

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 September 2020

Public Authority: The Council of the University of Exeter

Address: Northcote House
The Queen's Drive
Exeter
EX4 4QJ

Decision (including any steps ordered)

1. The complainant has requested information on staff dismissals from the University of Exeter ('the University'). The University released some information within the scope of the complainant's request and has withheld some under section 40(2) of the FOIA as it considers this information is the personal data of third persons.
2. The Commissioner's decision is as follows:
 - The University is not obliged to comply with the specifics of the complainant's request under section 40(2) of the FOIA as to do so would disclose the personal data of third persons and would not be lawful.
3. The Commissioner does not require the University to take any remedial steps.

Request and response

4. On 4 February 2020 the complainant wrote to the University and requested information in the following terms:

"Please supply the data under data protection law relating to the grounds for dismissal of all academic staff (staff employed in the

Education and Research job family, Education and Scholarship job family and Research job family, including Professorial staff) dismissed from the University of Exeter in the past 5 years, specifying, with dates, the reason for dismissal, i.e. the nature of the misdeeds that led to their dismissal rather than just generic terms like "gross misconduct"."

5. The University responded on 17 February 2020. It released some information relevant to the request, namely a table with data under the columns 'Job', 'Year Leaving', 'Staff Leavers', 'Reason' and 'Comment', for the calendar years 2015 to 2019.
6. Where the number of 'Staff Leavers' is fewer than five, the University had entered '<5' and not the actual number. The University advised that it had withheld the actual number under section 40(2) of the FOIA as it considered releasing those small numbers would release the personal data of third persons. Where the 'Reason' is 'Dismissal' in the released table, in the associated 'Comment' column, the University had entered the narrative: *'These dismissals will be through the probation or disciplinary or performance procedures'*. Where the 'Reason' is 'Redundancy/Severance' in the released table, in the associated 'Comment' column, the University had entered the narrative: *'Redundancy is dismissal in law'*.
7. In her request for an internal review, the complainant told the University that she had requested the specific *"nature of the misdeeds"* and, as such, wanted the University to provide her with the specific reasons for the dismissals. That is, the focus of the complainant's interest is those individuals whose reason for leaving was 'Dismissal' rather than those whose reason for leaving was 'Redundancy/Severance'. In her complaint to the Commissioner the complainant explained that she was expecting to receive reasons like *'fraud'* or *'sexual misconduct'*.
8. Following an internal review, the University wrote to the complainant on 6 March 2020. It upheld its original response.

Scope of the case

9. The complainant contacted the Commissioner on 8 April 2020 to complain about the way her request for information had been handled.
10. The Commissioner's investigation has focussed on whether the University can rely on section 40(2) of the FOIA to withhold the specific information the complainant has requested about staff dismissals that were not through redundancy or severance.

11. Given the nature of the withheld information – numbers that are fewer than five and specific dismissal reasons - it has not been necessary for the Commissioner to view that information on this occasion. The Commissioner has, however, had a telephone discussion with the University about the nature of the information being withheld.

Reasons for decision

Section 40 – personal data

12. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A), 40(3B) or 40(4A) is satisfied.
13. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
14. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data, then section 40 of the FOIA cannot apply.
15. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection (DP) principles.

Is the information personal data?

16. Section 3(2) of the DPA defines personal data as:
"any information relating to an identified or identifiable living individual".
17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

19. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
20. In this case the University has withheld the specific number of staff dismissed over a defined period where the number is fewer than five, and the specific reason why those individuals were dismissed ie the 'Descriptor' in the free text fields in the relevant electronic records.
21. The term 'mosaic argument' is often used to refer to the argument that whilst it may not be prejudicial to disclose requested information in isolation, it would be prejudicial where the requested information can be combined with other information already in the public domain or already known to the requester or others.
22. Since release under the FOIA is release to the wider world, the dismissed individuals' former colleagues or other University employees would potentially have access to additional corporate information, or would have general knowledge about individuals who have been dismissed, or who may have been dismissed, in particular circumstances. If they were motivated to do so, they would therefore be able to identify particular individuals if the specific information the complainant has requested was released.
23. In the Commissioner's view, within the relatively small community of a University in particular, there are likely to be employees and other people associated with the University, including the complainant, who, if sufficiently motivated to do so, would be able to piece together the specific information requested with other information held within corporate records or already publicly known. By doing so they would be able to identify that specific individuals were dismissed and the specific circumstances in which they were dismissed.
24. In the circumstances of this case, the Commissioner is satisfied that the specifics of the requested information - that is, the small numbers of individuals combined with the specific reasons for their dismissal - relates to former members of University staff who were dismissed. She is satisfied that this information both relates to and could identify the individual(s) concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
25. The fact that information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under

the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

26. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

27. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

28. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

29. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

30. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* lawful bases for processing listed in the Article applies.

31. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"*².

² Article 6(1) goes on to state that: -

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that: -

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph

32. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:

Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;

Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;

Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

33. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

34. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
35. In her complaint to the Commissioner the complainant has said only that she is seeking just the reasons for the dismissals, and not any personal details. As has been discussed, the Commissioner considers that the specific information the complainant is seeking *can* be categorised as other people's personal details. From the information provided to her it appears to the Commissioner that the complainant is pursuing a purely private concern unrelated to any broader public interest.

(dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

36. There is, however, a public interest in a public authority such as the University demonstrating that it is open and transparent.

Is disclosure necessary?

37. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
38. While it may be necessary to satisfy her own personal interests, in the Commissioner's view, the complainant has not made a compelling case for disclosure of the specific information in question being necessary. Such legitimate interest that she may have in dismissals at the University has been met, to a large extent, by the information the University has released. And the public interest in the University demonstrating it is open and transparent has also been met through the information that the University has released to the complainant in response to her request. However, for the sake of completeness, the Commissioner has gone on to consider the balancing test.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

39. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
40. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
41. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information

relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

42. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
43. The Commissioner is satisfied in this case that the individuals concerned - ie those individuals dismissed from the University over a period of five years - would have the reasonable expectation that their personal data – that is; the fact of their dismissal and the reason for it – would not be released to the world at large as the result of somebody requesting this information under the FOIA. As such, the Commissioner is also satisfied that it would cause those individuals a degree of harm or distress if that information was to be released.
44. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The complainant has not put forward any wider public interest argument and such wider public interest that there is in dismissals from the University has been met through the information it has released. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
45. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

Conclusion

46. The Commissioner has decided that the University is entitled to withhold the disputed information under section 40(2), by way of section 40(3A)(a).

Right of appeal

47. 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

48. 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.
49. 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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