

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 September 2018

Public Authority: Durham University
Address: Stockton Road
Durham
DH1 3LE

Decision (including any steps ordered)

1. The complainant requested information on the correspondence from a named Professor. Durham University (the University) confirmed that it does not hold any further information. The complainant considered that more information must be held. During the investigation, the University disclosed some information redacting the personal data. The Commissioner's decision is that the University does not hold any further information in this case and the redacted information was correctly withheld under section 40(2)-personal information. The Commissioner does not require the University to take any steps.

Request and response

2. On 27 February 2018 the complainant requested the following information:

'Please provide me with:

1) Copies of correspondence (including email and attachments) between Professor Kevin Dowd of Durham University Business School and individuals with email addresses containing the following:

- @voteleave.uk
- @leave.eu
- @parliament.uk
- @iea.org.uk
- @dexeu.gov.uk
- @trade.gsi.gov.uk.

Between 1 February 2016 – 1 July 2016 and between 1 November 2017 – present.

2) Copies of correspondence (including email and attachments) between Professor Kevin Dowd of Durham University Business School and the following individuals:

- Professor Patrick Minford*
- Professor Kent Matthews*
- Matt Ridley*
- Professor David Paton*
- Edgar Miller*
- Prof. Kent Matthews*
- Jacob Rees Mogg MP*
- Steve Baker MP*
- Owen Paterson MP*

Between 1 February 2016 – 1 July 2016.

3. On 28 March 2018 the University responded that *'Durham University's IT regulations allow personal use of IT facilities. The requested information and emails are not related to the business of the University and are personal documents. Therefore, this information is not subject to the Freedom of Information Act.'*
4. The complainant requested an internal review on 6 April 2018. He argued:

'We believe that Professor Kevin Dowd's position within the Economists for Free Trade and his role within the University Business School has a crossover due to related topics involved in both cases and that the individual in this case is representing the University to such a degree that the information is held under the act. Professor Dowd has consistently used his university job title when conducting business with Economists for Free Trade, possibly as a means to lend his political interventions greater credibility and impact. The above information request is clearly related to his activities as part of Economists for Free Trade, which he conducts as a member of Durham University staff, rather than in a personal capacity.'
5. The University sent the outcome of its internal review upholding the decision that the University does not hold the requested information for the purpose of the FOIA.

Scope of the case

6. On 29 June 2018 the complainant wrote to the Commissioner.

7. During the course of the investigation, the University withdrew its reliance on section 3 (not held for the purposes of the University) and on 2 August 2018 disclosed all the requested information that it holds. The disclosed information consisted of one (redacted) email dated 22 March 2016.
8. On 6 August 2018 the Commissioner wrote to the complainant seeking an informal resolution. On 15 August the complainant responded that he was not satisfied with the University's response for two reasons:

'1) They have redacted all information that could identify who Professor Dowd is corresponding with - neither the name nor the institution that the person represents have been provided.

2) I am not convinced that they have searched for deleted emails on their servers as I requested them to do.'
9. The Commissioner has considered that the scope of the case is to determine whether the University handled the request in accordance with the FOIA. In particular the Commissioner's investigation has focussed on two matters. First, with regard to section 1(1) of the FOIA, whether the University holds additional, relevant information that it has not disclosed to the complainant and secondly whether the University is entitled to rely on section 40 as a basis for refusing to provide the information withheld from the disclosed document dated 22 March 2016.

Reasons for decision

Section 1 of the FOIA – Information held/ not held

10. Section 1 of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information within the scope of the request, and if so, to have that information communicated to him.
11. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities.
12. 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 (or was held at the time of the request).

13. As is the practice in a case such as this, the Commissioner asked the University a number of questions to confirm/establish if further information is held. The University confirmed that it did not hold any further recorded information falling within the scope of the request.
14. The Commissioner asked the University a number of questions to establish what searches had been carried out for information falling within the scope of the request. The University stated that:

'A search was carried out of all emails in the user's mailbox including the deleted items folder. There is no paper correspondence held. The search was carried out using the specific search terms provided by the requester... covering the dates specified.'
15. The University stated that the searches had retrieved all the information pertinent to the request: *'The search was carried out on the user's mailbox which is held on the university network server. No correspondence has been saved outside of the email system.'*
16. The Commissioner asked questions on whether any recorded information ever held relevant to the scope of the request had been destroyed. The University answered: *'No, but for completion a search of deleted folders and server was undertaken.'* Therefore the Commissioner is satisfied that the University has searched for the deleted emails as the complainant requested it to do.
17. The Commissioner asked about the University's formal records management policy on the retention and destruction of records of this type. The University answered:

'The Records Management Policy advises that business emails are kept in structured format and disposed of in accordance with university Records Retention Schedule. The information requested and provided does not fall under the category of business emails therefore are not subject to the policy or retention schedule.'
18. In addition the University stated that there is no business purpose for which the requested information should be held and no statutory requirements to retain the requested information.
19. During the investigation the Commissioner spoke to the public authority which confirmed that during the Commissioner's investigation, it had decided on disclosure so the University had searched for all the information as requested and had not distinguished between emails for business purposes or not.
20. The Commissioner notes that this is one of two complaints concerning the correspondence to or from Professor Dowd (The other complaint is considered in Decision notice FS50732284). The Commissioner is

satisfied that the University has made a thorough search for the information as requested and provided what was found.

21. Having considered the University's responses to the Commissioner's investigations, the Commissioner is satisfied that, on the balance of probabilities, the University does not hold any further recorded information within the scope of the request.
22. As the Commissioner's decision is that further information is not held, the Commissioner does not require the University to take any steps.

Section 40(2) Personal information

23. The public's right of access to the personal data of third parties is in effect governed by the Data Protection Act. At the time the request was made and dealt with by the University the relevant Data Protection Act was the 1998 Act. Since that time the Data Protection Act 2018 has come into force and section 40(2) of the FOIA has been amended to accommodate the changes it has introduced. However the Commissioner's role is to determine whether the University correctly applied the legislation that was in force at the time it was handling the request.
24. At that time section 40(2) of the FOIA provided that a public authority is entitled to refuse a request for information which constitutes the personal data of someone other than the person making the request, if disclosing that information would breach any of the data protection principles set out in Schedule 1 of the Data Protection Act 1998.
25. The information which has been withheld under section 40(2) consists of the names and contact details on the email from March 2016. The Commissioner is satisfied that this constitutes the personal data of those individuals.
26. The University has argued that disclosing this information would have breached the first data protection principle. So far as is relevant, the first principle of the Data Protection Act 1998 provided that personal data shall be processed fairly and lawfully and not be processed unless one of the conditions set out Schedule 2 can be met.

Would disclosure breach the Data Protection Principles?

27. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness.

28. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual, the potential consequences of the disclosure and whether there is legitimate public interest in the disclosure of the information in question.

Reasonable expectations

29. The University considers all of the redacted information to be personal data belonging to third parties: *'the personal data relates to the individuals private life as the emails are not relating to work being carried out on behalf of the University'*.
30. The Commissioner understands that the University would not routinely make public such information.

Consequences of disclosure

31. Disclosure is unlikely to be fair if it would have unjustified adverse effects on the individuals. Although employees may regard the disclosure of personal information about them as an intrusion into their privacy, this may often not be a persuasive factor on its own, particularly if the information relates to their public role rather than their private life.
32. In this case the University has stated that the *'individuals have an expectation that their personal details contained within a private email that does not relate to the business of the University would not be released to the public'*.
33. The Commissioner is satisfied that the individuals would have a reasonable expectation that the disputed information would not be placed into the public domain by disclosure under the FOIA. Therefore she considers that disclosure of this information would be an unfair invasion of the privacy of the individual(s), and as such may cause them some distress.

Balancing the rights and freedoms of the individual with the legitimate interests in disclosure

34. Given the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(2) has been cited is in favour of protecting the privacy of the individual. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure which would make it fair to do so.
35. The complainant has argued that the University redacted all information that could identify who the Professor is corresponding with: *'neither the*

name nor the institution that the person represents have been provided.'

36. The University said that the information requested is not already in the public domain and the third party was not asked for their consent to the disclosure of their personal data.
37. In the interests of being fair and open the University released information that was held in relation to the request. *'We did not feel it was in the public interest to release personal data of third parties.'*
38. In addition, the University argued that
 - *'there was no public interest in releasing the data as it did not relate to any decision process or policy relating to the University.'*
 - *'The data related to emails which would not add to the public understanding of the subject in question as the emails were not conducted on behalf of the University or in a professional capacity. The public interest would not be served by releasing the personal data and therefore the weight of maintaining the exemption applies.'*
39. The Commissioner accepts that there is a legitimate interest in the overall transparency in the way a public authority such as the University conducts its business. However, this email was disclosed in the interests of being fair and open and there is no presumption that this should automatically take priority over personal privacy. The Commissioner judges each case on its merits.
40. In this case, the Commissioner is not convinced that the specific information requested, is of sufficient wider public interest to warrant overriding the protection of the third party personal data. The personal data was redacted from an email sent by the Professor in a personal capacity to a third party. The Commissioner accepts that the email was not related to the business of the University and was not sent on behalf of the University.
41. Having considered the University's submission and the views of the complainant the Commissioner is satisfied that the complainant's arguments for disclosing the specific information in this case are not as compelling as those that the University has put forward for protecting the individuals' personal data, namely:
 - the individual's likely expectation about how their personal data will be managed;
 - the individual's lack of consent to its release; and
 - the possible negative consequences to the individual of releasing the information.

42. Therefore, the Commissioner is satisfied that the withheld information is personal data and that disclosure would breach the first data protection principle as it would be unfair to the individuals concerned. The Commissioner upholds the University's application of the exemption provided at section 40(2) of the FOIA

Right of appeal

43. 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

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

44. 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.
45. 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

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