

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 August 2023

Public Authority: Board of Governors of Leeds Beckett University
Address: The Rose Bowl
City Campus
Leeds
LS1 3HB

Decision (including any steps ordered)

1. The complainant has requested information about applicants for a particular role at Leeds Beckett University (the university). The university provided some information but withheld other information, citing section 40(2) of FOIA. The university later confirmed that it did not hold some of the information relating to the first part of the request.
2. The Commissioner's decision is that the university appropriately applied section 40(2) of FOIA to withhold information. He has also concluded, on the balance of probability, that the university does not hold information regarding race and gender. In failing to confirm to the complainant within the legislative timeframe that it did not hold part of the information, the university breached section 1(1)(a) of FOIA.
3. The Commissioner requires no further steps to be taken by the university.

Request and response

4. On 22 March 2023 the complainant wrote to the public authority and requested information in the following terms:

“First: there is an opening for the Interim Head of the Graduate School/Associate Registrar of the Graduate School at grade 10 with reference (REQ0000971); I need to know the number of applicants, race, and gender along with any anonymised information about the applicants and related paperwork.

Second, for the same post (REQ0000971), there was an external assessor from the University of Warwick. The HR assigned him a task to review an application; I need to know if the university paid the external assessor money and to see the public element of any paperwork related to this assignment; the external assessor’s name is [redacted name]. The external assessor reviewed how many applications?

Third, Besides the university website, there was an external agent for the same post named Talentedu who helps in disseminating and managing applicants; How much did the University pay Talentedu as an external agent or the contact person? Was there any contract and related paperwork?”

5. The university responded on 21 April 2023 as follows:

Part one – refused to provide the requested information (race and gender) under section 40(2) of FOIA.

Part two – a response was provided.

Part three – provided some information but did not respond to “Was there any contract and related paperwork”.

6. The complainant asked for an internal review on 7 May 2023. They were not content with the citing of section 40(2), arguing that there was no means of reidentifying the individuals. The complainant stated that the information on race and gender could be provided in separate tables to provide anonymity. The review request suggested that the applicants’ age could be included but this wasn’t in the original request.
7. The university has sent correspondence to the Commissioner that explains that the number of applicants had been disclosed to the complainant in response to an earlier information request. The number was confirmed on 25 July 2023.
8. The university states that “age data” was not requested at any time. Regarding the second part of the request, the complainant asked further questions.

9. The complainant queried why the second element of part three of the request (contract/paperwork) had not been responded to and asked further questions. The university issued an internal review on 6 June 2023 in which it maintained its position in relation to parts one and two of the request.
10. Regarding part three, the university partly upheld the review concern and stated that any information held would be provided by 19 June 2023. The review did not cover the additional questions asked as they had not formed part of the original request.
11. On 19 June 2023, the university provided information it held relating to the contract and paperwork to the complainant.

Scope of the case

12. The complainant contacted the Commissioner on 6 July 2023 to complain about the way their request for information had been handled.
13. The complaint to the Commissioner is about the response to the first part of the request.
14. Having emailed and spoken to the university, the Commissioner was informed that it did not hold any information regarding race and gender but that it did hold information about the applicants and related paperwork. For clarity, the University's revised position is that it doesn't hold the race and gender information. It holds CV and cover letter information but this is exempt under section 40(2). The complainant was informed shortly after, on 23 August 2023.
15. The Commissioner considers the scope of his investigation to be to establish whether the public authority is entitled to withhold part of the requested information under section 40(2) of FOIA and whether the university, on the balance of probability, holds the information relating to race and gender.

Reasons for decision

Section 1 – general right of access to information held by public authorities

16. Section 1(1) of 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."

17. In cases where there is a dispute over the amount of information held, the Commissioner applies the civil test of the balance of probabilities in making his determination. This test is in line with the approach taken by the Information Rights Tribunal when it has considered whether information is held (and, if so, whether all of the information held has been provided). The Commissioner is not expected to prove categorically whether the information is held.
18. As set out earlier in this decision notice, the university originally stated that it held the requested information relating to part one of the request and exempted it under section 40(2) of FOIA.
19. The university looked again at this matter in response to the Commissioner's investigation letter. It concluded the following about race and gender:

"In the course of investigating how likely it was that individuals could be identified by disclosure of the requested data, we established that the University does not in fact hold this data (and never has held it) and the question of whether the s40(2) exemption applies or not is therefore moot."

A covering letter and CV were required to apply for the post. The university has considered the information contained in both items for each applicant and concluded that race and gender were not disclosed. These matters were not recorded during later online discussions with applicants.

20. The complainant does not accept this position. They argue that the position carried the following statement:

"We welcome applications from all individuals and particularly from black and minority ethnic candidates as members of these groups are currently under-represented at this level of post. All appointments will be based on merit."

Their view is that "the claim that there is no mention of race is false".

21. They further argue that,

"The university is aware of the race/gender, etc., of all applicants, given it's normal to share such information in any application. There were online meetings with all applicants and an idea about those factors, along with many people identifying themselves in the application and email upon applying. There were invitations to the interview as well, which made the university aware of the requested factors. In any case, Leeds Beckett University has no professional rationale for declining to disclose the requested information."

22. Additionally, the complainant argues that there is a conflict of interest involving employees of the university which has resulted in a "resistance to sharing the needed information". Similarly they contend that "the same applies to the internal review". The complainant also explains that the "university concluded there was a breach of applying the internal policy about this matter" but still refused to share the requested information about race and gender.
23. Although the Commissioner acknowledges the complainant's arguments he does not accept, on the balance of probability, that the university holds the race and gender information. The university has now had several opportunities to establish whether it holds this information and has belatedly concluded that it does not. The university has looked through the limited information it does hold – CVs and covering letters from applicants and has decided that the requested information is not held. It is unfortunate that this conclusion was not reached earlier.
24. The suggestion that race and gender might be implied from other personal details provided or from meetings is immaterial as gender or race cannot reliably be determined in this way. There is no requirement to create information in response to a request if it is not held at the time it is received. No information has been provided by the applicants regarding race and gender.
25. However, the university did not discover that it did not hold part of the requested information until after the Commissioner began his investigation or confirm it to the complainant until four months after the request had been made. This led the complainant to believe that the information on race and gender was held and was subject to an exemption when this was not the case. Therefore the Commissioner is recording a breach of section 1(1)(a) of FOIA.

Section 40 - personal information

26. 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.

27. 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').
28. 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.
29. 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.
30. Section 3(2) of the DPA defines personal data as: "any information relating to an identified or identifiable living individual".
31. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
32. 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.
33. 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.
34. The withheld information consists of the CVs and covering letters of applicants for a particular role in the university. The Commissioner asked if the letters are template letters. The university explained that they are not template letters: "The letter contains multiple pages regarding the education, memberships, personal successes and job roles which are specific to the individual."
35. The university's view is that the requested information that is held is personal data relating to a small number of applicants. It considered whether the information "would be personal data if the applicants' names were redacted". The university concluded,

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

"We remain firmly of the view that disclosure of this information would have enabled the individual applicants to be identified given that much of the information in the application forms and cover letters is in the public domain."

36. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that this information both relates to and identifies the applicants concerned. His view is that, even with the names redacted, the remaining information in a CV is likely to contain a quantity of data such as qualifications, previous roles etc that could be used to identify the individuals concerned. The Commissioner accepts that it is not the complainant's intention to identify these individuals but disclosure is to the world at large and it is likely that there will be others who can piece together information that can identify them.
37. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
38. 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.
39. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

40. 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".
41. 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.
42. 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 UK GDPR

43. 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.

44. 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.

45. 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.

46. 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

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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) 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 sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

47. 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.
48. The university accepts that the complainant has a legitimate interest in understanding application processes in general. The Commissioner agrees that the complainant has a legitimate interest in the requested information.

Is disclosure necessary?

49. '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.
50. The university, although it accepts the legitimacy of the complainant's interests, does not consider that disclosure is necessary, given the information made available to the complainant. The disclosure of the information held by the university is of third party applicants' CVs and personal covering letters to apply for a role. The university argues that applicants would not expect their application information to be disclosed to the world at large.

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

51. 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 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.
52. 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.
53. 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.
54. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
55. The Commissioner acknowledges that the complainant has cast doubt on the recruitment process (see paragraph 22) and how it was applied. However, the more appropriate route for concerns about a recruitment is the university's complaint process or other relevant means of addressing a grievance about the conduct of a process. It is beyond the Commissioner's remit to consider whether a recruitment exercise was conducted appropriately or not.
56. The university contends that,
- "Applicants would not reasonably expect that their application information would be disclosed to the public under the FOIA and if it was disclosed could cause unjustified harm (for example by alerting their current employers to their application to the University)."
57. The Commissioner agrees with the university that individuals applying for a job would not reasonable expect their applications to be disclosed. He also concurs that, however necessary the requested information, is considered to be by the complainant, the fundamental rights and freedoms of the applicants override the complainant's desire to scrutinise the application process.
58. 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.

59. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's view

60. 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).
61. Finally, had the university held the race and gender information the same conclusion would have been reached, given the limited number of individuals concerned and the potential for reidentification, even if the information was separated from the applicant. Additionally, the information is special category data. It is unlikely that there would be any legal basis for disclosure because, in order for such information to be disclosed, the individuals concerned would need to have specifically consented to this data being disclosed to the world in response to the FOIA request or deliberately made this personal data public.

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: 0203 936 8963

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

Janine Gregory
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