

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 7 April 2021

**Public Authority:** The Council of Imperial College  
**Address:** South Kensington Campus  
London  
SW7 2AZ

#### **Decision (including any steps ordered)**

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1. The complainant requested details of payments made to a particular GP practice for student placements. The Council of Imperial College ("the College") relied on section 40(2) of the FOIA to withhold information.
2. The Commissioner's decision is that the College has not correctly applied section 40(2) of the FOIA to any part of the request. In respect of elements 1, 3 and 4 of the request, it has not demonstrated that the information would be personal data. In respect of element 2, any information the College held would be personal data and therefore the Commissioner is proactively applying section 40(5B) of the FOIA to prevent the College from confirming or denying whether it holds relevant information.
3. The Commissioner requires the College to take the following steps to ensure compliance with the legislation.
  - Disclose the information that it holds within the scope of elements 1, 3 and 4 of the request.
4. The College must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 1 September 2020, the complainant wrote to the College and requested information about payments it might have made to a particular company ("the Company") in respect of student teaching placements that took place at a particular GP practice ("the Practice"). She considered that the payments had been made to either the personal bank account of one of the partners at the practice ("the Doctor") or to the accounts of a company controlled by the Doctor:

*"please can you provide me with information on payments made to [the Company] for medical student teaching at [the Practice], for the period July 2018 to February 2020."*

6. The College responded on the same day. Given the allegations that the complainant raised, it initially suggested that, although the correspondence had been submitted to the College's FOI inbox, a FOIA request might not be the appropriate route to deal with the broader issues.
7. After the complainant had provided some further information about her dealings with the Practice, the College wrote to her again on 4 September 2020. It noted that it had raised the allegations of irregularity with its finance team but that, as the Doctor was the sole director of the Company, any information about the Company would be information about the Doctor and would hence be the Doctor's personal data.
8. The complainant evidently sought some further categories of information because the College issued a further response on 8 September 2020. In this response, the College summarised the complainant's requests in the following terms:

*"[1] the amount of fees paid to the practice for teaching from July 2018 to July 2019 and from July 2019 to the end of February 2020*

*"[2] payments made to [the Company] for medical student teaching at [the Practice], for the period July 2018 to February 2020*

*"[3] details of how many groups/individuals were sent to [the Practice] from the period July 2018 to February 2020*

*"[4] how much was paid for each placement."*

9. The College explained that it considered some of the requested information to be personal data and would therefore only share it with the appropriate authorities for criminal or regulatory purposes. However, the response also stated that:

*"We shall proceed to provide the non-personal elements of the information that you have asked for under the Freedom of Information Act, which would be items 1, 2 and 4."*

10. The College issued a further response on 5 October 2020 in which it formally relied on section 40(2) of the FOIA to withhold all the information it held.
11. The complainant was dissatisfied with the response and argued that the College was *"protecting an individual who is syphoning off money."*
12. The College completed its review on 14 October 2020. It upheld its original position.

### **Scope of the case**

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13. The complainant contacted the Commissioner on 16 October 2020 to complain about the way her request for information had been handled.
14. The complainant explained to the Commissioner that she had previously been married to the Doctor and that she believed he had been diverting funds to his personal account to prevent her from receiving monies she was entitled to. Prior to the investigation, the complainant informed the Commissioner that she had now seen copies of the Doctor's bank statements which (she says) confirm her version of events.
15. At the outset of her investigation, the Commissioner wrote to the College, stressing the need to consider the individual elements both together and separately when considering personal data. She also noted that, given the nature of element [2] of the request, if the College had concerns about disclosing personal data relating to the Doctor, it ought not to be confirming or denying holding information in the first place.
16. The College issued a fresh submission on 30 March 2021. It maintained that it wished to rely on section 40(2) to withhold the requested information.
17. Given that she is also the regulator of data protection legislation, the Commissioner will apply the various limbs section 40 exemption herself

if she feels a public authority is at risk of disclosing personal data without a lawful basis for doing so. In this case she has proactively applied section 40(5B) of the FOIA in respect of element [2]. The reasons for this are explained below.

18. The remainder of the analysis looks at whether the College was entitled to rely on section 40(2) of the FOIA to withhold information within the scope of elements [1], [3] and [4] of the request.

## **Reasons for decision**

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19. When a public authority receives a request under FOIA, the request normally places two obligations upon the public authority: firstly, the public authority must confirm whether it holds information within the scope of the request and secondly, where the public authority has confirmed that it holds relevant information, it must communicate that information to the requestor.
20. If the public authority believes that it is unable to discharge either obligation, it must issue a refusal notice stating which exemption from the FOIA allows it to withhold information or allows it to neither confirm nor deny holding relevant information. Unless a specific exemption allows it to neither confirm nor deny holding information, the public authority must still discharge its duty to confirm or deny – even if it wishes to withhold the information.

## **Section 40 - personal information**

21. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.
22. Therefore, for the College to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request the following two criteria must be met:
  - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
  - Providing this confirmation or denial would contravene one of the data protection principles.

*Would a confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?*

23. Section 3(2) of the DPA 2018 defines personal data as:-

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

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

25. 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.

26. When explaining why it did not consider section 40(5B) to be appropriate, the College explained that:

*"Imperial College therefore remain of the view that that any information about payments to that company would be information about payments to [the Doctor] and would be his personal data. The information is therefore exemption by virtue of Section 40(2). As explained previously, we do not think that it would be necessary to apply Section 40(5B) to this request as the fact that payments would have been received by the practice from Imperial College for teaching work was known to [the complainant]. The surgery advertises itself as a teaching practice. We do not think that confirmation that Imperial College does hold payment information about the practice would disclose personal information. [The complainant]'s interest was not whether or not payments had been made to the practice, but the exact amount and to whom. It is the detail of the payments received that we think would amount to personal information and thus we are of the view that Section 40(2) is the appropriate exemption."*

27. The Commissioner agrees that the request seeks details of payments and to whom those payment are made. However, that is precisely why the College should not be confirming or denying whether it holds information about payments made to the Company.

28. Element [2] of the requests seeks details of any payments the College has made to the Company. If the College were to confirm that it held payment information, it would be confirming that it had in fact made payments to the Company.

29. Information available on Companies House records that that the Company has a single active director: the Doctor. Therefore financial

information about the Company will also be financial information about the Doctor as he is the only active director and can be identified via information in the public domain.

30. Therefore if the College confirms that it holds information within the scope of this element, it will be confirming that it has made payments to a company controlled by an identifiable individual. Information of this type would disclose something about the Doctor's personal finances as it would reveal that some of his income may be structured through the Company.
31. Conversely, if the College denied that it held relevant information, this would also reveal something about the way the Doctor structures his personal finances. Whilst a denial is likely to be less harmful to the Doctor, the College cannot only rely on a neither confirm nor deny approach when it does hold information – to do so would undermine the purpose of the exemption.
32. The Commissioner therefore considers that the College cannot even confirm or deny holding information within the scope of element [2] without disclosing personal data about the Doctor. The first criterion is thus met and the Commissioner must next consider whether issuing a confirmation or a denial would breach the first data protection principle.

*Would confirming whether or not the requested information is held contravene one of the data protection principles?*

33. Article 5(1)(a) GDPR states that:-

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

34. In the case of a 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 – or as in this case the public authority can only confirm whether or not it holds the requested information - if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), be fair, and be transparent.
35. 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"* conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.

36. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:-

*"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"<sup>1</sup>.*

37. In considering the application of Article 6(1)(f) GDPR in the context of a request for information under 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 confirmation as to whether the requested information is held (or not) 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.

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

*(i) Legitimate interests*

39. 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

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<sup>1</sup> 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 2018) 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".*

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, the more personal or more trivial the interest, the less likely it is that such an interest will outweigh the rights of the data subject.

40. The complainant in this case clearly has a strong personal interest in understanding whether or not Imperial College holds the relevant information. She has indicated that she has either begun, or is contemplating, civil (and, possibly, criminal) litigation against the Doctor.
41. In addition, the Commissioner also considers that there is a broader public interest in understanding whether Imperial College is spending public funds appropriately and not enabling individuals or companies to avoid their legal responsibilities.

*(ii) Is confirming whether or not the requested information is held necessary?*

42. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA as to whether the requested information is must therefore be the least intrusive means of achieving the legitimate aim in question.
43. In relation to the first legitimate interest, whilst the Commissioner recognises that this is, rightly, of strong interest to the complainant (and, presumably, the Doctor), it is of negligible interest to the wider public. Any litigation is purely private matter between those two individuals. Confirming or denying to the world at large (which is what the FOIA requires) would not be necessary because there are opportunities within the court process for either side to determine the information held by the other and to acquire such information. Any such disclosure of personal data would take place under the supervision of a court which would be able to balance the competing interests. This is less privacy-intrusive than the unrestricted disclosure of personal data to the world at large that would be required if the College were to confirm or deny that it held relevant information for the purposes of the FOIA.
44. Even if the complainant has seen the information that she claims to have seen, that does not alter the Commissioner's view. The College is



not just being asked to inform the complainant alone whether or not it holds information, but the world at large and, in particular, anyone else who made the same request.

45. In relation to the second legitimate interest, the Commissioner considers that the College's processes of internal and external audit should be sufficient to ensure that any questionable payments are identified and investigated. The College confirmed during the investigation that it had referred the matter to its finance team for further consideration. This is clearly a less privacy-intrusive process than providing a confirmation or a denial that information is held.
46. As the Commissioner has determined that it is not necessary for the College to issue a confirmation or a denial that it holds relevant information in order to meet a legitimate interest, it follows that issuing such a confirmation or a denial would be unlawful. As processing must have a lawful basis in order to take place, issuing a confirmation or a denial that relevant information is held would violate the first data protection principle.
47. The Commissioner therefore considers that she is obligated to apply section 40(5B) proactively to prevent any confirmation to denial that the College holds information relevant to element [2] of the request.

### **Elements [1], [3] and [4] of the request**

48. The remaining elements of the request deal with payments made for student placements at the Practice. The College's responses to the request did not state explicitly that it held such information, but the complainant is clearly aware that placements have taken place at the Practice and the College's submission indicates that it has no concerns about revealing the fact this information exists – even if it wishes to withhold the information itself. The Commissioner is therefore proceeding on the basis that the College holds relevant information.
49. The College, in its first submission to the Commissioner, did not draw a proper distinction between information relating to the Practice and information relating to the Company. The Commissioner considers that these are two separate matters and require separate treatment.
50. Information in the public domain indicates that the Practice has two partners as well as several other nursing and administrative staff. Therefore, unlike the company – which has only one director – information about the Practice does not relate to any single individual. The College could reveal the payments it made to the Practice without

revealing how much money was received by any individual connected with the practice.

51. The Commissioner does not consider that the College has demonstrated that the complainant will be able to use the answers to the remaining elements to undermine its use of the section 40(5B) exemption in respect of element [2].
52. The Commissioner does not therefore consider that any information the College held within the scope of either element [1], [3] or [4] would reveal personal data about the Doctor or anyone else at the Practice. The College has not suggested that disclosing this information would reveal anything about the students on placement and the Commissioner can see no reason to suggest that this would be the case.
53. Whilst, during the course of the investigation, the College has hinted at the possibility of other exemptions applying to the request, it has never formally cited any exemption apart from section 40(2). As the Commissioner does not consider that the requested information is personal data, it follows that section 40(2) cannot be engaged in relation to these elements and, as no other exemption has been relied upon, the College no longer has a basis for refusing to disclose this information.

## Other matters

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### *Multi-part requests*

54. 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.*

55. Public authorities receiving a single request made up of multiple parts should normally consider themselves to have received multiple single requests – this follows the approach taken by the Tribunal when considering the cost of compliance. That would mean that, in most circumstances, a public authority should be considering *both* its section 1(1) obligations in respect of *each* request.

56. A public authority should also issue an unambiguous statement as to whether it holds information, even if it wishes to rely on an exemption to withhold that information - unless it is relying on a specific exemption from the duty to confirm or deny (which must be stated).

57. The Colleges response to the request fell into error because it appears to have dealt with all four elements of the request together rather than considering what each individual element was actually seeking.

## Right of appeal

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58. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

59. 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.
60. 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**  
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