

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 September 2022

Public Authority: University of Liverpool

Address: Foundation Building
Brownlow Hill
Liverpool L69 7ZX

Decision (including any steps ordered)

1. The complainant requested information about the department and job title of staff who had been dismissed by the public authority in the past five years due to "failure of probation/non-confirmation of appointment" and "capability". The public authority relied on section 40(2) of FOIA (third party personal data) to withhold the information.
2. The Commissioner's decision is that the withheld information engages section 40(2), with the exception of information relating directly to the requester which is instead exempt from disclosure under section 40(1) of FOIA.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 26 November 2021, the complainant made the following request for information under FOIA:

"I kindly request the numbers of University of Liverpool staff members who were dismissed from their jobs in the past five years due to "failure of probation/non-confirmation of appointment" and "capability". Please

provide these figures on an annual basis broken down by department/school and job title (i.e. lecturer, senior lecturer etc)."

5. The public authority responded on 23 December 2021 informing the complainant that the number of individuals dismissed for the reasons specified was seven but explained that the information regarding the department and job title was exempt under section 40 (third party personal data) because it could lead to the identification of the individuals.

6. On 23 December 2021, the complainant requested an internal review and requested the following clarification:

"Could you please confirm that these seven individuals dismissed for "failure of probation/non-confirmation of appointment" and "capability" were all dismissed for poor performance?"

The exact number of individuals who were dismissed due to failure of probation/non-confirmation of appointment."

The exact number of individuals who were dismissed due to "capability."

I also kindly ask you to reconsider your decision not to disclose the data in the disaggregated format requested. In particular I note that the University of Liverpool employs approximately 6000 staff. According to its 2020-21 accounts (p78) it made 191 employees redundant in 2021 and 349 employees redundant in 2020. In addition, hundreds of staff voluntarily leave the university every year. It is therefore highly unlikely that, were the university to disclose the information I request, it could be used to identify the individuals concerned."

7. The public authority provided an internal review response on 26 January 2022 in which it maintained its original position regarding section 40.

Scope of the case

8. The complainant contacted the Commissioner on 26 January 2022 to complain about the way their request for information had been handled.
9. The Commissioner commenced his investigation with a letter to the public authority on 8 August 2022 in which he asked a series of questions about the application of section 40 of FOIA and requested a copy of the withheld information.

10. The public authority responded on 5 September 2022 maintaining its position as regards the application of section 40(2) of FOIA (third party personal data) and providing a copy of the withheld information.
11. The Commissioner considers that the scope of his investigation is to determine the extent to which the withheld information engages the absolute exemption at section 40(2) of FOIA. He will also consider whether section 40(1) of FOIA should be applied to one section of the information.

Reasons for decision

Section 40 personal information

12. Section 40(2) of 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.
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 UK General Data Protection Regulation ("UK 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 FOIA cannot apply.
15. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

16. Section 3(2) of the DPA defines personal data as:
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¹ As amended by Schedule 19 Paragraph 58(3) DPA.

“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 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 public authority has revealed to the complainant that the withheld information relates to just seven individuals who were dismissed in the five-year period specified for the reasons specified.
21. The public authority has provided the withheld information to the Commissioner for consideration. A key factor in this case is to determine whether the individuals are identifiable from the withheld information.
22. The Commissioner notes that the complainant has requested the dismissal figures on an annual basis broken down by department/school and job title (i.e. lecturer, senior lecturer etc). The Commissioner also notes that one of the individuals is the complainant and so, in fact, the number of potentially identifiable third party individuals is only six.
23. The public authority has argued that due to the very small number of third party individuals involved and the nature of information requested it would be possible to identify the individuals. The public authority explained that the number of dismissals broke down to only one per department during the period requested and the Commissioner has seen this breakdown in the withheld information.
24. The public authority went on to argue that academic staff in higher education in the UK have a professional profile on their employer's website and often additionally on professional sites such as LinkedIn and ResearchGate. The public authority argued that by searching University of Liverpool, department, job title and year, it would be possible to find the professional profile of an individual. The public authority demonstrated this by explaining that it had done such a search using the complainant's department, job title and year and had found their professional CV online. As the complainant is one of the individuals

whose details are contained in the withheld information, it is not illogical that other individuals could be identified in the same way.

25. As is explored in the ICO guidance on determining what is personal data, the Commissioner advises that it is necessary to consider whether individuals would be identifiable "by a determined person with a particular reason to want to identify individuals." This is because disclosure ordered under FOIA is disclosure to the world at large and not just to the person making the request.
26. The ICO guidance on anonymisation² sets out that it is good practice to try to assess the likelihood of motivated individuals having and using the prior knowledge necessary to facilitate re-identification of statistical data. However, the guidance also states:

"Small numbers in small geographical areas present increased risk, but this does not mean that small numbers should always be removed automatically... always removing numbers relating to five or 10 individuals or fewer may be a reasonable rule of thumb for minimising the risk of identification... but in the context of a specific freedom of information request a different approach may be possible".
27. Having considered the withheld information and the information available in the public domain, the Commissioner considers that the six third party individuals could potentially be identified by a "determined person" using the requested information due to the very small numbers involved.
28. The Commissioner is satisfied that the risk of identification is sufficient that the information falls within the definition of "personal data" in section 3(2) of the DPA.
29. The Commissioner is satisfied that all the withheld information both relates to and identifies the six third party individuals. The withheld information therefore falls within the definition of "personal data" in section 3(2) of the DPA.
30. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under

² <https://ico.org.uk/media/1061/anonymisation-code.pdf>

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

31. The most relevant DP principle in this case is principle (a). Article 5(1)(a) of the UK GDPR states that:

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

32. 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 if to do so would be lawful, fair, and transparent.

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

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

34. Article 6(1) of the UK 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.

35. 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”³.

³ 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 UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second

36. In considering the application of Article 6(1)(f) of the UK 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 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.
37. 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

38. 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. The interests may be public or personal, broad, or narrow, compelling, or trivial. However, the narrower and less compelling the interest, the less likely it is that such an interest will outweigh the rights of the data subjects.
39. It is clear that, as one of the individuals who has been dismissed, the complainant has a personal interest in the withheld information.
40. The public authority acknowledges that there is a legitimate public interest in how it encourages the highest standards of staff performance.
41. The Commissioner recognises that there is a legitimate interest that would be served by disclosure of the withheld information. He has therefore gone on to consider the necessity test.

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

Necessity

42. The public authority argued that disclosure was not necessary to satisfy the legitimate interest in this case because it sets out expectations of staff competence and performance in its Performance Management Procedure, Capability Procedure and Disciplinary Procedure, all of which are available on its website:

[Policies and procedures - Legal & Governance - University of Liverpool](#)

43. The public authority also argued that the legitimate public interest was met by the disclosure to the complainant of the total number of dismissals for poor performance over the five-year period in question.

44. The ICO guidance⁴ on the necessity test advises that when considering the question of necessity, you must consider whether there is a pressing social need for the disclosure of the information, taking into consideration the legitimate interest in question.

45. The Commissioner considers that the legitimate interest of transparency in how the public authority encourages staff competence and performance is met by its published policies and, furthermore, the number of dismissals already disclosed to the complainant demonstrates that the public authority applies the relevant staff performance policies.

46. Additionally, disclosure under FOIA is disclosure to the world at large and not just to the requester. It is the equivalent to the public authority publishing the withheld information on its website.

47. As the Commissioner does not consider the disclosure of the withheld information to be necessary, he has not gone on to consider the balancing test.

The Commissioner's view

48. In this instance, the Commissioner has decided that the public authority was entitled to withhold the third party personal information under section 40(2), by way of section 40(3A)(a).

Section 40(1) – personal data of the requester

⁴ <https://ico.org.uk/media/for-organisations/documents/2619056/s40-personal-information-section-40-regulation-13.pdf>

49. Section 40(1) of FOIA provides an exemption from disclosure for any information which is the personal data of the person who has requested it. This is because a right of access to this information already exists via the Subject Access (SAR) provisions of the DPA and UK GDPR. Disclosure under SAR is disclosure of a person's data to them alone – rather than the disclosure to the world at large required by FOIA.
50. The Commissioner notes that some of the withheld information relates directly to the complainant and that they could be identified from it. It therefore follows that the information is the personal data of the complainant.
51. Section 40(1) is an absolute exemption, with no requirement to consider the complainant's wishes. Given his dual role as the regulator of data protection legislation, the Commissioner has a responsibility to prevent personal data being inadvertently disclosed under FOIA. He has therefore proactively applied section 40(1) of FOIA to the personal information of the complainant, to prevent any possibility that the information might be disclosed under FOIA.

Right of appeal

52. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

53. 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.
54. 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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