

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 1 December 2016

**Public Authority:** The University of Manchester  
**Address:** Oxford Road  
Manchester  
M13 9PL

#### Decision (including any steps ordered)

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1. The complainant has made a series of requests to the University of Manchester (the University) for information variously relating to the operation of its policies, named individuals, and its decision-making pertaining to a particular situation. The University considers that it has provided the complainant with all the recorded information to which he was entitled. The Commissioner has decided that some of the requests are subject to the 'personal data' (sections 40(2) and 40(5)) and 'legal professional privilege' (section 42(1)) exemptions to the right to know and, for the remaining requests, the University has disclosed the relevant information. In light of her findings, the Commissioner does not require any steps to be taken by the University. She has determined however that the University did breach section 10(1) of FOIA as a result of its failure to respond to information requests within 20 working days.

#### Request and response

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2. The complainant has made a number of requests to the University. For ease of reference, the Commissioner has split the requests into the following three categories.

##### **A – requests for policy documents**

1. *May I ask which document contains these guidelines [referred to in an email of 8 December 2015]? It is not the Code of Practice for Investigation Concerns about the Conduct of Research. (9 December 2015)*
2. *[(a)] May I ask again when and by whom this document [the Terms of Reference] was prepared and [(b)] what is its status as University policy? (17 December 2015)*
3. *Furthermore, you have ignored my requests that [name redacted] was quoting when he wrote:*

*[(a)] The panel can determine its own procedures, but the usual form is for [a complainant to make his or her case and to call witnesses if they wish]. Panel members and the Respondent can then ask questions [...]. She will then present her response, calling witnesses if she wishes. [A complainant] can then question the Respondent and her witnesses. Questions on either side must be judged relevant by the chair. It will be for the panel to determine whether they wish to interview anyone else.*

*And when he wrote:*

*[(b)] The panel will normally hold a formal meeting at which it will hear individual representations from or on behalf of the Respondent and the Complainant. The HR manager should be present at any such formal meeting. The Respondent, Complainant and any witnesses should be given the opportunity to be accompanied by a person of their choosing (subject to restrictions defined by the University's Statutes, Ordinances and Regulations) at the formal meeting. The Respondent should be given the opportunity to set out his/her case and respond to the complaint made against him/her. The Respondent should be allowed to ask questions of the Panel, to present evidence, call witnesses and raise points about any information given by any witnesses (including the Complainant). The respondent, Complainant and witnesses will not be permitted to remain present during the proceedings after they have given evidence. (4 March 2016)*

3. In making his complaint to her, the complainant informed the Commissioner that he had not received a response to the requests.

## **B – requests concerning an individual**

4. On 27 February 2016 the complainant asked for the following information about a particular party, referred to in this decision notice as 'person x'

1. *Where is [person x] and where has he been during the last four months?*
  2. *Did he seek permission to absent from the University, and did anyone give approval for this? If so, who?*
  3. *What is the reason given for his absence from the [redacted] meeting on [date redacted], and when was it given?*
  4. *Did he seek permission to absent himself from the meeting, and did anyone give approval for this? If so, who?*
  5. *Did the University take any action to ensure his attendance at the meeting? If so, what?*
  6. *What is [person x]'s current status as [redacted], and when will he return to [redacted]?*
  7. *Has the [redacted] been appointed? If not, when will this happen?*
5. The University refused to comply with the requests on the basis that the information engaged the 'third party personal data' (section 40(2)) exemption in FOIA.

### **C – requests relating to an investigation**

6. On 27 February 2016 the complainant made two requests to the University, which asked for all documentation relating to:
  1. *[Redacted name]'s decision not to investigate [redacted] and his refusal to supply a report on this.*
  2. *The legal basis of your opinion that the University of Manchester's procedures for Investigation Panel relating to [redacted] are being conducted lawfully.*
7. The complainant informed the Commissioner that he had not received a response to the requests.

### **Scope of the case**

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8. The complainant contacted the Commissioner to complain about the way his requests for information had been handled. With regard to the requests in A and C, the complainant referred to the University's failure to reply to his requests. In relation to B, the complainant disagreed with the University's refusal to comply with the requests.

9. On the instructions of the Commissioner, the University did subsequently write to the complainant in relation to the requests in A and C. This included providing the information that the University considered fell within the scope of the requests. The complainant has advised the Commissioner however of his continued dissatisfaction with the University's position. The Commissioner's determination therefore covers each category of requests.

## Reasons for decision

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### A – requests for policy documents

10. The University considers it has provided all the information it holds that is covered by each of the requests. The complainant disputes this position, however. The reasons for this are set out below, alongside a summary of the University's response in each case:

A1: The complainant considers that the reference made by the individual specified in the request differed from advice previously given and was not information contained in a publicly available document.

Response: The University has confirmed that a copy of the relevant policy document has been provided to the complainant. It has also consulted the person who sent the email, who has confirmed that this was the correct information.

A2(a): The complainant considers that the clarification provided by the University about when the guidance was prepared does not correspond with the electronic date stamp of the relevant document that had been provided. He has therefore questioned whether the information provided was correct.

Response: The University has explained that the difference in dates can be explained by an intervening modification. This modification took the form of a re-arrangement of the structure of the record and therefore did not affect the substance of the information. Nevertheless, for completeness the University has provided the complainant with both versions of the records.

A2(b): The complainant considers that the difference in the versions of the documents indicates that the status of the guidelines may have altered.

Response: Referring to the explanation given in reply to A2(a) above, the University considers that the essential meaning, and therefore status, of the guidelines has not changed.

A3(a): The complainant considers that the University has not identified the relevant policy from which the quote originated.

Response: The University has explained that the information originally provided to the complainant in earlier correspondence was given in error, in that it related to an irrelevant procedural area. The University has nevertheless stated where the misquoted advice came from and directed the complainant to where this document could be found. The complainant continues to argue however that the request has not been fulfilled – considering that the quote does not resemble anything in the stated policy.

A3(b): At the stage of referring his concerns to the Commissioner, the complainant considered that the University had not specifically addressed this request.

Response: During the Commissioner's investigation the University informed the complainant that the quotation came from the guidance referred to in A1 and A2 above. The complainant has accepted this explanation.

11. FOIA is solely concerned with recorded information that is held by a public authority. This means that the legislation does not require a public authority to provide opinions or explanation, generate answers to questions, or create or obtain information it never held, or no longer holds, even where this would be helpful.
12. As the Commissioner's guidance 'Determining whether information is held'<sup>1</sup> explains, when the Commissioner receives a complaint that a public authority has not provided any or all of the requested information, it is seldom possible to prove with absolute certainty that there is not either any information or anything further to add. The Commissioner will therefore apply the normal civil standard of proof in determining the case, namely she will decide on the balance of probabilities whether the requested information is held. To exercise this test, the Commissioner will consider the scope, quality, thoroughness

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1169/determining\\_whether\\_information\\_is\\_held\\_foi\\_eir.pdf](https://ico.org.uk/media/for-organisations/documents/1169/determining_whether_information_is_held_foi_eir.pdf)

and results of the searches carried out and, or any other explanations offered that demonstrate why the information is not held.

13. In this case the issue relating to the University's handling of the requests does not directly relate to the question of whether the University has carried out appropriate searches. Rather, it goes back to whether the University has checked that the relevant policy underpinning some advice has been identified.
14. The Commissioner is satisfied that the University has adopted a proportionate response to each of the requests. In respect of request A2(a), the complainant has asserted that the version of the policy document required for his purposes may not have been provided. The University has explained that the essential meaning of the policy has not changed and therefore does not accept the complainant's view. Nevertheless, by providing copies of the different versions, the Commissioner considers that the University can reasonably say that the requested information has been made available.
15. With respect to the other requests, the complainant maintains that there is a disparity between the original advice purportedly based on University policy and the actual contents of the policy documents cited by the University. To an extent, it is understandable why this concern has emerged. A further complicating factor in this case relates to the extent to which the freedom of information requests stem from, or cover ground, relating to a past matter involving the parties. In the Commissioner's view, this may have served to cloud – at least initially – the central freedom of information issues that needed addressing.
16. Notwithstanding these points, the Commissioner considers that University's response to the requests was appropriate. She understands that the University has contacted the original sender of the correspondence referred to in the requests. It may be reasonably assumed that they would be the best placed person to state what policy had informed the instructions provided in the original correspondence. While the complainant may have doubts about whether the University has properly engaged with the requests, the Commissioner has not been provided with any specific evidence that would suggest the University's explanations cannot be relied upon. It could also be assumed that it would be in the University's interests to ensure that the correct recorded information was cited.
17. As stated, the test to be applied when considering whether the requested information has been provided is the civil standard of the test of probabilities. Using the submissions provided, the Commissioner has concluded that on balance the University has complied with the requests.

## **B – requests concerning an individual**

18. The University has refused to comply with the requests in this section under the personal data exemption in FOIA.
19. Section 40(2) of FOIA provides an exemption from the right to know where it has been confirmed the requested information is held and that information is the personal data of an individual other than the applicant which is protected by the Data Protection Act 1998 (DPA).
20. There are effectively two parts to section 40(2) of FOIA. Firstly, the exemption will only cover information that comprises the personal data of a third party. Secondly, the engagement of the exemption requires that disclosure of the personal data would contravene a data protection principle in the Data Protection Act 1998 (DPA). For the purposes of a disclosure under FOIA, it is the first data protection principle that is likely to be relevant. In this situation, a public authority can only disclose the personal data if to do so would be fair, lawful and meet one of the conditions in Schedule 2 of the DPA.
21. A decision on whether personal data is exempt information will normally turn on the test of fairness. This will involve balancing the consequences of any disclosure and the reasonable expectations of a data subject with general principles of accountability and transparency. Various factors may affect whether an individual has a reasonable expectation that their personal data will not be disclosed but they will typically include whether the information relates to an individual's public or private life and the relative seniority of the individual.
22. In this case information is held for requests 1, 2 and 6 and the Commissioner is satisfied that this is the personal data of person x. This is because the requests are specifically directed at the individual and ask for information which would have a biographical significance to them; it would either record their whereabouts at a particular point in time, or denote their status at the University. The first stage of the exemption would therefore be satisfied.
23. The next step for the Commissioner has therefore been to consider whether the release of the personal data would comply with the data protection principles. When doing so, the Commissioner has been guided by the approach of the First-tier Tribunal (Information Rights) to personal data and the application of section 40(2) in *Lownie v*



*Information Commissioner (EA/2015/0282, 6 September 2016)*<sup>2</sup>. At paragraph 11 of its decision, the Tribunal provided the following explanation:

*11. The Tribunal agrees with the Commissioner that where section 40(2) is engaged, the Tribunal is required to undertake a different task from when it deals with other FOIA exemptions. Whilst FOIA in general promotes the right to information, where section 40(2) is under consideration, the proper approach is for the interest of data subjects to receive a high degree of protection. Whilst this does not mean that disclosure cannot be justified, it does mean that the Tribunal must be careful not to start from the position of presuming disclosure should occur.*

24. The Commissioner has incorporated this general principle into the consideration of the application of section 40(2). Based on an analysis of the nature of the information that has been requested, it is the Commissioner's view that the disclosure of the personal data could not be supported under the legislation. This is because the release of the information would disproportionately interfere with the data subject's privacy rights. The Commissioner considers that an individual would have a reasonable expectation that details concerning their private life (such as an absence from an organisation) would be kept confidential.
25. In certain cases a public authority may also need to consider whether it would be appropriate to use the 'neither confirm nor deny' provision in section 40(5) of FOIA. Section 40(5)(b)(i) of FOIA says that a public authority is not obliged to confirm or deny that it holds information if, by confirming or denying that it is held, the authority would breach one of the data protection principles. The subsection is about the consequences of confirming or denying whether the information is held, and not about the content of any such information. This means, in other words, that the condition for engaging the exemption is not whether disclosing the requested information would contravene a data protection principle but whether the simple action of confirming or denying that it is held would have this effect.
26. The Commissioner's guidance on section 40(5)<sup>3</sup> explains how there may be circumstances, for example requests for information about criminal

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<sup>2</sup><http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1873/014%20060916%20Decision%20.pdf>



investigations or disciplinary records, in which the act of confirming whether or not information is held can itself reveal something about an individual. In her twin role as the regulator of the DPA, the Commissioner has a responsibility to ensure that personal data is properly managed and protected. Even though the exemption has not been specifically cited, the Commissioner has found it appropriate in the circumstances to consider whether section 40(5) applies to the remaining requests in the section, namely 3, 4, 5 and 7. In her view, it does.

27. When making a decision on whether FOIA has been applied correctly, the Commissioner must take into account the fact that a disclosure under the legislation is to the world at large and not just the applicant. In some cases a requester may argue that confirming or denying whether information is held would not contravene a data protection principle because it would simply affirm what the requester already knew. However, this would ignore the wider ramifications of an FOIA disclosure. In this case the Commissioner considers it would be plainly unfair to the data subject for the University to take an action – either confirming or denying whether information was held – which would result in the public being told whether the individual was the subject of an investigation. For this reason, the Commissioner has found that section 40(5) is engaged.

### **C – requests relating to an investigation**

28. The Commissioner addresses each of the requests covered by this section in turn.
29. With respect to C1, the Commissioner has found that for the same reasons elaborated on in section B the request would be covered by section 40(5) of FOIA. This is because the act of confirming or denying whether information is held would inform the public at large whether a complaint had been made against the individuals specified in the request.
30. In relation to request C2, the University initially responded by saying that it did not hold relevant information. Upon further inspection, however, the University discovered information that it considered was close to what the complainant was seeking. It considered though that

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<sup>3</sup> [https://ico.org.uk/media/for-organisations/documents/1206/neither\\_confirm\\_nor\\_deny\\_in\\_relation\\_to\\_personal\\_data\\_and\\_regulation\\_foi\\_eir.pdf](https://ico.org.uk/media/for-organisations/documents/1206/neither_confirm_nor_deny_in_relation_to_personal_data_and_regulation_foi_eir.pdf)

the information did not fall within the scope of the request on the basis that it did not constitute the legal basis for the opinion and that, in any event, the material would be covered by the 'legal professional privilege' (section 42(1)) exemption to disclosure.

31. In the Overview to her guidance 'Interpreting and clarifying requests'<sup>4</sup>, the Commissioner says that public authorities should interpret information requests objectively. This means avoiding reading into a request any meanings that are not clear from the wording. Equally, however, the public authority should also remember that an applicant may not know exactly the nature of the information held and so it should take a reasonable approach to determining which records are covered by a request. A public authority may return to an applicant for clarification under section 1(3) of FOIA but this should only be necessary where the authority has genuine reasons for considering that the request is unclear.
32. The Commissioner considers that the direction of the request, which in essence can reasonably be construed as asking for the legal advice underpinning a policy, means that the material located by the University would fall within the request. She has therefore gone on to consider whether the University was obliged to provide the information or if section 42(1) could be relied upon.
33. Section 42(1) provides an exemption from the right to know where the requested information is subject to legal professional privilege (LPP). The exemption is qualified by the public interest test. The principle behind LPP is the protection of advice given by a lawyer to a client and confidential communications between them about that advice, and exists to ensure complete fairness in legal proceedings. There are two types of privilege within the concept of LPP; litigation privilege and advice privilege.
34. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice where litigation is not just a possibility but is being contemplated or has been proposed. For information to be covered by litigation privilege, it must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for

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<sup>4</sup> <https://ico.org.uk/media/for-organisations/documents/1162/interpreting-and-clarifying-a-request-foia-eir-guidance.pdf>

the dominant purpose of seeking or giving legal advice. This must be done in a legal context – for example, in relation to issues concerning legal rights, liabilities, obligations or remedies.

35. In this case the complainant has in effect confirmed that he is seeking the legal advice underpinning a University procedure. The Commissioner is satisfied that the information which meets this description, namely the advice provided by a legal professional, had been subject to LPP. The next question for the Commissioner to consider is whether privilege was still intact at the time the request was made.
36. Information may no longer be protected by LPP where its quality of confidence is lost owing to an unrestricted disclosure. In her guidance on section 42 of FOIA<sup>5</sup>, the Commissioner explains at paragraph 29 what constitutes an unrestricted disclosure:

*This refers to a disclosure of information made to the world at large or without any restriction on its future use. This would mean that it is capable of entering the public domain [...]. As a result, the original holder or owner of the information (eg the legal advice) can no longer expect it to remain confidential. [...] Where confidentiality is lost, the authority cannot claim that s42 applies.*

37. The Commissioner has been informed that the legal advice was only shared with those persons that had a specific interest in clarifying the University's position with respect to the procedure. The Commissioner is satisfied that the sharing of the information was on a restricted basis, that the University had not 'lost control' of the advice, and therefore LPP did apply. On the basis that section 42(1) of FOIA is therefore engaged, the Commissioner has gone on to assess the public interest test.

*The balance of the public interest*

38. The degree of importance attached to the concept of LPP in respect of the administration of justice is extremely strong. In many cases this will translate into a finding upholding an application of section 42(1) of FOIA. The Commissioner also recognises, however, that the authors of the legislation did not intend to rule out the possibility of accessing information covered by LPP. This is demonstrated by the listing of section 42 as a qualified exemption, which is subject to the public

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<sup>5</sup> [https://ico.org.uk/media/for-organisations/documents/1208/legal\\_professional\\_privilege\\_exemption\\_s42.pdf](https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf)

interest test, rather than an absolute exemption, which is not. The Commissioner would nevertheless expect that a disclosure of privileged information will only occur where there is some clear, compelling, and specific justification.

39. When considering where the balance of the public interest lies, the Commissioner will take into account what the information actually reveals and the extent to which disclosure would benefit public debate. In previous decisions, factors supporting disclosure that have attracted considerable weight in the balancing exercise have referred to situations where a large number of people are affected by the issue, significant public funds are involved, or the advice itself has in some way been misrepresented.
40. A theme linking these public interest considerations is the value of the information to the wider public. In other words, disclosure would be in the public good. In this instance the Commissioner understands that the complainant has a private interest in seeking access to the advice. This may serve to weaken the argument for disclosure unless it can be demonstrated that there is an overriding concern for the information to be placed in the public domain. In the view of the Commissioner, this is not the case here.
41. The Commissioner considers that while the information would be of some relevance to the complainant, it would not be of any great significance to the wider public. This is because it does not show anything that would aid the public's understanding of how the University was run or whether it had robust policies and procedures in place. The Commissioner accepts that there may be occasions when there will be considerable public interest in knowing more about the process by which a public authority had settled on the particular version of a policy. However, the Commissioner does not find this applies to any meaningful degree here and instead considers that the case for disclosure suffers greatly in comparison with the strong case for maintaining LPP. For this reason, the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in favour of disclosure.

### **Procedural matters**

42. In addition to the substantive issues considered above, the complainant has also notified the Commissioner of his concerns about the University's handling of the requests from a procedural perspective.
43. In this regard, the complainant has made reference to the initial failure of the University to identify and act on the freedom of information requests it had received. Section 8 of FOIA states that a 'request for

information' is a reference to a request which; (a) is in writing, (b) states the name and address of the applicant, and (c) describes the information requested. As the Commissioner's guidance 'recognising a request made under the Freedom of Information Act'<sup>6</sup> explains (paragraph 10), and as the complainant himself highlighted, a valid request does not have to make any direct reference to FOIA, or be the sole or main theme of a requester's correspondence.

44. The guidance goes on to clarify that even a request buried within the text of a long piece of correspondence will be valid as a stand-alone request, so long as it fulfils the other criteria outlined in section 8. The failure to identify a request is important because it is likely to result in a breach of section 10(1) of FOIA, which requires a public authority to respond to a request within 20 working days.
45. It has been accepted that some of the freedom of information requests were not picked up by the University in the first instance. This led to a delay in the University responding and a corresponding breach of section 10(1) of FOIA. The University, for its part, has expressed regret for its non-compliance, explained that there were some mitigating circumstances in terms of the separate number of information requests it was processing, and advised that it will look to provide staff with training where it is deemed appropriate.

## Right of appeal

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<sup>6</sup> <https://ico.org.uk/media/for-organisations/documents/1164/recognising-a-request-made-under-the-foia.pdf>

46. 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)

47. 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.
48. 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** .....

**Alun Johnson**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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