

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 29 June 2009

Public Authority: Cardiff University
Address: Park Place
Cardiff
CF10 3AT

Summary

The complainant requested the results of 2007/08 LLB Law Year 1 examinations in a particular format. Cardiff University (the University) provided the results for each module in descending order. The University withheld information in the format requested by the complainant under section 40(2). During the complaint, the complainant stated that the reason for his request was to determine his overall ranking in his class. The University stated that information relating to the complainant's overall ranking constituted his personal data and was exempt by virtue of section 40(1) but confirmed that it could provide this information via a subject access request under section 7 of the Data Protection Act 1998 (the DPA) and payment of the relevant fee. The Commissioner's decision is that the public authority applied the Act appropriately in withholding the examination results by virtue of the exemption at section 40(2). The Commissioner also concluded that the complainant's overall ranking was exempt under section 40(1) and would need to be requested under section 7 of the DPA. The Commissioner does not require the public authority to take any steps in relation to the complainant's request.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the Act). This Notice sets out his decision.

The Request

2. On 8 July 2008 the complainant made a request to the University for "the results for the 2007/8 LLB Law Year 1 examinations as follows. The complete list of results for examinations in the following modules:

CL2106	Legal Foundations [30]
CL2107	Contract [30]
CL2108	Public Law [30]
CL2109	Tort [30]"

3. The complainant asked that the information requested be provided to him in “an electronic tabular format suitable for further analysis” and that “the relationship between the candidate and all four results (where applicable) should be maintained”, with the student identification removed or de-sensitized.
4. The University responded to the request on 21 July 2008 confirming that the information requested was held but stated that to provide the data in the format requested would breach the first data protection principle¹ in that it would be unfair to individuals and was therefore exempt under section 40(2). The University stated that to publish the examination marks in the format requested, which maintained the link to the student, created a risk that a particular student could be identified.
5. The University provided the complainant with the marks for each examination module in descending order and confirmed that the information reflected only those marks where the student completed the assessment in 2008 and that module marks for those students re-sitting had been capped at 40.
6. On 24 July 2008 the complainant requested an internal review of the University’s decision. He challenged the University’s statement that students could be identified by release of the information in the format requested. He also pointed out that certain examination results had been publicly displayed on a notice board at the University, which included the student identification number. The complainant also stated that the University had agreed to provide him with information relating to his overall ranking via a subject access request in accordance with section 7 of the DPA. However, the complainant remained of the view that he should be able to access the information he wanted, without paying a fee, via the Act.
7. On 2 September 2008 the University provided the complainant with the outcome of its internal review. The University upheld its decision not to release the information in the format requested and referred to a conversation it had had with the complainant during which he had indicated the reason for his request was to determine his ranking in relation to other students. The University reminded the complainant that he could access the information he required via a subject access request.

¹ As set out in Schedule 1 to the DPA

The Investigation

Scope of the case

8. On 3 September 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
- whether the information requested constituted personal data;
 - the fact that one set of examination results with the appropriate student identification number had been publicly displayed on a notice board in the University;
 - whether the complainant's overall ranking constituted his personal data;
 - how students could be identified from publishing an anonymised list of four sets of numbers; and
 - the threshold of the issue of fairness in respect of the first data protection principle and whether examination results related to the professional life of the students.

Chronology

9. On 17 September 2008 the Commissioner wrote to the University to confirm that the complaint had been deemed eligible for consideration under the Act and to request a copy of the withheld information.
10. On 1 October 2008 the University responded to the Commissioner providing a copy of the withheld information and further representations in support of its view that release of the information in the format requested would be unfair. The University also confirmed that the complainant's individual ranking in the class was exempt under section 40(1) of the Act as it constituted his personal data, but advised that the information could be provided as part of a subject access request if the complainant paid the relevant £10 fee.
11. On 22 December 2008 the Commissioner wrote to the University requesting further information relating to:
- why it considered that release of the information in the format requested would breach the first data protection principle of fair and lawful processing; and
 - what consideration the University had given to redaction of some of the information held to overcome the risk of identification of certain individuals.
12. The University explained the reasons why it considered the information requested was personal data and provided further examples to demonstrate how students could be identified through disclosure in the format requested.
13. The University maintained its view that to provide the information in the format requested would breach the first data protection principle and considered that there were no conditions under Schedule 2 to the DPA that would allow

disclosure, and, as it could lead to students being identified, such disclosure would be unfair and unlawful.

14. The University stated it had considered redaction of the information requested and had reviewed the sending of the information with the candidate identification number removed at the time of the original request.
15. The University maintained the view that individuals could be identified by their examination profile even without the student identification number. For that reason, it had provided details of exam performance for each module in a format which did not maintain the link to each student throughout.

Analysis

Section 40(2)

16. Section 40(2) of the Act provides an absolute exemption for information that constitutes the personal data of third parties, if its disclosure would breach any of the data protection principles, as set out in Schedule 1 to the DPA. The Commissioner has considered both questions below. All sections of the Act are reproduced in the attached legal annex.

Is the information 'personal data'?

17. Section 1(1) of the DPA states:

““personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual”

18. The information requested consists of the results of 2007/08 LLB Law Year 1 examinations in a tabular format which maintains the relationship between each candidate and the four results. The Commissioner is satisfied that, in the hands of the University, the information requested constitutes personal data. The reason for this is that the information relates to living individuals (the students concerned) and that those individuals can be identified by that information and other information in the possession of the 'data controller' (the University). This is because the student examination results are directly linked to information held by the University that include the names and personal information of the data subjects (the students).

Can living individuals be identified from the data?

19. As the Commissioner is satisfied that the information requested constitutes personal data, he has gone on to consider whether disclosure of the actual information withheld into the public domain would lead to the identification of the individuals to whom the personal data relate. This is because if disclosure of the information requested could not lead to the identification of the data subjects, then it would be unlikely that such a disclosure could be considered 'unfair'.
20. The Commissioner has drawn a parallel with the concept of an 'identifiable person' as set out in the European Data Protection Directive (95/46/EC), which is implemented in the UK by the DPA:

““personal data” shall mean any information relating to an identified or identifiable natural person ...; an identifiable person is one who can be identified, directly or indirectly ...”

21. The Commissioner's technical guidance on 'Determining What is Personal Data'² states:

“Sometimes it is not immediately obvious whether an individual can be identified or not, for example, when someone holds information where the names and other identifiers have been removed. In these cases, Recital 26 of the Directive states that, whether or not the individual is nevertheless identifiable will depend on “all the means likely reasonably to be used either by the controller or by any other person to identify the said person”.

Therefore, the fact that there is a very slight hypothetical possibility that someone might be able to reconstruct the data in such a way that the data subject is identified is not sufficient to make the individual identifiable for the purposes of the Directive. The person processing the data must consider all the factors at stake.

The starting point might be to look at what means are available to identify an individual and the extent to which such means are readily available. For example, if searching a public register or reverse directory would enable the individual to be identified from an address or telephone number, and this resource is likely to be used for this purpose, the address or telephone number data should be considered to be capable of identifying an individual.

When considering identifiability it should be assumed that you are not looking just at the means reasonably likely to be used by the ordinary man in the street, but also the means that are likely to be used by a determined person with a particular reason to want to identify individuals. Examples would include investigative journalists, estranged partners, stalkers, or industrial spies”.

22. In this case, the information withheld constitutes the results of 2007/08 LLB Law Year 1 examinations for all students. On the one hand, this is purely statistical

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http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf

information that does not obviously identify individuals and the Commissioner is not aware that the complainant in this case is particularly seeking to identify the other individuals concerned. On the other hand, the Commissioner has taken into account that the withheld information could provide personal biographical details of individuals that may not be widely known in their communities or to their peers.

23. In order to determine whether the withheld information in this case can identify individuals the Commissioner has looked at various factors, including other information already in the public domain (whether published by the University or others, or information known in the community).
24. The examples provided by the University in respect of 'identifiability' include students who had been awarded a specific mark in one examination despite attendance at the examination, students re-sitting one or more modules and students who only attended one examination and were absent from the others. The University maintained that the examination patterns of such students would be known to the complainant and their peers and would lead to identification of individuals if the information was released in the format requested.
25. Taking into account the above factors the Commissioner believes that it would be possible for individuals to be identified if the withheld information were disclosed and that this is more than a slight hypothetical possibility. Accordingly, the Commissioner is satisfied that the information requested does constitute personal data, within the definition at section 1(1) of the DPA.

Would disclosure breach any of the data protection principles?

26. The second test under section 40(2) is whether the disclosure of the information would breach any of the data protection principles. The University has claimed that disclosure of the information requested would breach the first data protection principle which states:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

27. In this context, 'processing' is construed broadly and includes disclosure of the information requested.

First data protection principle

28. The first data protection principle, has three components:
 1. Personal data shall be processed fairly
 2. Personal data shall be processed lawfully and

3. Personal data shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met.
29. In considering whether disclosure of the information requested would be unfair, and therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:
- The students' reasonable expectations of what would happen to their personal data;
 - Whether disclosure would cause any unnecessary or unjustified harm to the individuals; and
 - The legitimate interests of the public in knowing the examination results of the students involved.

Students' Expectations

30. The University has stated that it did not inform students that it may disclose their examination results under the Act and this would render disclosure unfair. The Commissioner considers the disclosure of personal data in response to a request made under the Act is unlikely to be one of the University's stated purposes for which such information is processed. In responding to a request made under the Act it is not fulfilling one of its business purposes; it is simply complying with a legal obligation. It would be difficult to argue that, as a rule, compliance with a legal obligation, such as that imposed by the Act, would be incompatible with the other purposes for which personal data may be processed. Therefore the Commissioner rejects the argument that a disclosure in response to a request made under the Act would be unfair, simply because the individual concerned had not been informed of the potential disclosure.
31. The University also argued that students have no expectation that their individual examination results would be disclosed to the public. The University stated that, occasionally, students' overall outcomes (eg, pass, fail or absent with/without reason) had been placed on internal notice boards. It confirmed that this was the case with the Legal Foundations module results for LLB Law 2007/08, where provisional (not final) outcomes were posted on the notice board. The University confirmed that the Law School had since reviewed this practice and in future these results would be made available via the student intranet only.
32. The University advised that, historically, it had published final award data in newspapers, but stated it had reviewed this practice and no longer did this as a matter of course, without obtaining prior consent from students. The University also confirmed that, in relation to individual examination results, this level of detail was not what it had previously published in newspapers.
33. The Commissioner accepts that students would not have a reasonable expectation that this level of examination results would be disclosed into the public domain. The Commissioner does not accept the complainant's view that the information requested relates to individual's professional lives and believes that attendance at university constitutes part of an individual's education and

therefore falls into the category of their private life. The Commissioner's guidance on section 40 indicates that when considering what information third parties should expect to have disclosed about them, among the factors to take into account is the distinction between information relating to the third party's public or private lives:

'Information about an individual's private life [ie their home, family, social life or finances] will deserve more protection than information about them in an official or work capacity

Harm caused by disclosure

34. In its response to the Commissioner dated 19 January 2009, the University confirmed that, through its counselling and student advice services, it had direct experience of students experiencing harm and distress from failing to achieve the goals they had set themselves in examinations. The University stated that this view was supported by POPYRUS³, a voluntary UK organisation committed to the prevention of young suicide. The Commissioner accepts the argument that disclosure could result in identification of certain individuals and that it may cause harm and distress to students who may not have achieved the standards that they had set themselves.

Legitimate interests of the public in disclosing the information

35. The University acknowledged that there is a legitimate interest in disclosing general information on student attainment on all courses in respect of quality assurance and accountability for public funds. The University does not consider that the general public interest extends to the level of any particular student's achievement in each course, and the Commissioner agrees with this view. .
36. The Commissioner's view is that disclosure of the information withheld would be unfair and would therefore breach the first data protection principle. The Commissioner therefore believes that the public authority has applied the Act appropriately in withholding the information withheld by virtue of the section 40(2) exemption.
37. As the Commissioner has determined that it would be unfair to the students involved to disclose the information in the format requested, and so would contravene the first data protection principle of the DPA, the Commissioner has not gone on to consider whether disclosure is lawful or whether one of the Schedule 2 DPA conditions is met.

Section 40(1)

38. Section 40(1) of the Act provides that information is exempt from disclosure if it constitutes personal data of which the person making the request is the data subject. Personal data is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified from those data and other information

³ <http://www.papyrus-uk.org/>

which is in the possession of, or is likely to come in the possession of, the data controller, as set out in paragraph 17 above. In this case the data controller is the University.

39. The University has advised that, in a discussion with the complainant, he indicated that the reason for his request was to determine his ranking in relation to the rest of his class. The University has stated that the complainant's overall ranking constitutes his personal data and is exempt under section 40(1) of the Act. The University agreed to provide this information to the complainant upon receipt of a subject access request, in accordance with its procedures, and payment of the relevant £10 fee.
40. The Commissioner is satisfied that information relating to the complainant's overall ranking within the class constitutes his personal data, as defined in section 1(1) of the DPA and is therefore exempt under section 40(1). Whilst the Commissioner considers this information to be exempt under the Act, given that the information constitutes the personal data of the complainant, the complainant is entitled to request this information under section 7 of the DPA.

The Decision

41. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act, in that it correctly applied section 40(2) to the information, and section 40(1) to that information which comprised the personal data of the complainant.

Steps Required

42. The Commissioner requires no steps to be taken.

Right of Appeal

47. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 29th day of June 2009

Signed

**Anne Jones
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex: Relevant statutory obligations

General Right of Access

Section 1(1) provides 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”.

Personal information.

Section 40(1) provides 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.”

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.”

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.”

Section 40(4) provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”