

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 February 2019

Public Authority: The Governing Body of the University of Sussex
Address: Sussex House
University of Sussex
Falmer
Brighton
BN1 9RH

Decision (including any steps ordered)

1. The complainant has requested the amount of money paid to a certain officer ("the Officer") to "encourage" that officer's resignation. The Governing Body of the University of Sussex ("the University") refused to confirm or deny whether it held the requested information in reliance on the exemption provided by section 40(5) (personal information) of the FOIA.
2. The Commissioner's decision is that the University has correctly used Section 40(5) to neither confirm nor deny holding information as confirmation or denial would have breached the Data Protection Principles.
3. The Commissioner does not require any further steps.

Nomenclature

4. Schedule 1 (Part IV) of the FOIA states that, in the case of further or higher education institutions, it is the governing (or decision-making) body of that institution (not the institution itself) which is the public authority for the purposes of the Act. However, to avoid confusion, the Commissioner will refer to "the University" in this notice.

Request and response

5. On 18 April 2018, the complainant wrote to the University and requested information in the following terms:

"I wish to know how much [the Officer] was paid by the University of Sussex to encourage his resignation in [date redacted]."
6. The University responded on 17 May 2018. It refused to confirm or deny holding information within the scope of the request. It claimed to be relying on Section 40(2) as its reason for doing so.
7. Following an internal review the University wrote to the complainant on 19 June 2018. It again refused to confirm or deny holding information and again cited Section 40(2).

Scope of the case

8. The complainant contacted the Commissioner on 8 August 2018 to complain about the way his request for information had been handled. In particular, he argued that disclosure was "in the public interest".
9. Section 40(2) of the FOIA is an exemption from the duty to provide information that is held, but the University stated explicitly that it did not wish to confirm or deny holding any information. Therefore at the outset of her investigation, the Commissioner invited the University to confirm that it wished to rely on Section 40(5) instead.
10. The University confirmed that Section 40(5) was indeed the exemption it wished to rely on and it issued a corrected refusal notice on 22 January 2019.
11. The scope of the Commissioner's investigation and of this notice is to determine whether providing confirmation or denial that information within the scope of the request was held would contravene any of the Data Protection Principles.
12. In this Notice the Commissioner has used various hypothetical scenarios to aid understanding of the arguments involved. Nothing in this Notice should be taken as any indication as to whether the requested information is held by the University.

Reasons for decision

13. When a public authority receives a request for information under the FOIA, its first duty, set out at Section 1(1)(a) of the Act is to confirm or deny whether it holds information within the scope of the request.
14. Section 40(5)(b)(i) of the FOIA stated, at the time the request was responded to, that the duty to confirm or deny whether information is held does not arise where:

*"the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998."*¹

15. The first step for the Commissioner in determining whether the exemption is engaged is therefore to determine whether confirmation (or denial) alone that information is held would involve the disclosure of personal data.
16. The definition of personal data is set out in section 1 of the Data Protection Act 1998:

"...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 intention of the data controller or any other person in respect of the individual."

17. The complainant has named an individual (the Officer) in his request and his request is worded in such a way that any information within its scope must relate to that named individual. It therefore follows that any confirmation or denial of the extent of information held will, by definition, "relate" to the Officer.

¹ The FOIA was amended in 2018 by the Data Protection Act 2018 ("DPA 2018") to update references within Section 40 from the Data Protection Act 1998 ("DPA 1998") to DPA 2018. As DPA 2018 had not come into force at the time the request was responded to, the Commissioner has dealt with this case with reference to DPA 1998.

18. As information disclosed as a result of confirmation or denial could only relate to the Officer and he is identified in the wording of the request, the Commissioner considers that confirmation or denial could not be achieved without the disclosure of the Officer's personal data.

Would confirmation or denial that information is held contravene the Data Protection Principles?

19. The complainant is seeking information about payments made to "encourage" the Officer to resign from the University. If the University were to confirm that it held information, it would be confirming that it had encouraged the Office to resign – which might suggest that the Officer involved had no other reason to resign and/or would not have resigned otherwise.
20. Equally, if the University were to deny that it offered a financial inducement to "encourage" the Officer to resign, that, again, might offer information as to the Officer's motivation for resigning.
21. The University has argued that providing a confirmation or denial that information is held would violate the First Data Protection Principle, which states that:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless....at least one of the conditions in Schedule 2 is met."

22. The Commissioner's approach when considering the First Principle is to start by looking at whether the disclosure that would result from confirmation or denial would be fair. If that disclosure would be *unfair*, the exemption is engaged immediately. Only if the Commissioner finds that that disclosure *would* be fair will she go on to look at lawfulness and whether a Schedule 2 condition can be satisfied.
23. In assessing whether the disclosure that would result from confirmation or denial would be unfair, and thus constitute a breach of the First Data Protection Principle, the Commissioner takes into account a number of factors, including the following:
- What reasonable expectations does the data subject(s) have about what will happen to their personal data?
 - What are the consequences of disclosure?
 - Are there any legitimate interests in disclosure which would outweigh the rights and freedoms of the data subject(s)?
24. In this case any information which the University held (or disclosed through confirmation or denial of holding information) would relate to

the reasons for the cessation of the Officer's employment with the University.

25. The University explained to the Commissioner that any information would relate to the Officer's *public* life, as it would be in the context of their employment at the University. However, the University also noted that information would relate to the Officer's *private* life, given the underlying implication of the request that there was an inducement to resign and the resulting potential for an impact on the Officer's reputation. The Commissioner agrees with the University's assessment in this regard.
26. The University further argued that:

"any employee leaving the University would reasonably expect information relating to their resignation to be treated confidentially. There is no information in the public domain and no expectation or requirement in relation to publication...."
27. The University also confirmed that the officer involved had not been asked to consent to the University confirming or denying whether it held information within the scope of the request, and there is no requirement under the FOIA for the University to seek such consent.
28. The University was keen to draw a distinction between payments made to "encourage" an employee to resign and payments which might arise as a result of contractual obligations (such as a payment in lieu of notice) on the University as an employer. This should not be taken as the University confirming (or denying) that the latter type of payment was made to the Officer – merely noting that any such information would be outside the scope of the request.
29. Finally, the University notes that there is a requirement to publish details of payments made to staff that exceed £100,000 which, it argues, is sufficient to meet the requirements for transparency.

The complainant's view

30. The complainant has levelled a series of allegations of impropriety against the Officer including that the officer was involved in the publication of a statement on the University's website which was later found to be defamatory. Whilst this statement does appear to have resulted in a legal settlement, the complainant has not put forward any evidence to support his other allegations. The Commissioner also notes that the complainant appears to have an underlying grievance with the Officer.

31. Finally, the complainant has drawn the Commissioner's attention to the University's annual accounts for 2017, in which a particular sum is recorded as having been made for "*payment in lieu of notice paid to senior post-holders.*"
32. The complainant believes that this payment must relate to the Officer and therefore he argues that the University has, in effect, already put the information into the public domain – which would make a decision to withhold the information, let alone confirming or denying whether it is held, irrational.
33. The complainant argued that disclosure was "in the public interest." Whilst Section 40 does not require consideration of the balance of public interest, some of the arguments the complainant made have informed the Commissioner's view of the "legitimate interest" in confirmation or denial.

The Commissioner's view

34. The Commissioner considers that, by confirming or denying that it held information within the scope of the request, the University would have disclosed personal data relating to the Officer and therefore the University was correct to rely on Section 40(5).
35. In reaching this conclusion, the Commissioner has had regard to the information which would be disclosed if a confirmation or a denial that information was held was made.
36. Disclosure under the FOIA is considered to be disclosure to the world at large. It is the equivalent of the University publishing the information on its own website.
37. In this particular case, the complainant has asked for a particular figure, but the existence of that figure depended on a particular "event" having happened: that the Officer was "encouraged" to resign. The University cannot confirm or deny the existence of the figure without also confirming or denying that the "event" took place.
38. The Commissioner accepts that, as a general rule, when an employee ceases their employment they have a reasonable expectation that their employer will keep the precise details of that cessation confidential.
39. The Commissioner recognises that, where very large sums of public money are involved, where the employee held a very senior position, where there was strong evidence of malpractice involved or where one of the parties has already placed much of the information into the public domain, there may be a legitimate interest in the disclosure of information.

40. Whilst there is always an inherent value in bodies which spend public money being accountable for the way in which that money is spent, the Commissioner does not take the view that the particular circumstances of this case are such that that value outweighs the rights of the Officer.
41. The University has pointed out to the Commissioner that it is required to publish details of payments that it makes to its staff over a certain value. The Commissioner is satisfied that this is an appropriate level of transparency.
42. The Commissioner does not consider that information confirming details of the cessation of the Officer's employment have been placed into the public domain. The Officer involved was not of a seniority where they would have had a reasonable expectation that their employment details would be published as a matter of course.
43. The Commissioner has not been persuaded that there is sufficient evidence of malpractice as to justify overriding the interests of the data subject in keeping their personal information confidential.
44. Having considered the matter, the Commissioner takes the view that there would be a risk of distress caused to the Officer if the University confirmed or denied that it held information as the Officer would have a reasonable expectation that any such information would remain confidential.
45. The Commissioner can confirm that she has considered the figure mentioned in the University's annual accounts. She considers that there is a lack of information, either in the report or elsewhere in the public domain, to substantiate the complainant's belief that this figure must or could only relate solely (or, indeed, at all) to the Officer. The published number is labelled as being the sum allocated for "*payment in lieu of notice paid to senior post-holders.*" It is not clear from the accounts which or how many individuals were covered by this payment. Whilst the Commissioner has raised this point with the University, her decision remains unchanged.
46. The Commissioner therefore concludes that for the University to either confirm or deny that information within the scope of the request was held would be unfair to the Officer.
47. That being the case, the Commissioner is satisfied that Section 40(5) is engaged and therefore the University was not required to confirm or deny holding the requested information.

Right of appeal

48. 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: www.justice.gov.uk/tribunals/general-regulatory-chamber

49. 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.
50. 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

**Ben Tomes
Team Manager
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