

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 June 2020

Public Authority: The University Council of the University of Warwick

Address: University Road
Coventry
CV4 7AL

Decision (including any steps ordered)

1. The complainant requested information about non-disclosure agreements and the criminal convictions of staff. The University Council of the University of Warwick ("the University") originally said that it did not hold any information within the scope of part of the request and relied on section 12 of the FOIA to refuse the remainder. It subsequently clarified that it did hold some further relevant information which it has now disclosed.
2. The Commissioner's decision is that University failed to comply with its duty under section 1(1) of the FOIA within 20 working days and therefore breached section 10 of the FOIA. She also finds that it failed to obtain the correct interpretation of the original request and thus breached its section 16 duty to provide advice and assistance.
3. As the Commissioner is satisfied that University has now complied with its section 1(1) duty, she does not require any further steps to be taken.

Request and response

4. On 16 September 2019, the complainant wrote to the University and requested information in the following terms:

"Please could the University provide information to the following requests?"

1. *How many Non-disclosure agreements has the University entered into with staff and students in each of the following years:*

2018 - 2019
2017 - 2018
2016 - 2017
2015 - 2016

2. *What was the total amount of money spent by the University as consideration for entry into non-disclosure agreements in each of the following years?*

2018 - 2019
2017 - 2018
2016 - 2017
2015 - 2016

3. *How many members of Human Resources have unspent criminal convictions (excluding minor motoring offences)?*
4. *How many members of campus security (including car parking enforcement) have unspent criminal convictions (excluding minor motoring offences)."*
5. The University responded on 6 November 2019. It stated that it did not hold any information within the scope of elements [1] and [2] of the request. It refused elements [3] and [4] because it said that the cost of complying would exceed the appropriate limit.
6. The complainant responded to the University on the same day. He pointed to a copy of a document he had obtained, titled "Settlement Agreement", which included non-disclosure provisions. He argued that the University had failed to interpret elements [1] and [2] of his request correctly and, as a result, had denied him information. He was also dissatisfied about the University's use of section 12 to refuse elements [3] and [4].
7. After the complainant had chased a response, the University issued a further response to him on 6 December 2019. Whilst it referred to the University's formal internal review process not having been followed, this correspondence acknowledged a delay in the original response being provided. This correspondence further stated that, in respect of elements [1] and [2] "*The University's response to your original request was correct.*" It stated that the University was now treating his correspondence of 6 November 2019 as a fresh request, with the wording of elements [1] and [2] changed from "non-disclosure agreements" to "settlement agreements." In respect of elements [3] and [4], it stated that:

"In relation to Q.3 and Q. 4 of your original request, the University has already explained that in its current format, this part of your

request would exceed the appropriate costs limit under section 12(1) of the Freedom of Information Act 2000...the University's refusal notice under S.12 still stands."

8. The University responded to the "fresh" request on 19 December 2019.

Scope of the case

9. The complainant first contacted the Commissioner on 29 October 2019 to complain about the delayed response. Once the University had issued its response, the Commissioner advised the complainant that, if he remained dissatisfied, he should seek an internal review.
10. On 8 December 2019, the complainant returned to the Commissioner to complain that the University had still not issued what he considered to be an adequate response to his request. Having reviewed the University's correspondence of 6 December 2019, the Commissioner was satisfied that it demonstrated that the University had reconsidered its original response and she therefore considered that that the complaint was eligible for investigation.
11. At the outset of her investigation, the Commissioner wrote to the University on 9 March 2020. She asked the University to provide a detailed breakdown of its estimate of the cost of complying with elements [3] and [4]. She also noted that the University had adopted an overly-narrow interpretation of elements [1] and [2] and invited the University to either issue a fresh response or explain why it considered that it had adopted the correct interpretation.
12. The University responded on 10 March 2020 to confirm that it believed it had interpreted the request correctly and explained why it believed this to be the case. It also noted that it had issued a further response to the reinterpreted version of the original request. The Commissioner was not satisfied by this explanation and originally intended to deal with the matter formally, via a decision notice.
13. In respect of elements [3] and [4], the University contacted the Commissioner on 2 April 2020 to argue that it had not been afforded the opportunity to carry out a proper internal review. Mindful that it was now some six months since the complainant had made his dissatisfaction with the original request known, the Commissioner was not inclined to invite a further delay unless the University was satisfied that its original position was not correct. However, the University decided that it no longer wished to rely on section 12 of the request, provided some information and stated that it did not hold further information.

14. During the course of the investigation, the COVID-19 pandemic hit the UK. As many public authorities needed to redeploy resources to deal with the unprecedented situation, the Commissioner took the decision to suspend the issuing of decision notices for a short period. Given that any decision notice in respect of this complaint was likely to be delayed anyway, she therefore took the view that it was worth revisiting the issue of interpretation to see whether it could be resolved informally. She therefore set out her view, once again, that the University had not adopted the correct reading of the request.
15. The University repeated its objection to the Commissioner's interpretation. It now noted that it did not consider that the complainant had expressed any dissatisfaction with the response to his "fresh" request and that this suggested that its approach had been proved to be correct. It also challenged the Commissioner's decision to investigate the complaint – which she deal with under "Other Matters."
16. The Commissioner asked the complainant to clarify whether he was satisfied with the substance of the information he had received. She also advised him that she considered it unlikely that the University held any further information beyond that which was disclosed. The complainant was deeply unhappy with the process by which the University had reached its eventual stance (and its handling of information requests more generally), but accepted that it was unlikely that pursuing the matter would produce further information. He agreed with the Commissioner's suggestion that a decision notice focusing on the procedural handling of the request would be the appropriate way of concluding the complaint.
17. Having clarified that there were no further outstanding matters, the Commissioner informed the University that she would proceed to issue a decision notice. The University was not happy this approach and again challenged the legality of such a notice and the Commissioner's right of discretion in investigating complaints.
18. Not only is the Commissioner satisfied that issuing a decision notice in respect of this complaint would be lawful, but the University's resistance in the matter has strengthened her view that such a decision notice would be both appropriate and necessary.
19. The analysis which follows considers whether the University obtained the correct objective reading of the request and whether it complied with section 10 of the FOIA.

Reasons for decision

Did the University obtain the correct objective reading of the request?

20. Section 1(3) of the FOIA states that:

Where a public authority—

- (a) reasonably requires further information in order to identify and locate the information requested, and*
- (b) has informed the applicant of that requirement,*

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

21. Section 16 of the FOIA places a duty on a public authority to provide “reasonable” advice and assistance to those making and wishing to make information requests.

22. In the Commissioner’s view, this duty requires a public authority to seek clarification of requests which are unclear or which are capable of multiple objective readings.

23. The University argued that a “non-disclosure agreement” has a specific legal meaning which was distinct from a “settlement agreement.” As the complainant is a senior law student, the University argued that he would be aware of the importance of clarity of language.

24. It pointed out that it would enter into standalone non-disclosure agreements with external third parties but that it did not use these as part of the process for settling complaints from students or staff.

25. The Commissioner is not persuaded by the University’s interpretation or its reasons for adopting it.

26. The Commissioner accepts that it would be unreasonable to expect a public authority to have a psychic ability to discern exactly what every requestor is seeking when they make a request. Equally, it is unreasonable for every would-be requestor to know exactly what information a public authority holds and the format in which that information is recorded. That is why public authorities have a duty to provide advice and assistance where it is possible that a request may have more than one objective reading. Not only does a public authority risk failing to comply with its duty under section 1(1) of the FOIA if it fails to ensure that it has the correct reading of the request, but it also risks wasting its valuable time and resources in searching for irrelevant information – and dealing with subsequent complaints that could have been avoided.

27. The phrase "non-disclosure agreement" may have a very specific meaning in litigation but it also has a meaning in plain English as well: that being an agreement where both parties agree that one or both of them must not disclose certain information. According to a plain English definition, such an agreement does not have to occupy an entire document, nor does it have to be in a separate document labelled "non-disclosure agreement." If a non-disclosure provision is contained within a broader agreement, that agreement is still a "non-disclosure" agreement.
28. The Commissioner is also not persuaded that the complainant's status as a senior law student provided a justification for the University's interpretation. Whilst she accepts that the context in which a request is made can affect the interpretation of the request, she is also conscious that the complainant is likely to be unaware of the precise manner in which the University enters into such agreements. The University did not offer any additional evidence that the complainant would have such special insight, beyond noting that he was a law student.
29. The University's interpretation of this request begs the question of whether, had an ordinary member of the public made such a request, the University would have responded differently. The University did address this point and the Commissioner is not persuaded that the University would have adopted a different interpretation, regardless of the identity of the requestor.
30. The complainant suggested that the University had deliberately adopted a narrow interpretation of the request in order to frustrate his request. The Commissioner has seen no evidence to suggest that this was the case but, given the sensitivity and public interest around the use of so-called "gagging clauses", she does consider that it was unwise for the University to have proceeded as it did without seeking further clarification.
31. The Commissioner accepts that the request seemed superficially clear – and possibly would have only one meaning to a solicitor. She is not saying that University did not adopt a reasonable objective reading of the request, only that the request was capable of *more than one* objective reading and the University did not adopt *the* correct objective reading.
32. The University therefore failed in its section 16 duty to advise and assist the complainant.
33. The Commissioner considered whether it would be appropriate to order steps to remedy the breach. Whilst the University did adopt a second interpretation of the complainant's request and responded accordingly,

this was not, strictly speaking, an accurate interpretation of the complainant's request either. However, her correspondence with the University has persuaded her that requiring the University to issue a third response would only produce the same information as that it disclosed in respect of the "fresh" request. She therefore considers that it would be disproportionate to order remedial steps.

Timeliness

34. Section 1(1) of the FOIA states 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.*

35. Section 10 of the FOIA states that a public authority must comply with its section 1(1) duty "*promptly and in any event not later than the twentieth working day following the date of receipt.*"

36. The University noted that, at the time the original request was received, it was struggling under the burden of a considerable amount of requests, falling on a relatively small team to respond to. It also noted that it had been working with the Commissioner's office on specific FOIA complaints as well as more general improvements to its request handling.

37. The Commissioner is happy to accept that the University was under pressure and would have issued its response as soon as it could. She also notes that it did apologise to the complainant for the delay.

38. Unfortunately for the University, the wording of section 10 of the FOIA does not allow a public authority to delay its handling of the request. Nor does it allow the Commissioner to take mitigating factors into account when determining a breach. The public authority's initial response was not issued within 20 working days and therefore a breach of section 10 occurred.

39. The Commissioner also notes that, even if the University's initial response *had* been provided within 20 working days, the wording of section 10 of the FOIA refers to the date at which a public authority must comply with its section 1(1) duty – not the date at which it issues its first response.

40. In this case, the University failed to obtain a correct interpretation of the request and therefore failed to communicate the information it held in respect of elements [1] and [2]. It also, having dropped its reliance on section 12 of the FOIA, confirmed, outside of the 20 working days, that it did not hold information within the scope of elements [3] and [4].
41. From the evidence presented to the Commissioner in this case, it is clear that the University failed to discharge its duty under section 1(1) of the FOIA within 20 working days and therefore it has breached section 10 of the FOIA.

Other matters

42. Section 50 of the FOIA states that:

- (1) *Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.*
- (2) *On receiving an application under this section, the Commissioner shall make a decision unless it appears to him—*
 - (a) *that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45,*
 - (b) *that there has been undue delay in making the application,*
 - (c) *that the application is frivolous or vexatious, or*
 - (d) *that the application has been withdrawn or abandoned.*
- (3) *Where the Commissioner has received an application under this section, he shall either—*
 - (a) *notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or*
 - (b) *serve notice of his decision (in this Act referred to as a "decision notice") on the complainant and the public authority.*

43. During the course of correspondence, the University attempted to argue that the Commissioner should have relied on section 50(2)(a) to refuse the complaint as the formal internal review process had not been completed that point. It went on to argue that the Commissioner was acting inappropriately in issuing a decision notice when the outstanding matters had been resolved informally.

44. The Commissioner does not accept that the wording of section 50(2)(a) *prevents* her from accepting a complaint where the complainant has been unable to exhaust a public authority's internal review or complaints procedure – especially when she considers that not accepting a

complaint would be contrary to her section 47 duty to promote good practice in handling FOIA requests.

45. For the Commissioner to not accept such complaints would mean that a public authority would be able to delay a complaint from reaching her indefinitely if it failed to complete a formal internal review. Blocking a complaint in this way would quite clearly frustrate the right to ask for a decision – which section 50 of the FOIA confers.
46. Furthermore, in this particular case, the Commissioner is satisfied that, whilst the University may not consider that it had completed its formal process at the point she accepted the complaint, it had nevertheless had the opportunity to review its response.
47. The wording of the University's correspondence of 6 December 2019 (highlighted in the seventh paragraph of this notice) gave the clear impression that, although the University did not wish to change its position in respect of the request, it *had* given additional thought to the original position.
48. The Commissioner is not convinced that accepting the complaint when she did significantly increased the administrative burden on the University – even though she was addressing matters via an investigation that could have been addressed via an internal review. The University did not alter its stance on elements [3] and [4] until after the Commissioner's investigation began and, given the reasons for decision outlined above, the Commissioner is content that her overall decision would have been the same regardless of when the complaint was accepted.
49. The University then contested the Commissioner's right to issue a decision notice - either until such times as the University was satisfied with the Commissioner's stance or, indeed, at all.
50. The University argued that correspondence from the Commissioner's office had given it a reasonable expectation that the outstanding grounds of complaint had been resolved informally and would thus not require a decision notice. It argued that the Commissioner was "estopped" from issuing a decision notice addressing any matter which she had resolved informally. The University also argued that the Commissioner should not issue a decision notice until it had made further representations – despite having already made considerable representations.
51. The Commissioner wishes to state very clearly and very firmly for the record that no part of FOIA requires her to have the acquiescence of a public authority prior to serving it with a decision notice. It is not

uncommon for a public authority to disagree with the Commissioner's view of a particular complaint. The fact that such disagreement arises places, in the Commissioner's view, an even greater responsibility on her to record her view formally in a decision notice, which the public authority may then appeal. Whilst she will attempt to ensure that any concerns have been responded to, the Commissioner cannot and will not allow a public authority to block the issuing of a decision notice merely because it is unhappy with the outcome or the process – especially when it is apparent that both sides have taken entrenched positions. Again, to do otherwise would frustrate the intent of the legislation.

52. During the course of an investigation, the Commissioner will, where it is necessary and appropriate for her to do so, attempt to narrow the original grounds of complaint either by persuading the public authority to disclose additional information or persuading the complainant that further disclosure is unlikely. In some circumstances, this is sufficient for a complainant to withdraw their complaint – but there is no requirement for them to do so. In such circumstances, section 50(3)(b) of the FOIA indicates that a decision notice should be issued. Section 50(1) requires the Commissioner to consider whether a public authority has complied with part I of the FOIA in responding to the request.
53. To its credit, the University did reverse its position in respect of elements [3] and [4] and provided information. However, the fact that a breach has been remedied does not mean that it never occurred in the first place. In this case, both the breaches occurred at the point the University first responded to the request. The fact that the University has since modified its position only affected the Commissioner's decision as to whether remedial steps were necessary – not whether the breach had or had not occurred.
54. The Commissioner does not issue decision notices to “punish” public authorities – indeed, a large proportion of the decisions she issues highlight the fact that a particular public authority *has* complied with its responsibilities under the FOIA. Even where a public authority has committed a breach, the Commissioner's decision notices are aimed at promoting good practice among public authorities by highlighting where they went wrong and, if necessary explaining what they should have done. A decision notice also acts as a formal record, for the complainant, of their complaint.
55. In this particular case, the University has been found in breach because it was not following best practice in dealing with requests. This notice explains, in some detail, why this was the case and the University now has the opportunity to learn from this complaint so that similar breaches (and, indeed, similar complaints) do not occur.

56. Thirdly, the University argued the Commissioner was prolonging her investigation unnecessarily because she had failed to understand the grounds of complaint properly. It argued that the complainant had always been satisfied with the information he had been provided with on 19 December 2019 and that, in seeking to impose her own interpretation of the request on the University, the Commissioner was creating unnecessary work.
57. When this was first drawn to the Commissioner's attention, she reviewed the correspondence she had received, both directly from the complainant, and copied or forwarded emails between him and the University. Whilst it was clear that the complainant was not satisfied with the further response he had received, the Commissioner asked him to clarify whether he was unhappy with the actual substance of the information he had received, or whether his concerns related to the process by which the University had arrived at its answer.
58. The complainant initially stated that he was satisfied with the information he had received, however he subsequently reversed his position and argued that the University had failed to comply with his request. It was only when the Commissioner explained her view that, the process aside, the University had disclosed all the information it was likely to hold, that the complainant agreed not to pursue this aspect of his complaint.
59. Whilst the Commissioner initially offered an apology in her correspondence, in light of the further correspondence she has had with the complainant, she now considers that it is the University's failure to adhere to good practice in its handling of requests that has drawn out this complaint unnecessarily.
60. The Commissioner accepts that the complainant in this particular case corresponded with the University in a manner which was not always constructive. If the complainant does make further requests to this or any other public authority, he should be mindful that using language which might appear aggressive or threatening could render a request vexatious. Nevertheless, that does not spare the University from its obligations under the legislation.
61. The Commissioner intends to address some of the broader issues highlighted in this case with the University in separate correspondence.

Right of appeal

62. 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@justice.gov.uk

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

63. 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.
64. 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

Phillip Angell
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF