

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 16 February 2016

**Public Authority:** Cardiff University

**Address:** Main Building  
Park Place  
Cathays  
Cardiff  
CF10 3AT

### Decision (including any steps ordered)

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1. The complainant has requested information in connection with a complaint regarding a named academic employee of Cardiff University. The University refused to confirm or deny whether it held relevant information citing section 40(5) of the FOIA on the basis that to confirm or deny whether a complaint had been received against a specific employee would in unfairly disclose personal information. The Commissioner's decision is that Cardiff University appropriately relied on section 40(5) of the FOIA to neither confirm or deny whether it held any relevant information. The Commissioner does not require the public authority to take any steps.

### Request and response

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2. On 1 September 2015, the complainant wrote to Cardiff University ('the University') and requested the following information:
  - *"All communications and other documents (both paper and electronic) from 15<sup>th</sup> April 2014 to 1 September 2015, relating to a complaint of academic misconduct against [named Professor] Cardiff University [name School], submitted by [named individual B]."*
  - *This release should include, but is not limited to, all communications and documents relating to this misconduct complaint, written or received by the following: [named individual C], Christopher Turner, "the Pro Vice Chancellor for Research" (as described in a letter to me*

*from Dr Turner, dated 24<sup>th</sup> November 2014), [named individuals D, E, F and G, and unspecified "University Officers" (as described in a letter to [named individual B] from named individual E dated 18<sup>th</sup> January 2015).*

- *For the avoidance of doubt, the release should include all emails relating to this issue sent from or received by Cardiff University email addresses (such as [named individual C@[named dept].cf.ac.uk) to or from all recipients."*
3. The University responded on 28 September 2015. It refused to either confirm or deny (NCND) whether information is held in relation to the request as it considered that to do so would in itself reveal information about the named individual which would be unfair. It further informed the complainant that it was relying on section 40(5) of the FOIA.
  4. Following an internal review the University wrote to the complainant on 10 November 2015. It stated that:  
  
*"Following due consideration of the case I have concluded that the original response to your FOIA request was justified."*
  5. The University also informed the complainant that where information (if it were held) consists of the applicant's own personal data there is a right of access to information referred to as a SAR (Subject Access Request), under Section 7 of the Data Protection Act 1998, ('the DPA').

## **Scope of the case**

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6. The complainant contacted the Commissioner on 25 November 2015 to complain about the way his request for information had been handled. The complainant expressed concern at the University's refusal to provide any documents (if held), and considers that there is a legitimate interest in disclosure of documents because the University's handling of misconduct complaints should be open and transparent.
7. The Commissioner has focussed his investigation on whether the University is correct to refuse to confirm or deny whether it holds the information that has been requested which if held, would constitute the personal information of a third party under section 40(5)(b)(i) of the FOIA.

## Reasons for decision

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8. When a public authority receives a request for information under FOIA, it normally has a duty under section 1(1)(a) of the Act to tell the requester whether it holds the information. This is called “the duty to confirm or deny”. However, in certain circumstances, this duty does not apply and the public authority is not obliged to say whether or not it holds the information; instead, it can give a “neither confirm nor deny” response.

### Section 40(5)

9. Section 40(5) of FOIA sets out the conditions under which a public authority can give a “neither confirm nor deny” response where the information requested is, or would be, personal data. It includes provisions relating to both personal data about the requester and personal data about other people.
10. If the information would constitute personal data relating to someone other than the requester, then the public authority does not have to confirm or deny whether it holds it if one of the conditions in section 40(5)(b)(i) or (ii) applies.
11. There may be circumstances, for example requests for information about criminal investigations or disciplinary records, in which simply to confirm whether or not a public authority holds that personal data about an individual can reveal something about that individual. To either confirm or deny that the information is held could reveal that a person is or is not the subject of a criminal investigation or a disciplinary process. If to do so would contravene data protection principles, for example because it would be unfair, then the public authority is not obliged to confirm or deny that it holds the information.
12. The University says that 40(5)(b)(i) applies in this case, namely that confirming or denying whether information is held would contravene one of the data protection principles. Specifically it would contravene the first principle which says that personal data should be processed fairly and lawfully.

*If held, would the information be personal data?*

13. The Commissioner has first considered whether the requested information if held, would be the personal data of a third person.
14. The Data Protection Act categorises personal data as data that relates to a living individual from which that individual can be identified. If held, the information would relate to a living and identifiable individual. The

Commissioner has considered this and the wording of the request and is satisfied that the requested information would be personal data. If held, it would tell the public something about that individual, namely whether the individual has been subject to an investigation or complaint.

*Would confirming or denying the information is held breach any of the data protection principles?*

15. The University has confirmed that if information were held, it would relate to documentation that may have been generated following an allegation of research misconduct against a third party. It considers that either confirming or denying that information is held in relation to a named individual would indicate that they had been / had not been subject to an investigation, and has argued that an indication one way or the other would in itself disclose personal information, the disclosure of which would contravene the first data protection principle – that personal data should be processed fairly and lawfully.
16. The Commissioner accepts that there may be situations in which it could be argued that giving the confirmation or denial to a requester would not necessarily contravene data protection principles because the requester already knows or suspects that the public authority holds the information. However, he would stress that the FOIA is motive and applicant 'blind' and the test is whether the information can be disclosed to the public at large, not just to the applicant.
17. In assessing fairness therefore, the Commissioner believes due consideration should be given to the reasonable expectations of the individual concerned and what might be the likely consequences of disclosure.
18. In his consideration of the reasonable expectations of the data subject, particular regard has been given to 'Cardiff University Procedure for Dealing with Allegations of Misconduct in Academic Research'. The University has stated that throughout this document, emphasis is placed on the confidential nature of any investigation undertaken. Paragraph 1.7 states:  
  
*"...an allegation of academic impropriety is serious and potentially defamatory and ...it is in this context that this procedure contains provision for a preliminary screening of allegations and supporting evidence and lays stress on principles of confidentiality and natural justice."*
19. The University considers that the provisions of the procedure clearly establish the principle that matters relating to allegations of academic misconduct are confidential in nature.

20. Having considered the explanation put forward by the University the Commissioner acknowledges that the individual at the centre of the request would reasonably expect that such confirmation or denial would not be disclosed.
21. In terms of the consequences of such confirmation or denial, the University has argued that such a disclosure has the potential to result in detriment to the professional standing of the individual and a degree of personal distress.
22. The Commissioner considers that it is highly probable that an individual would feel a degree of distress if the University confirmed whether or not it held information of the type that has been requested.
23. The Commissioner therefore considers that confirming or denying whether the University holds the requested information would not be fair and would contravene one of the data protection principles. He is therefore satisfied that the University was correct to rely on section 40(5)(b)(i) of the FOIA.

## Right of appeal

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24. 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)

25. 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.
26. 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** .....

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