

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 January 2024

Public Authority: The Governing Body of the University of Sheffield

Address: Western Bank
Sheffield, S10 2TN

Decision (including any steps ordered)

1. The complainant has requested the University of Sheffield (‘the University’) to disclose information relating to applicants to particular courses and the number with disabilities. The University disclosed some information but withheld the remainder in accordance with sections 40 and 43 of FOIA.
2. The Commissioner’s decision is that the University is entitled to refuse to disclose some of the outstanding information under section 40 of FOIA. However, the University is not entitled to rely on section 43 of FOIA to refuse to disclose the remaining information.
3. The Commissioner requires the University to take the following step to ensure compliance with the legislation.
 - Disclose the information withheld under section 43 of FOIA.
4. The public authority 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

5. On 1 July 2023, the complainant wrote to the University and requested information in the following terms:
 - “When was the pool of applicants whittled down to the candidates successful for the rounds of interviews?
 - How many of the applicants had disabilities?
 - How many of the applicants who made it to the interview rounds had disabilities?
 - How many of the successful applicants had disabilities?
 - How many successful applicants to all PhD and DPhil courses in the last three years had disabilities?
 - How many successful applicants to all PhD and DPhil courses in the last three years had Asperger's Syndrome?”
6. The University responded on 4 August 2023. It disclosed the information for bullet points one and two. For bullet points three and four it provided the information, except where the number was less than five. For this information, it advised the complainant that the number is less than five and it considered the exact number exempt from disclosure under section 40 of FOIA. In respect of bullet points five and six, the University applied section 43 of FOIA to the current admissions cycle. It however provided the requested information for the years 2020, 2021 and 2022. It clarified for bullet point six that the disclosed data was for the number of offers to PhD applicants who declared that they had ‘Autistic Spectrum Disorder’ and/or ‘Social/communication conditions such as a speech and language impairment or an autistic spectrum condition’.
7. The complainant requested an internal review (date unknown). They felt that section 40 of FOIA did not apply, disputing that a number is personal data or that an individual could be identified from it.
8. The University carried out an internal review and notified the complainant of its findings on 22 August 2023. It upheld its application of section 40 of FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 23 August 2023 to complain about the way their request for information had been handled. They disagree that section 40 of FOIA applies and that the requested information is personal data.

10. During the Commissioner's investigation the complainant raised concerns over the University's application of section 43 of FOIA to bullet points five and six of their request. Although these concerns were not raised during the internal review process or when the complainant first raised their complaint with the Commissioner, the Commissioner has exercised his discretion and accepted these concerns as part of his investigation.
11. The Commissioner therefore considers that the scope of his investigation is to establish whether or not the University is entitled to refuse to disclose the remaining withheld information under sections 40 and 43 of FOIA. He will now address each exemption in turn.

Reasons for decision

Section 40 personal information

12. 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.
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 the FOIA cannot apply.
15. 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?

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. The University confirmed that there are 21 individuals on the course and the likelihood of them working out who has a disability is high. It said that it is because of this low level data set being compared against a similarly low level data set that personal identification is likely. It advised that it is protecting the anonymity of its disabled students on the physics course by providing a ‘fewer than five’ response to questions three and four of the request.
21. The Commissioner is satisfied in this case that due to the withheld information being small it is possible for a motivated intruder (and this will include anyone out of the 21 students on the course) to use this information and other information available to them to work out with some accuracy who on the course has the said disability. The course only has 21 students and although Asperger’s Syndrome and Autism Spectrum Disorder may be classed as a more hidden disability, the Commissioner considers it is possible for someone with knowledge of these disabilities and how they may present in people to work out with some accuracy who the information relates to.
22. For arguments sake (and no inference should be taken from the following statement of the likely numbers and/or if the number is the same for each question), due to the low numbers, even disclosing the number of applicants with disabilities that made it to interview would encourage a motivated intruder to piece this information together with other information to work out with a level of accuracy who the information relates to. Even if that figure is not the same as the number of students that were ultimately successful, because it is a small number a motivated intruder could attach or relate that information to a student or students on the course, even if they are not completely correct.

23. For the above reasons, the Commissioner is satisfied that the withheld information falls within the definition of 'personal data' in section 3(2) of the DPA.
24. 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.
25. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

26. 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".

27. 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.
28. 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.
29. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

Is the information special category data?

30. Information relating to special category data is given special status in the UK GDPR.
31. Article 9 of the UK GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
32. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include special category data. He has reached this conclusion on the basis that disclosure of the requested information could lead to the identification of an individual(s) that have a diagnosed disability. A diagnosed disability such as Asperger's Syndrome and/or Autism Spectrum Disorder is information concerning an individual's health. It therefore falls within the definition of health data.

33. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
34. The Commissioner considers that the only conditions that could be relevant to a disclosure under FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
35. The Commissioner has seen no evidence or indication that the individual or individuals concerned have specifically consented to this data being disclosed to the world in response to FOIA request or that they have deliberately made this data public.
36. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of FOIA.

Section 43 commercial interests

37. Section 43 states that a public authority may refuse to disclose information if its disclosure would or would be likely to prejudice the commercial interests of the public authority and/or a third party. It is also a qualified exemption, subject to the public interest test.
38. The University has withheld the data for 2023 – what it described as the current admissions cycle in its correspondence to the complainant – in relation to questions five and six of the request.
39. The University said in correspondence to the complainant that it considered disclosure at the time of the request would have been likely to impact the University's ability to compete effectively in the higher education market. In its submissions to the Commissioner it argued that disclosure would provide an insight into the admissions process and knowledge of this could impact its recruitment strategy in the future.
40. No further arguments have been provided and the University has not explained how it considered the public interest test.
41. The Commissioner cannot uphold the application of section 43 of FOIA with such limited arguments on the likelihood of prejudice and the public interest test. The University has been provided with sufficient opportunities to provide adequate submissions but to date has failed to do so. The Commissioner cannot see how disclosure of the data for the current admission cycle would be likely to have the effects described nor

why the public interest in disclosure is outweighed by the public interest in maintaining the exemption.

42. The onus is on a public authority to provide adequate submissions on the application of such an exemption and in the absence of such detail, the Commissioner can only conclude that the exemption is not engaged.
43. The Commissioner's decision is therefore that section 43 of FOIA does not apply and the information is required to be disclosed.

Right of appeal

44. 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

45. 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.
46. 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

Samantha Coward
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Wycliffe House
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