. Minutes of closed Council meetings including verbatim notes concerning staff at director level and below; staffing structures; and any other operational matters.

c. Internal email correspondence between the Chair and CCEA staff, and external email correspondence between the Chair and DE, the Chair and ETI, or any other external parties, on CCEA operational activity, such as CCEA projects, staffing structures or other staffing matters at director level and below.”

5. On 25 March 2022 the CCEA responded by stating that the request would exceed the fees limit (section 12 of FOIA) but that the requester could restrict the request, if desired.

6. The complainant refined their request on 4 April 2022 as follows:

- All correspondence from the Chair to the recruitment agency and Council members involved in the recruitment of Temporary Director of Curriculum and Assessment, plus the CCEA staff, on the appointment process for the Temporary Director of Curriculum and Assessment, from advertisement to appointment.
- Internal correspondence between the Chair and [redacted personal data] from 1 November 2021 to 1 April 2022 on any operational activity and or staffing matters.
- Internal correspondence between the Chair and [redacted personal data] from 1 August 2021 to 29 January 2022 on CCEA projects or contract with CCEA.

- External correspondence between the Chair and [redacted personal data] ETI [Education and Training Inspectorate] from his start date to 1 April 2022 on any matters concerning CCEA.
 - External correspondence between the Chair and [redacted personal data] DE [Department of Education] from 1 January to 1 April 2022 on any matters concerning CCEA.
 - Minutes of closed Council meetings including verbatim notes concerning staff at director level and below; staffing structures; and any other operational matters.
7. The CCEA emailed the complainant on 26 April 2022 stating that it required an additional 20 working days to consider the public interest regarding the exemptions it cited – sections 41 and 36 of FOIA. The latter exemption was subsequently withdrawn until CCEA's further response several months later.
 8. The CCEA responded on 26 May 2022 and provided some information, parts of which were redacted under sections 40(1) and 40(2) of FOIA (personal information). It also cited section 41 of FOIA (information provided in confidence). At this point the public authority could not be completely certain that it had located all the information falling within scope because it explained that there could be information held on a laptop that was not currently accessible.
 9. The complainant requested an internal review on 15 June 2022 because they did not accept that all the information to which they were entitled had been provided.
 10. On 29 June 2022 the complainant reiterated this point. On the same date the CCEA responded by explaining that the internal review would take 20 extra working days because it was "voluminous and complex".
 11. On 5 July 2022 the complainant was asked by CCEA if they could "narrow your statement to help expedite the review" regarding what the complainant believed had been withheld. The complainant did so on 10 July 2022 asking for 10 sets of verbatim meetings, correspondence between named individuals and querying whether all the information to which they were entitled had been provided.
 12. Following an internal review, the CCEA wrote to the complainant on 28 July 2022. It maintained its position but stated that there was still some outstanding information to be provided.
 13. A further response was issued from the CCEA on 16 November 2022. This response provided the complainant with minutes dated 29 April

2021, 27 May 2021, 26 August 2021 and 25 November 2021. However, other information was withheld under section 36 of FOIA (prejudice to the effective conduct of public affairs).

Scope of the case

14. The complainant contacted the Commissioner on 3 August 2022 to complain about the way their request for information had been handled.
15. The Commissioner considers the scope of this case to be the CCEA's citing of sections 36, 40(1) and 40(2) of FOIA. Depending on his decision regarding section 36, he may also consider section 41. Additionally, he will look at whether the public authority holds any further information and any procedural issues occurring.

Reasons for decision

Section 1 – general right of access to information held by public Authorities

16. Section 1(1) of FOIA states that:

“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.”

17. In cases where there is a dispute over the amount of information held, the Commissioner applies the civil test of the balance of probabilities in making his determination. This test is in line with the approach taken by the Information Rights Tribunal when it has considered whether information is held (and, if so, whether all of the information held has been provided). The Commissioner is not expected to prove categorically whether the information is held.

The CCEA's view

18. In response to the Commissioner's questions, the CCEA explained that it had formally requested the Chair to provide their email correspondence.

It confirmed that all the relevant information was provided on 17 May 2022. When the review was carried out, the Chair again confirmed on 13 July 2022 that there was nothing further to add. As for the other named individual, the information was provided to the Data Protection Officer on 5 April 2022 and they confirmed on 18 July 2022 that they held nothing further. Both individuals have been asked again since the Commissioner began his investigation. They also confirmed that adequate searches had been carried out to determine this. There is more detail regarding searches below.

19. One individual's emails were obtained by Information Communication Technology (ICT) and assessed by the Data Protection Officer at the time of the request. The remaining two named individuals are not employees but external and "outside the control of CCEA".
20. The Commissioner highlighted the complainant's queries about the email correspondence but the CCEA contends that this issue was dealt with in the internal review which was provided on 28 July 2022.
21. The CCEA believes that the searches it conducted at the time of the request and subsequent clarifications were adequate and that all the information to which they were entitled was provided to the requester. The information is held electronically (particularly as staff were working remotely at the time) and electronic based searches were carried out on the CCEA network as well as local hard drives on personal computers. The CCEA has explained that,

"The practice of holding business related information on private or locally held devices or email addresses runs contrary to CCEA's policy and practices and therefore no information relevant information (sic) is held in this format..."

The search terms used were CCEA and Department of Education email addresses in order to help identify the requested information.

22. The CCEA confirmed that no relevant information had been deleted or destroyed. It provided a link to its records management policy <https://ccea.org.uk/about/policies/records-management-policy> to the Commissioner and drew his attention to section 5 "Records Management Requirements" and section 7 "Preservation", the latter setting out the CCEA's policy on retention. However, there is currently a review being carried out involving all CCEA teams to capture all information held by the organisation. The "review has been hampered by the disruption caused by the COVID-19 Pandemic and the lack of a functioning Northern Ireland Executive in recent times".

23. The CCEA does not believe that there are any statutory requirements for it to retain the requested information but there are business requirements and "to ensure that due process is served". The information itself is broad, including emails on operational matters, recruitment, structural and governance matters. Much of the information has been retained for reasons that were provided to the Commissioner but cannot be set out here.

The Commissioner's view

24. The Commissioner understands that the complainant is not convinced that they have been provided with all the information falling within the scope of their request. However, the CCEA has provided detailed responses to the Commissioner's questions concerning what it held and the extent of the searches carried out to locate them. On the balance of probability he accepts that no further information is held, other than what has been withheld from the complainant under an exemption.

Section 40 - personal information

Section 40(1)

25. The CCEA explained to the Commissioner that it had handled the parts of the request that it considered dealt with the complainant's own personal data as a subject access request.

Is the information personal data?

26. Section 40(1) of FOIA states that:

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

27. Section 3(2) of the Data Protection Act 2018 (DPA) defines personal data as:

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

28. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
29. 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.

30. 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.
31. In this case, some of the requested information identifies and relates to the complainant directly and this is the information that the CCEA has withheld under section 40(1).
32. As there is no route to a requester's own personal data under FOIA, if the complainant is unhappy with the information received, they should challenge any exemption from disclosure under Subject Access Request.
33. Section 40(1) is an absolute exemption and there is no requirement for the Commissioner to consider the balance of public interest. Nor is he required to consider whether or not the complainant would be happy to have their personal data published to the world at large. If the exemption applies, the information is not available via FOIA.

Section 40(2) – third party personal data

34. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
35. See paragraphs 27-30.
36. In this case, the CCEA explains, the complainant has requested information that contains the personal information of third parties that were not named or involved in the request:

“The redactions were made in order to protect the privacy rights of those third parties in line with published ICO Guidance. In considering whether redactions made under Section 40(2) were reasonable, CCEA decided to redact information relating to CCEA Officers and external third parties (primarily CCEA Council members, Departmental Officials and External Contractors) who were not named in the request. CCEA also redacted the personal details (eg names, email addresses, phone numbers etc) of those individuals who did not constitute part of the request and for whom disclosure would potentially breach their privacy rights.”

37. The Commissioner is satisfied that the redacted information is the personal data of identifiable individuals because it contains names and contact details as set out in the previous paragraph.

38. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focused here on principle (a), which states:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”

39. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
40. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.
41. The Commissioner considers that the complainant is pursuing a legitimate interest and disclosure of the requested information is necessary to meet that legitimate interest. The fact that the individuals' names and contact details are not named in the request is not a crucial deciding factor in whether the requested information should be withheld or released. If it falls within the scope of the request it needs to be considered, whether or not the individuals are named. There is additionally the fact that the individuals concerned are acting in their professional capacity where there is less expectation of privacy.
42. However, the third party individuals have a reasonable expectation that the information remain confidential.
43. The complainant has been provided with redacted information (though some information has been withheld) by the CCEA. Therefore, the Commissioner recognises that the CCEA has attempted to be fair and transparent by disclosing what information it considered it could disclose relating to the request. His view is that the complainant's legitimate interest has been met to an adequate degree through the information which has been disclosed to them.
44. The Commissioner has determined that there is insufficient legitimate interest to outweigh the fundamental rights and freedoms of the individuals whose personal details have been redacted. Therefore, he considers that there is no legal basis for the CCEA to disclose the requested information and to do so would be in breach of principle (a).
45. The Commissioner has therefore decided that the CCEA was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

46. There is some very limited email communication where section 41 was also cited but where section 40(2) of FOIA also applied. Therefore the Commissioner has not gone on to consider section 41.

Section 36 – Prejudice to the effective conduct of public affairs

47. Section 36 of FOIA provides that,

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act -

(2)(b) would, or would be likely to, inhibit -

i. the free and frank provision of advice, or

ii. the free and frank exchange of views for the purposes of deliberation, or

(2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

48. The CCEA has cited section 36(2)(b)(ii) and 36(2)(c) for part of the information it has withheld. The CCEA did consider that section 36(2)(b)(i) also applied and the Qualified Person (QP) had recorded their view to that effect on the form that was completed but the CCEA confirmed to the Commissioner that it would not be relying on this limb. The Commissioner has been provided with the withheld information. He is unable to describe it in any detail without giving away the substance of the information.
49. The exemption has been applied to the final notes of the closed council meeting held on 20 January 2022 and the draft or incomplete verbatim notes of closed council meetings held on 29 April 2021 and 25 November 2021, 9 December 2021 (two sets), 6 January 2022, 20 January 2022, 27 January 2022 meetings.
50. The CCEA also explained why it had initially cited section 36 but not been in a position to continue citing it. There was no QP to provide their opinion for reasons that cannot be outlined here. Attempts were made to find a QP, including asking its sponsor department, but there were “no viable alternatives”. However, section 36 was applied when the CCEA provided some information to the complainant in November 2022 and withheld other information.
51. The public authority also noted that, had this not been the case, it believes -

“that much (if not all) of the information redacted under S41 (i.e. the minutes of the closed session meetings of CCEA Council held on 9 December 2021 and 6 January 2022) would have been exempt from disclosure under Section 36...”

52. The Commissioner must consider the qualified person’s opinion as well as the reasoning which informed that opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner will:
- Establish that an opinion was given;
 - Ascertain who was the qualified person or persons;
 - Ascertain when the opinion was given; and
 - Consider whether the opinion was reasonable.
53. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. The qualified person for the CCEA at the time was Leah Scott, Acting Interim Chief Executive Officer. The Commissioner is satisfied that Leah Scott was the appropriate qualified person to give an opinion. The opinion was signed on 16 November 2022.
54. The Commissioner next needs to establish whether the qualified person’s opinion was reasonable.

Is the qualified person’s opinion reasonable?

55. The QP gave consideration to the arguments contained in the public interest test (set out later). Both sides of the argument were presented, for and against disclosure. They considered whether the disclosure of closed minutes and verbatim notes of discussions during the meetings being withheld would have a detrimental impact on the ‘live’ recruitment process going on at the time concerning the role of Chief Executive. The CCEA believes that there is a need to engage -

“in such discussions candidly...CCEA Council members must have the ability to express themselves openly and honestly and to explore all the options in relation to such an important decision as the recruitment of a Chief Executive.”

A safe space is required “away from public or media involvement in which to develop ideas and discuss options relating to significant strategic decisions...” Otherwise discussions would be inhibited and the quality of the decision-making impaired. There was also concern raised by the CCEA about the accuracy of the verbatim notes. The

Commissioner notes, however, that any such concerns could be allayed by providing an explanation.

56. The CCEA notes that the timing of the request is important "in light of the current recruitment process". There would be a "disruptive impact on the ability of CCEA to manage the current recruitment process as the minutes could be used by current applicants to gain some benefit or insight in relation to the current procedure". The QP signed to the opinion that inhibition "would be likely" to occur but acknowledged that this judgement was "timebound" and that the position could change.
57. A prejudice test was also carried out regarding section 36(2)(c) to ascertain the level of prejudice resulting from disclosure. Again, the public interest arguments were considered. The CCEA also assessed whether disclosure of the minutes or verbatim notes would prejudice "the effective management of CCEA and would have a direct impact on the ability to manage the current recruitment process".
58. It concluded that prejudice "would be likely to" occur but made the same proviso concerning the time factor.
59. The Commissioner's guidance says QP opinion "only has to be a reasonable opinion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold". It is clear that the QP was provided with the information in question and there were arguments both in favour of withholding and in favour of disclosing the information. The Commissioner accepts that the QP's reasoning covers sections 36(2)(b)(ii) and section 36(2)(c) and the inhibition/prejudice identified. The QP's signed opinion is therefore one that a reasonable person could hold. There was an additional reason provided as to why disclosure would be likely otherwise to prejudice the effective conduct of public affairs that cannot be disclosed here. The exemption is engaged at the lower level of inhibition or prejudice.
60. Even though he considers section 36(2)(b)(ii) and 36(2)(c) to be engaged, the public interest arguments in favour of disclosure may outweigh those in favour of withholding the information.

Public interest factors in favour of disclosing the information

61. The CCEA has acknowledged that disclosure "could improve transparency, accountability and decision making".
62. The complainant has stated that they believe the requested information was deliberately withheld by the CCEA, indicating that its release would be in the public interest.

Public interest factors in favour of maintaining the exemption

63. The CCEA's view is that council members might be inhibited from engaging candidly in discussions about a 'live' recruitment process for the role of Chief Executive should the minutes and verbatim notes of discussions during these meetings be disclosed. They need "to express themselves openly and honestly and to explore all the options in relation to such an important decision". In other words a safe space is required to develop ideas and discuss options whilst strategic decisions are being made. Any impairment in decision-making is not in the public interest.
64. Disclosure of the minutes or verbatim notes to the world at large, "would have a direct impact on the ability to manage the current recruitment process". The minutes could be used by applicants to gain some benefit or insight in relation to the current procedure".

Balance of the public interest

65. The Commissioner agrees that a loss of candour would not be in the public interest when discussing any important recruitment process. In this case that process was 'live' and remains so. He accepts that the information is of importance to the requester and may be of interest to the wider public but has concluded that disclosing the discussions between council members regarding the recruitment of a senior figure would undermine the process.
66. The CCEA had cited section 41 for the redacted minutes of 9 December 2021 and limited email communications. The Commissioner accepts that section 36 applies, though not cited at the time it was provided to the complainant. As the Commissioner has decided that section 36 has been correctly cited, he has not gone on to consider section 41.

Procedural matters

67. The public authority breached section 10 of FOIA by providing information outside the 20 working day timeframe.

Right of appeal

68. 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@justice.gov.uk

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

69. 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.
70. 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

Janine Gregory
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