

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 April 2020

Public Authority: The University Council
Address: University of Warwick
Coventry
CV4 8UW

Decision (including any steps ordered)

1. The complainant has made a seven part request for information relating to the disciplinary procedure and subsequent appeal carried out by the University Council (the University) following a complaint in April 2018 regarding a group chat involving students at the University.
2. The University refused to provide information falling within the scope of parts five a), b) and c) of the request under section 38(1) (health and safety) and 40(2) (third party personal data) of the FOIA.
3. The Commissioner's decision is that the University has correctly applied the provisions of section 40(2) to withhold the information requested in parts five a), b) and c) of the request. The Commissioner did not go on to consider the University's application of section 38(1) as she considered that section 40(2) applied to the entirety of the information requested in parts five a), b) and c) of the request.
4. However, the Commissioner has recorded a procedural breach of section 10 of the FOIA, as the University failed to respond to the complainant's request within the statutory time limits.
5. The Commissioner does not require any further steps to be taken as a result of this decision notice.

Request and response

6. On 8 February 2019, the complainant wrote to the University and requested information in the following terms:

"Under the Freedom of Information Act 2000, we would like to request the following information from the University of Warwick, in relation to the disciplinary procedure and subsequent appeal carried out by the university following a complaint last April about a group chat.

In relation to the disciplinary and appeals panels established, could you please provide us with information regarding:

- 1) The gender breakdown of the members of the disciplinary panel, and the appeals panel established for this case.*
- 2) The roles or the nature of the roles of those members chosen for the disciplinary panel and appeals panel in question.*
- 3) A description of the process by which members are chosen to participate on such a panel.*

In relation to the role of [name redacted], [job title redacted], as Investigations officer, could you please provide us with information regarding:

- 4) Any training that [they] had received in dealing with cases of this nature prior to [their] appointment*
- 5)*
 - A) The number of previous investigations into complaints handled by [name redacted]*
 - B) A general description of the nature of those complaints*
 - C) The outcome of all previous investigations handled by [name redacted]*

Could you please provide us with information regarding:

- 6)*
 - A) Whether the defendants had lawyers or legal advisors of any kind present during the initial questioning carried out by [name redacted] in [their] role as Investigations Officer.*
 - B) Whether the defendants had lawyers or legal advisors of any kind present during any later questioning related to their case.*

7) Whether any of the defendants made use of a PR company or media relations firm in their communications with the university about the case at any time during the investigation, disciplinary procedure or appeals process."

7. The University responded on 13 March 2019. It provided some information within the scope of the request but refused to provide the remainder. It cited section 38(1)(a) and (b) of the FOIA as its basis for refusing to provide the information requested in parts one and two of the information request. In addition, it cited section 40(2) and section 40(3A)(a) of the FOIA as its basis for refusing to provide the information requested in parts four, five, six and seven of the information request.
8. On 19 March 2019 the complainant requested the University carry out an internal review of its decision to withhold the information requested in parts one and five of the request for information.
9. Following an internal review, the University wrote to the complainant on 2 July 2019 maintaining its original position.

Scope of the case

10. The complainant initially contacted the Commissioner on 31 May 2019 to complain about the way her request for information had been handled and the fact that she had still not received a decision regarding the internal review she had requested.
11. The Commissioner wrote to the University on 20 June 2019 and requested that it issue an internal review decision as soon as was practicable and within 20 working days.
12. The complainant contacted the Commissioner on 5 August 2019, advising that she had now received a response from the University to the internal review. The response refused to provide the information requested, disclosure of which the complainant believes is strongly in the public interest.
13. The focus of the internal review request, and the internal review conducted by the University, was the withholding of the information requested in parts one and five of the request.
14. During the Commissioner's investigation, the University revised its position at the Commissioner's invitation and provided the information requested in part one of the request. It also added a further ground of refusal to part five a), b) and c) of the request. It cited section 38(1) of the FOIA to withhold this information.

15. The Commissioner therefore considers that the scope of this investigation is to determine whether the University is entitled to rely on section 38 and section 40(2) of the FOIA to withhold the information requested in part five of the FOIA request.

Reasons for decision

Section 40 personal information

16. 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)(3B) or 40(4A) is satisfied.
17. 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').
18. 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.
19. 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 DP principles.

Is the information personal data?

20. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
22. 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.

23. 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.
24. The University has stated that the information withheld is the personal data of the individual named in the request (the data subject). It identifies them, as the information is provided in response to a question about the data subject. Furthermore, the University has stated that it is biographically significant, and has the data subject as its focus. The University has stated that its position is that all the information withheld in relation to part five of the request is personal data.
25. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to a named individual. She is satisfied that this information both relates to and identifies the data subject concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
26. The fact that information constitutes the personal data of an identifiable living individual 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.
27. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

28. 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".

29. 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.
30. 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.
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.

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: -
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **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 the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

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

35. Further, 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
36. The Commissioner understands that the complainant considers that information about the data subject's previous experience of investigations such as the one in this case "*is in the legitimate public interest and its disclosure considering the public nature and seriousness of the case, is considered fair.*"
37. In the circumstances of the case, the Commissioner accepts that there is a specific legitimate interest in knowing whether the data subject had the relevant experience to investigate such disciplinary complaints, especially one that has attracted public interest. In addition, disclosure would promote openness and transparency enabling members of the public to satisfy themselves that the appropriate measures are in place to deal with disciplinary complaints of a sensitive nature.

Is disclosure necessary?

38. '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.
39. The Commissioner considers that the disclosure would give the public more insight into whether the data subject had the relevant experience to investigate a group chat disciplinary complaint, and there is no other way that the same objective could be achieved by other less intrusive means. She therefore considers that disclosure is therefore necessary to meet the legitimate interest identified.

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

40. 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.

41. 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.
42. 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.
43. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
44. The University has stated that it would not be fair to disclose the withheld information, as it would be disclosing the information to the world at large. Furthermore, the data subject would not expect their personal data to be used in this way, particularly as it relates to HR disciplinary matters which it says tend to involve contentious and sometimes highly personal material.
45. The University has stated that the need to preserve the confidentiality of all the people involved in HR disciplinary investigations is reiterated throughout the process. The University has confirmed that supporting documentation used throughout the process is marked as confidential and this includes meeting notes, letters and investigation reports.
46. The University has provided the Commissioner with an extract from its Disciplinary Policy, which states:

14. Confidentiality

14.1. All information relating to a disciplinary case will be treated confidentially. Information relating to the alleged misconduct will be shared with only those who have a legitimate requirement to see the documentation as part of resolution to the disciplinary or any consequent procedure and therefore the processing of data for contractual necessity.

14.2. Employees will normally be informed of the names of any witnesses whose evidence is relevant to disciplinary proceedings, unless the University believes that the identity of witnesses

should remain confidential, for example in cases where there is a genuine fear of reprisals or violence.

14.3. It is expected that all parties will be sensitive to the nature of such proceedings, including matters discussed and any evidence provided. Breach of confidence, on either side, may compromise the integrity of the procedure and may itself be subject to disciplinary action. This does not preclude individuals from seeking appropriate advice, support and information in relation to the case.

47. The University has stated that there is therefore a duty of confidence owed to the data subjects in relation to their personal data in connection to their involvement with HR disciplinary matters, to allow them to discharge this voluntary function independently and without fear of reprisal.
48. The University have also argued that its employees have an implied contractual duty of confidentiality to ensure the business efficacy of the process.
49. The University has confirmed that the data subject has not consented to the disclosure of the withheld information and is strongly opposed to the disclosure.
50. The University has stated that the disclosure of the withheld information would not be lawful.
51. The University has stated that the complainant's legitimate interest in knowing whether the data subject had the sufficient relevant experience to investigate such disciplinary complaints, prior to their appointment as Investigating Officer in the group chat case, is clearly outweighed by the data subject's interests and rights in having their personal data withheld. The University has emphasised the fear, anxiety and distress with which the data subject views the possibility of the disclosure of their personal data.
52. The University has stated that the disclosure of the withheld information would lead to the matter being revived in the public mind through press articles, social media comment and possibly another television programme made by the complainant. The University has stated that shortly after the data subject became involved in the group chat case, they received numerous emails and telephone messages to their work email address and work telephone number. The University stated that these messages ranged from the personally abusive to intimidating. The University has stated that the disclosure of the withheld information would result in the data subject receiving further harassing, intimidating

and abusive messages of the type they had already received. The University has confirmed that the direct result of the disclosure of the withheld information would cause wholly disproportionate and unwarranted damage and distress to the data subject.

53. As noted above, the Commissioner does recognise the legitimate interest in being assured that the data subject has the relevant experience to investigate a group chat disciplinary complaint.
54. However, the Commissioner is conscious that disclosure under the FOIA is disclosure to the world at large. The Commissioner recognises that the data subject has a general expectation that their personal data will remain private and will not be disclosed to the world at large. Disclosure under the FOIA would confirm to the world at large the number, nature and outcome of the disciplinary complaints that the data subject has investigated. Individuals involved in the disciplinary process would not have any expectation that the information could be disclosed into the public domain and disclosing this information is likely to cause damage and distress to the data subject.
55. The Commissioner also considers that the disclosure of the information in question may deter other individuals from volunteering for this role in the future.
56. 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 Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
57. 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.

The Commissioner's view

58. The Commissioner has therefore decided that the University was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).
59. The Commissioner has not gone on to consider the application of section 38 of the FOIA.

Procedural matters

Section 10 – Time for compliance

60. Section 10(1) of the FOIA states that a public authority shall respond to information requests promptly and, in any event, no later than 20 working days from receipt.
61. The Commissioner notes that, from receipt of the request, the University took 23 working days to respond to the request for information. The Commissioner has therefore recorded a breach of section 10 of the FOIA against the University as a result.

Other matters

62. The Commissioner notes that the University's response to the internal review exceeded 40 working days. Although there is no statutory time set out in the FOIA within which public authorities must complete a review, the Commissioner takes the view that a reasonable time for completing an internal review is 20 working days from the date of the request for review, and in no case should the total time taken exceed 40 working days. The Commissioner therefore recommends that the University review the Section 45 code of practice³.

³ <https://ico.org.uk/media/for-organisations/documents/1624144/section-45-code-of-practice-request-handling-foia.pdf>

Right of appeal

63. 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

64. 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.
65. 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

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