

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

### **Decision notice**

**Date:** 6 October 2014

**Public Authority:** The Governing Body of Activate Learning  
**Address:** Oxpens Road  
Oxford  
OX1 1SA

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

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1. The complainant requested from Activate Learning ("the College") a copy of a report concerning an investigation into allegations about misconduct by staff at the College ("the Report"). The College disclosed some information but withheld other information under the exemptions in sections 40(2) and 41 of FOIA. It also stated that it only held one of the appendices which had originally been attached to the Report.
2. The Commissioner's decision is that, on the balance of probabilities, the College only holds one of the appendices to the Report. He has also determined that the College has correctly withheld information under section 40(2), with the exception of the name of the consultant who carried out the investigation and prepared the Report. The Commissioner therefore requires the College to take the following further steps to ensure compliance with the legislation:
  - To disclose to the complainant the name of the consultant who carried out the investigation and prepared the Report.
3. The public authority must take these steps within 35 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

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4. On 10 December 2013 the complainant made the following request for information to Activate Learning (formerly Oxford and Cherwell Valley College) under FOIA:

*"I would refer you to:*

[https://www.whatdotheyknow.com/request/fe\\_associates](https://www.whatdotheyknow.com/request/fe_associates)

*The response to the requester included a document. That document clearly referenced work done for OCVC. This means that there would have been a report issued.*

*Would you please send the report."*

5. The complainant's request referenced a request made on 5 October 2011 through the website "What do they know" to Oxford and Cherwell Valley College for details of spending with a named company between May and December 2010. The response refers to an invoice relating to services provided in respect of human resources consultancy.
6. On 11 January 2014, the complainant emailed the College to point out that he had not received a response to his request.
7. On 13 January 2014, the complainant received an email attaching a response to his request. The response was dated 10 January 2014. The requested information was withheld under the exemptions in sections 40(2) and 41 of FOIA. The complainant was also informed that Oxford and Cherwell Valley College had been rebranded as Activate Learning.
8. On 17 January 2014 the complainant asked the College to review its decision to withhold information and also complained about issues related to the handling of his request.
9. On 5 February 2014 the College provided the outcome of its internal review. It disclosed some information contained in the Report to the complaint but withheld the remainder of the information under sections 40(2) and 41.

## Scope of the case

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10. The complainant contacted the Commissioner on 10 February 2014 to complain about the way his request for information had been handled. He specifically complained about the College's refusal to disclose all of

the information that he requested and its failure to respond within the time frame required by FOIA.

11. During the course of the Commissioner's investigation, the College subsequently disclosed some additional information to the complainant and informed him that it only held one of the appendices to the Report. The complainant queried whether the College still held copies of the other appendices to the Report.
12. The Commissioner considered whether the College:
  - (i) had identified all of the information that it held that fell within the scope of the request;
  - (ii) was entitled to rely on sections 40(2) and 41 as a basis for refusing to provide information contained in the Report; and
  - (iii) had complied with section 10 of FOIA in its handling of the request.
13. The complainant also raised concerns as to whether an offence may have been committed under section 77 of FOIA and whether the internal review was properly carried out. These issues are considered in the "Other matters" section at the end of this decision notice as they are not issues on which the Commissioner can make a formal decision under section 50 of the Act.

## **Reasons for decision**

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### **Section 1 - Information held**

14. During the course of the Commissioner's investigation, the College confirmed that it only held a copy of Appendix 3 to the Report and that it no longer held copies of the other appendices to the Report. The complainant raised concerns that the College may still hold copies of the appendices to the Report, other than Appendix 3.
15. The Commissioner therefore considered whether the College held any of the other appendices to the Report, in addition to Appendix 3.
16. In situations where there is a dispute between a public authority and a complainant about whether further information is held by the public authority, the Commissioner, following the lead of a number of Tribunal decisions, applies the civil standard of proof. In other words, in order to determine such complaints, the Commissioner must decide whether on

the balance of probabilities a public authority holds any information which falls within the scope of the request.

17. The College informed the Commissioner that there were numerous hard copy files relating to the investigations that were carried out. It confirmed that all the relevant files were searched twice to ensure that any information held falling within the scope of the request was retrieved from the files. The College assured the Commissioner that any relevant information would only have been stored within those files.
18. The College explained that it believed that the appendices to the Report, with the exception of Appendix 3, were not retained when changes to the structure of the College were made, when it changed from Oxford and Cherwell Valley College to Activate Learning on 1 September 2013. It believed that the appendices would have been securely destroyed for confidentiality purposes at the time of the restructuring. It confirmed that, unfortunately, it did not hold a record of when this process was carried out, but as the appendices were not identified at the time of the request, it was certain that the destruction occurred prior to the request, most likely in September 2013.
19. In relation to a query from the Commissioner as to why the appendices would not have been held in electronic form, the College explained that the Report was provided to the College by the consultant in hardcopy format only. The College informed him that, save for the Report itself and Appendix 3, this information was not scanned onto its system. It confirmed that this was not unusual, as it was normal practice at the time for it to store information received in hardcopy format in a secure (locked) manual filing cabinet only, rather than also scanning hardcopy documents onto its system. As such, it believed that the appendices stored only in hardcopy would have been destroyed when changes to the structure of the College were made in September 2013.
20. The College informed the Commissioner that its Data Protection and Data Retention Policy at the time of the request stated that:

*"It is not in the interest either of data subjects or of the College to retain unnecessary or duplicated information. The College does, however, retain some data relating to former employees and students partly in order to comply with statutory requirements but also as a way of maintaining a complete historical record. Nonetheless, it is College policy to discourage the retention of personal data within files for longer than it is needed."*
21. The College went on to comment that, as the investigation was completed and all recommendations and required steps had been

implemented, the information was no longer needed, in accordance with the College's policy.

22. The complainant contended that as the information in the appendices concerned child protection matters, it would be covered by statutory provisions which would require the College to retain this information for a considerable period of time. As a result he doubted whether it would have been destroyed.
23. The College informed the Commissioner that it recognised that there were occasions when details relating to allegations against staff in relation to their behaviour towards children should be retained by the College. It explained that it was aware of its obligations under the Education Act 2002 and guidance produced further to section 175 of this Act. However, having spoken with staff who were involved in the investigation process, the College believed that any requirements (whether statutory or best practice) upon it were not relevant, as the appendices were not believed to have contained any information relating to such allegations. As such, it believed that they were appropriately destroyed around the time of the restructuring.
24. Based on the searches that the College has carried out and the explanation that it has provided to the Commissioner, he is satisfied that, on the balance of probabilities, it no longer holds any of the appendices to the Report, other than Appendix 3. He has therefore decided that the College does not need to take any further steps to comply with FOIA in respect of that part of the complaint.

## **Exemptions**

25. The College withheld information falling within the scope of the complainant's request under the exemptions in sections 40(2) and 41 of FOIA. The Commissioner initially considered whether the withheld information was exempt from disclosure under section 40(2).

## **Section 40(2) – Personal information**

26. Section 40(2) provides an exemption for information which is the personal information of an individual other than the complainant and where one of the conditions listed in section 40(3) or 40(4) is satisfied.
27. Section 40(2) provides that –

*"Any information to which a request for information relates is also exempt information if-*

- a. it constitutes personal data which do not fall within subsection (1), and*

*b. either the first or the second condition below is satisfied."*

28. Section 40(3) provides that –

*"The first condition is-*

*a. in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-*

*(i) any of the data protection principles, or*

*(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and*

*b. in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."*

29. In this case the relevant condition is contained in section 40(3)(a)(i). This applies where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act ("DPA").

30. The Commissioner therefore considered:

(1) whether the withheld information constitutes personal data; and if so

(2) whether disclosure would breach one of the data protection principles.

### **(1) Does the withheld information constitute personal data?**

31. In order to establish whether section 40(2) had been correctly applied, the Commissioner first considered whether the withheld information is the personal data of parties other than the complainant.

32. Personal data is defined in the DPA as information about a living individual who can be identified from that information, or from that information and other information in the possession of, or likely to come into the possession of, the data controller.

33. The College informed the Commissioner that it considered that the withheld information contained the personal data of:
- the independent consultant who was appointed to prepare the report;
  - various members of staff at the College who were identifiable from details about them contained in the report; and
  - students at the College who were witnesses to the grievances that were under investigation.
34. The Commissioner was informed by the College that it considered some of the withheld information constituted "sensitive personal data". "Sensitive personal data" is defined in section 2 of the DPA as personal data which falls into one of the categories set out in that section.
35. The Commissioner notes that most of the withheld information in the main body of the report is detailed discussions about allegations concerning a particular member of staff at the College. There is also some discussion of the procedure followed in investigating those allegations and the consultant's conclusions regarding the allegations. In addition, it details some evidence provided by witnesses to the consultant. Appendix 3 to the report contains details of evidence given by a number of members of staff to the consultant. Finally, the College withheld the name of the consultant who carried out the investigation.
36. In the Commissioner's view the two main elements necessary for information to be personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in some way.
37. In the Commissioner's view, much of the withheld information constitutes the personal data of the individual who was the subject of the allegations as it relates to the nature of the allegations and the investigation of them. He also believes that some of the personal data is "sensitive personal data" under section 2 of the DPA as it relates to some allegations that, if proven, could have constituted criminal offences.
38. The Commissioner accepts that some of the withheld information is also the personal data of witnesses who provided evidence to the consultant. In addition, the name of the consultant carrying out the investigation is clearly his personal data.

39. However, the fact that information constitutes the personal data of individuals does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the data protection principles. The Commissioner therefore went on to consider whether disclosure of the individuals' personal data would breach one of the data protection principles.

**(2) Would disclosure breach one of the data protection principles?**

40. The College informed the Commissioner that it believed that the first, second and seventh data protection principle would be breached if the withheld information was disclosed.

41. The Commissioner initially considered whether the disclosure of the withheld information would be a breach of the first data protection principle. The first data protection principle requires that any disclosure of personal data is fair and lawful and that at least one of the conditions in schedule 2 of the DPA is met.

42. The Commissioner firstly gave consideration to whether the disclosure of the withheld information would be fair. In doing so, he took into account the following factors:

(i) the individuals' reasonable expectations of what would happen to their information;

(ii) whether disclosure would cause any unnecessary or unjustified damage or distress to the individuals concerned; and

(iii) whether the legitimate interests of the public in disclosure were sufficient to justify any negative impact to the rights and freedoms of the individuals concerned.

**(i) Reasonable expectations of the individuals concerned**

43. The Commissioner considered the reasonable expectations of the individuals in terms of what would happen to their personal data. These expectations can be shaped by factors such as an individual's general expectation of privacy and also the purpose for which they provided their personal data.

44. When considering what information an individual should expect to have disclosed about them, the Commissioner considers that a distinction should be drawn as to whether the information relates to their public or private life. The Commissioner's view is that information which relates to an individual's private life (i.e. their home, family, social life or finances)



will deserve more protection than information about them acting in an official or work capacity (i.e. their public life).

45. The College contended that where the information concerned its current or previous employees, it related to personal aspects of their lives rather than their working lives.
46. The complainant argued that it was not acceptable to withhold the names of employees ultimately employed by the public purse, whose names were included in a report which was also paid for by the public purse.
47. The Commissioner notes that the Report relates to events that occurred at the College. Consequently it concerns the employees, or former employees, of the College acting in a work related capacity. In light of this, the Commissioner's view is that the information may not attract the same level of protection as information which relates to individuals' private lives.
48. However, the Commissioner does not accept the complainant's contention that simply because the information relates to individuals employed in the public sector there is an expectation that information about them should automatically be disclosed. Whether personal data about public sector employees should be placed in the public domain will depend on the circumstances of each case.
49. The College informed the Commissioner that verbal assurances, that the information provided by the individuals interviewed would be kept confidential, were given to each individual. It therefore believed that the withheld information that was supplied for the purposes of the Report was provided with a genuine and reasonable expectation of confidence and that such confidentiality should be maintained.
50. The College went on to explain that its standard practice was that all information provided to it relating to a private grievance matter, or other allegations made internally, would remain private (unless the College was lawfully required to disclose the information for the prevention or detection of crime).
51. The College also noted that, in relation to any sensitive personal data contained in the withheld information, the ICO's guidance on the disclosure of public authority employees' personal information states that *"if the information is sensitive personal data ...disclosure is unlikely to be fair."*
52. The College argued that in light of the private nature of the investigation, the nature of the withheld information and the fact that

much of it was provided to it confidence, there would have been no expectation of it being place in the public domain on the part of those involved.

53. The Commissioner considers that employees of public authorities should be open to scrutiny and accountability and should expect to have some personal data about them released because their jobs are funded by the public purse. However, he considers that certain types of information should generally not be disclosed even though such information relates to an employee's professional life and not their personal life. One of those types of information is information that relates to disciplinary/personnel matters. His general view is that this type of information should remain private.
54. The Commissioner therefore considers that those involved in internal investigations into allegations of misconduct within public authorities, whether as the person against whom the allegations are made or as witnesses, would normally have a reasonable expectation prior to participating in the process that the information that they provide will not be disclosed to the public. This is reinforced in this case by the College's confirmation that verbal assurances were given to this effect to those who were interviewed.
55. In addition, following the conclusion of the investigation, the Commissioner notes that the consultant found that none of the allegations contained in the Report could be substantiated. This would almost certainly have increased the reasonable expectations of those involved, particularly the person against whom the allegations were made, that the College would not subsequently place in the public domain detailed information about the matter.
56. The Commissioner is therefore satisfied that those involved in the investigation would have had a reasonable expectation that the withheld information, which constitutes their personal data, would not be disclosed to the public at large.
57. In relation to the consultant, the College informed the Commissioner that they had a belief that their name and involvement with the Report would not be disclosed to the public.
58. The Commissioner notes that the consultant carried out a significant investigation on behalf of the College and subsequently, not only made findings in relation to the specific allegations that had been made, but also made recommendations as to changes in the College's practices. The work that he carried out was paid for by public funds. In these circumstances, the Commissioner believes that there should be a

reasonable expectation on the part of the person involved that their name may be disclosed to the public.

## **(ii) Consequences of disclosure**

59. The Commissioner was informed by the College that, considering the private and sensitive nature of the matters dealt with in the Report, there was a reasonable expectation on the part of those individuals that their personal data would be kept confidential. It believed that the possible consequences for those individuals of disclosing the information would be significant and would result in unwarranted prejudice to them, including distress and damage.
60. The Commissioner accepts that disclosure of information provided by those involved in an investigation into allegations of misconduct could potentially cause damage and distress to those individuals, particularly the person against whom the allegations were made. He acknowledges that the disclosure of the withheld information would result in information about unproven evidence and allegations being placed in the public domain. Any such disclosures could clearly be potentially harmful to those involved in a professional, as well as in a personal, capacity. The Commissioner also accepts that disclosure could cause distress to those involved by the reopening of matters which they believed had been concluded after the Report had been considered by the College.
61. As regards the consultant who carried out the investigation and prepared the Report, the Commissioner is not aware of likely damage or distress that they might suffer from the disclosure of their name, given their role in the matter.

## **(iii) General principles of accountability and transparency**

62. The Commissioner notes that, notwithstanding a data subject's reasonable expectations or any damage or distress caused to them by disclosure, depending on the circumstances of the case, it may still be fair to disclose the withheld information if there is a more compelling public interest in disclosure.
63. In considering 'legitimate interests', the Commissioner's view is that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests. In the circumstances of this case, he accepts that there is a valid interest in ensuring that the College has investigated issues related to allegation of misconduct fully and, where relevant, taken appropriate action.
64. The complainant argued that, given his belief that the allegations were of a serious nature, the information that had been withheld by the

College should be disclosed to the public. He particularly emphasised the public interest in identifying any improper conduct and ensuring that students at the College were protected from such conduct.

65. The Commissioner is obviously not able to provide detailed comments on the nature of the allegations contained in the withheld information. However, from the information contained in the Report that has been disclosed by the College, the Commissioner notes that this points towards the issues being investigated mainly relating to relationships between staff members, rather than between staff members and students. Also, as he has previously noted, the Report concluded that none of the allegations that were made were substantiated.
66. The Commissioner, in addition, acknowledges that from the evidence available to him it appears that the consultant carried out a detailed investigation into the allegations and spoke to a considerable number of witnesses. There is nothing in the information that the Commissioner has seen to suggest that the consultant did not undertake a thorough investigation of the allegations that had been made.
67. The Commissioner believes that any public interest in disclosure must be weighed against potential the prejudices to the rights, freedoms and legitimate interests of the individuals who gave evidence for the purpose of the investigation. Taking into account of all of the issues discussed above, the Commissioner has concluded that the strength of the legitimate interest in disclosure is not sufficient to supersede the right of the data subjects, the witnesses, to privacy. This decision has been informed by his consideration of the reasonable expectations of those witnesses and the possible consequences of disclosure for them.
68. The Commissioner has therefore concluded that it would be unfair to disclose the withheld information, with the exception of the name of the consultant that carried out the investigation, as this would breach the first data protection principle. In light of this, it has not been necessary for him to go on to consider whether disclosure of this information is lawful or whether one of the conditions in Schedule 2 of the DPA is met. He has therefore decided that the College has correctly applied section 40(2) to the information that it withheld under that section, with the exception of the name of the consultant.
69. Having determined that the College had correctly withheld information under section 40(2), the Commissioner did not go on to consider its application of section 41 to the same information.
70. In relation to the College's withholding of the name of the consultant, the Commissioner believes that there is a legitimate public interest in the disclosure of their name so that the public can be assured that an

investigation into significant matters within a public authority was carried out by an appropriate person. He has consequently determined that it would be fair and lawful to disclose the name of the consultant.

71. Having determined that this would be fair and lawful to disclose the consultant's name, the Commissioner went on to consider whether a condition in Schedule 2 of the DPA was met. In relation to the conditions in Schedule 2 of the DPA, the Commissioner believes that the most appropriate condition in this case is the sixth condition which states that:

*"The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms of legitimate interests of the data subject".*

72. The Commissioner has explained above why he believes that the disclosure of the consultant's name would serve a legitimate public interest. As a result he is satisfied that a condition in Schedule 2 is met and that section 40(2) is not applicable to their name. The Commissioner therefore requires the College to disclose the consultant's name to the complainant.

### **Section 10 – Time for compliance with the request**

73. Section 1 of FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds the information and, if so, to have that information communicated to him, subject to the application of any relevant exemption. Section 10(1) of FOIA provides that this must be done *"...not later than the twentieth working day following the date of receipt."*

74. The Commissioner notes that the complainant made his request on 10 December 2013 and that the College provided a response on 13 January 2014. The complainant believed that the College may not have responded within the required 20 working days.

75. Section 10(6) defines a "working day" as

*"...any day other than a Saturday, a Sunday, Christmas Day, Good Friday, or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom."*

76. The Commissioner's guidance on section 10 states the following:

*"31. Authorities should take particular note that any day which is a bank holiday in any one of the four nations comprising the UK will be a non-working day for the purposes of the FOIA.*

*32. For example, St. Patrick's Day can be counted as a non-working day in all countries covered by the legislation, even though it is only a bank holiday in Northern Ireland, and not in England Scotland or Wales."*

77. The Commissioner notes that, following the College's receipt of the complainant's request, in addition to Saturdays and Sundays, the following days did not qualify as "working days" for the purposes of section 10, Christmas Day, Boxing Day, New Year's Day and 2 January 2014 (as it was a bank holiday in Scotland). Consequently, he has determined that the College responded within 20 working days following the date of the receipt of the request and did not breach section 10.

## **Other matters**

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78. The complainant informed the Commissioner that an email sent to him by the College on 13 January 2014 had a letter attached which was dated 10 January 2014, one day before the he sent his email chasing a response. The complainant alleged that the metadata for this document showed that it was created on 13 January 2014, not 10 January 2014, and that he believed that the backdating of the letter was a deceit on the part of the College to suggest compliance with FOIA. He raised concerns as whether an offence may have been committed under section 77 of FOIA.
79. The Commissioner notes that whether an offence has been committed under section 77 is not a matter on which he can make a determination in a decision notice as it is not a matter which falls within Part I of FOIA. However, following enquiries made by the Commissioner, the College informed him that its response letter was created and ready to be sent on Friday 10 January 2014 but that due to an administrative error it was not sent until the next working day, 14 January 2014. It assured the Commissioner that this was not an attempt at any form of deception. After receiving the College's explanation, the Commissioner has not investigated this matter further.
80. The complainant also raised concerns about the College's handling of the internal review, in terms of the review apparently being conducted by the same person as signed the refusal notice. The College explained that when the request for an internal review was received it carefully considered whether there was any other senior member of staff who

could conduct the review other than the person involved in the initial response. However, due to staff absences, it was determined that the individual concerned was the most senior member of staff available to carry out the review. The College assured the Commissioner that the person did carry out the review independently and objectively and pointed out that the review resulted in the original response being amended and some information being disclosed to the complainant.

81. The Commissioner would expect, where ever possible, an internal review to be carried out by a person other than the one that dealt with the original request and, ideally, by a person who is at least at the same level of seniority within the organisation as the person that provided the initial response. This helps to promote confidence on the part of a requester that the handling of the request has been independently reviewed by a public authority when an internal review is undertaken.
82. The Commissioner would therefore have expected that someone within the College, other than the person who made the initial decision, should have carried out the internal review, even if this would have meant that there was a little bit of a delay in providing the outcome of the internal review to the complainant.

## Right of appeal

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83. 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)

84. 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.

85. 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 .....**

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**