

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 November 2023

Public Authority: The Governing Body of the University of
Cambridge

Address: The Old Schools
Trinity Lane
Cambridge
CB2 1TN

Decision (including any steps ordered)

1. The complainant has requested a copy of an internal report into a confidential HR investigation. The University of Cambridge ('the University') refused to disclose the requested information, citing section 40(2) (personal information) of FOIA.
2. The Commissioner's decision is that disclosure would breach the data protection principles and therefore the requested information is exempt under section 40(2).
3. The Commissioner does not require further steps.

Request and response

4. On 9 July 2023, the complainant wrote to the University of Cambridge ('the University') and requested:

"Under the terms of the Freedom of Information Act, I request:

A copy of the report by [redacted] into who may have been responsible for, and the reasons behind the whistleblowing emails sent in March 2022 to hundreds of recipients – myself included – centering on the conduct and culture at the University of Cambridge Judge Business School."
5. The University responded on 4 August 2023. It explained to the complainant that 'some of the requested information, namely your own personal data insofar as it is contained within the report, has already been disclosed to you by this office following your separate subject access request.' It confirmed 'the remainder of the information requested is exempt under section 40(3A)(a) (personal information).'
6. The complainant requested an internal review, stating that the report should be released with all names redacted.
7. The University provided the outcome of its internal review on 31 August 2023; it upheld its previous position.
8. The scope of the Commissioner's investigation is to determine whether the University was correct to withhold the information. The Commissioner will not consider the University's handling of the complainant's request for their own personal data which has been handled as a subject access request ('SAR') under data protection legislation.

Reasons for decision

Section 40 – personal data

9. Personal data must not be disclosed under FOIA if to do so would breach any of the data protection principles.
10. Section 40(2) of FOIA specifically states that information is exempt from disclosure if it's the personal data of a third party and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied. The Commissioner assumes that the circumstances surrounding this request are common knowledge, otherwise the University should have neither confirmed nor denied the requested information was held.

11. In this case the relevant condition is contained in section 40(3A)(a)¹, where disclosure to the world at large 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').

Is the withheld information personal data?

12. First, for section 40(2) to apply the withheld information must constitute 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.
13. Personal data must relate to an identified or identifiable living individual. The University has explained that the entire report is the personal data of one individual who the University identified in their internal review outcome. The report relates to this individual (the main data subject) in its entirety. The University also confirmed that in the report 'numerous other individuals (especially witnesses, and the evidence they gave) are referred to in ways that they could readily be identified indirectly by those with some knowledge of the process.'
14. The complainant has asked that the University redact the names in the report so it can be disclosed. However, since the University has identified the main data subject in their internal review outcome, they will still be identifiable from the report.
15. Furthermore, the report contains descriptions of events from several individual's points of view in the form of witness statements. These statements will detail the witnesses' actions and perspective of events and so is likely to constitute information from which they can be identified. It's unlikely to be sufficient to remove the name of the witness to prevent them from being identified, either by the complainant or by someone else who was involved in the investigation.
16. The Commissioner is satisfied the entire report is personal data. Now he must establish whether disclosure of the information would breach any of the DP principles.

¹ [Freedom of Information Act 2000 \(legislation.gov.uk\)](https://legislation.gov.uk)

17. The most relevant data protection principle in this case is principle (a) which states that "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject"².

Would disclosure contravene principle (a)?

18. Personal data is processed when it is disclosed in response to the request. This means that a public authority can only disclose personal data in response to an FOI request if to do so would be lawful, fair and transparent.
19. In order to be lawful, one of the lawful bases listed in Article 6(1)³ of the UK General Data Protection Regulation (UK GDPR) must apply to the processing.

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

20. 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."
21. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information made 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;

² [Regulation \(EU\) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC \(General Data Protection Regulation\) \(Text with EEA relevance\) \(legislation.gov.uk\)](#)

³ [Regulation \(EU\) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC \(General Data Protection Regulation\) \(Text with EEA relevance\) \(legislation.gov.uk\)](#)

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

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

Legitimate interest test

22. The Commissioner must first consider the legitimate interest in disclosing the personal data to the public and what purpose this serves. 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 represent legitimate interests; they can be the requester's own interests as well as wider societal benefits. These interests can include the broad principles of accountability and transparency that underpin the FOIA or may represent the private concerns of the requester.
23. It's important to remember that disclosure under the FOIA is effectively disclosure to the world at large. If the requester is pursuing a purely private concern which is unrelated to any broader public interest, then disclosure is unlikely to be proportionate. Legitimate interests may be compelling or trivial, but trivial interests may be more easily overridden by the fundamental rights and freedoms of the data subject during the test under stage (iii).
24. At the time of raising this complaint with the Commissioner, the complainant explained:

"As I gave evidence, and was asked directly if I wrote the whistleblowing emails, I believe I have a right to know the University's conclusions regarding that matter: whether I am suspected, or whether they have evidence who did send the emails.

More widely, as well as a personal interest, the report is a matter of public interest as it investigates criminal conduct centred on a publicly funded organisation."
25. The Commissioner is satisfied that there is a legitimate interest in disclosure of this information.

Necessity test

26. The Commissioner must also consider if disclosure is necessary for the purpose that this legitimate interest represents or if there is an alternative method of doing so.

27. 'Necessary' means more than desirable but less than indispensable or absolute necessity. The necessity test is a means of considering whether disclosure under FOIA is necessary to meet the legitimate interest identified, or whether there is another way to do so that would interfere less with the privacy of individuals.
28. The Commissioner is satisfied that the specific information requested in this case has not otherwise been made available to the public. Therefore, there are no less intrusive means of achieving the legitimate aims identified in stage (i).

Balancing test

29. Since the Commissioner is satisfied that disclosure is necessary for the purpose that this legitimate interest represents, he will now go onto consider whether the identified interests in disclosure outweigh the interests or fundamental rights and freedoms of the data subject(s).
30. For example, if the data subject(s) would not reasonably expect that the information would be disclosed to the public under the FOIA, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
31. In performing this balancing test, the Commissioner has considered the following
 - 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.
32. The balancing test should take into account whether the data subjects' concerned have a reasonable expectation that their information would not be disclosed. This expectation may be influenced by a number of 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 which this personal information serves.
33. It's also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

34. Whistleblowing is when an employee reports wrongdoing at work and whistleblowers are protected by law. The University has its own whistleblowing policy⁴ which states:

“Staff should treat any information about the disclosure, the investigation or its outcome as confidential; and

Where appropriate the formal record need not identify the person making the disclosure.”

35. The Commissioner has no doubt that the whistleblower, and those involved in the subsequent investigation, would have the expectation that their personal data would not be disclosed to the world at large. Given that there are specific laws to protect whistleblowers – the Commissioner considers this is a reasonable expectation for the data subject(s) to have.

36. Furthermore, there is a specific subsection in the University’s policy that is dedicated to protecting whistleblowers from retaliation.⁵ Whilst the University has identified an individual in their internal review outcome (and it’s not the Commissioner’s role to comment on whether this was appropriate or not), the Commissioner considers that disclosure of the report (which would include all details of the complaint, findings and involved parties) would cause distress to the data subject(s) involved.

37. The Commissioner understands that the report, and the whistleblowing, relate to a data breach in which the complainant’s personal data was disclosed. The Commissioner acknowledges that disclosure would build a fuller picture of the breach and the whistleblowing complaint and investigation.

38. However, the Commissioner isn’t convinced that the legitimate interest in this request outweighs the rights and freedoms of the data subject(s). The University can report any data breach to the ICO⁶ and take steps to mitigate the harm that might come from any such breach. It can communicate the details of the breach, and any steps that have or should be taken, to the affected parties without disclosing details of the whistleblowing complaint or investigation; both of which involve the

⁴ [Whistleblowing Policy: public disclosure by University employees | Human Resources \(cam.ac.uk\)](#)

⁵ [Complaints of retaliation as a result of disclosure | Human Resources \(cam.ac.uk\)](#)

⁶ [Report a breach | ICO](#)

processing of personal data imparted with an expectation of confidence the disclosure of which would cause distress to the data subject(s).

39. The Commissioner therefore considers that there is no Article 6 basis for processing and so disclosure would not be lawful. For that reason the Commissioner hasn't gone on to separately consider whether disclosure would be fair or transparent.

Right of appeal

40. 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

41. 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.
42. 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

Alice Gradwell
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF