

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 October 2011

Public Authority: The Governing Body of University of Salford
(‘The University’)

Address: Clifford Whitworth Building
Salford
Greater Manchester
M5 4WT

Decision (including any steps ordered)

1. The complainant wrote to the University to request the amount that was paid on a named individual's departure and whether or not a compromise agreement had been signed by them. The University refused to provide the requested information. It cited sections 41 and 40.
2. The Commissioner's decision is that the University should have applied section 40(5) of the FOIA and not confirmed nor denied whether or not it holds relevant recorded information for the remaining information requested. This is because even confirming or denying whether relevant information is held would be unfair to the named individual. He requires no remedial steps to be taken.

Request and response

3. In an earlier case from the same complainant with reference number **FS50288812** the Commissioner found that the University was wrong to characterise a request for information as being vexatious. He ordered the University to reconsider its position under the FOIA.
4. The University did so and subsequently claimed that it was entitled to withhold the information. This case reference number will consider the application of the exemptions to the information withheld.

5. The original request outlined below was dated 16 November 2009 [the Commissioner has divided the requests into their components to ensure that there is clarity]:

"I should like to enquire on the following details for termination of employment of a [named individual], former [job description]:

[1] Please indicate when [their] employment was terminated.

[2] [a] Please indicate if there was a financial 'pay-off' associated with [their] departure.

[b] If so, please indicate the quantity of money involved in the financial transaction...

[c] and please also indicate who authorised the expenditure.

[d] Please also indicate where, in the Annual Accounts Report, this expenditure is declared.

[3] [a] Please indicate if [named individual] signed or was asked to sign any kind of 'gagging order' upon [their] departure from the University of Salford.

[b] If so, please indicate why this was deemed necessary."

6. On 14 December 2009 the University refused the request under section 14(1) of FOIA on the grounds that it is vexatious. The complainant requested an internal review on the same day. The internal review upheld the refusal of the request as vexatious on 7 April 2010. The request was referred to the Commissioner and on 7 February 2011, he agreed that the request was not vexatious and ordered the University to reprocess the request in 35 calendar days.
7. On 7 March 2011 the University issued its new response. It provided the information for request [1]. It explained that it would not provide the requested information for request [2] because it would be a breach of confidence to the named individual and it was therefore applying section 41. It said it would not provide the requested information for request [3] because it would constitute a breach of the data protection principles and was therefore covered by section 40 of FOIA. It did not specifically confirm or deny whether there was relevant recorded information in either case.
8. On the same day, the complainant requested an internal review. He explained, in his view, the information was 'not personal data, but employment data'. He explained that he did not believe that any data

protection principles would be contravened and was not happy with the University's analysis in this regard. He said he had a 'very good public interest basis for requesting this information – one which the Commissioner is fully apprised of and seemingly agrees with'.

9. On 29 March 2011 the University communicated the results of its internal review. It said that it upheld its decision to withhold the information by virtue of section 40 and 41 of the FOIA. It provided no more details. The complainant responded on the same day to confirm that he continued to disagree with the University's position.

Scope of the case

10. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He explained that the information that was withheld should have been provided and gave the Commissioner detailed arguments about why this was so.
11. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of FOIA. In particular, the Commissioner cannot comment on the validity of complaints about the circumstances that may have led to an individual's departure.
12. The Commissioner has considered all the information that was before him in both this case and in the previous case **FS50288812**. He has asked for and received arguments from both parties.

Reasons for decision

13. The University did not clearly explain what exemptions it was applying to each part of the request but indicated that section 40 and 41 of the FOIA were applicable. The Commissioner however considers it is appropriate for him to consider the application of Section 40(5) first for the reasons set out below.
14. Section 40(5) sets out the following: -
 - 'The duty to confirm or deny –*
 - (a) *does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection(1), and*

- (b) *does not arise in relation to other information if or to the extent that either-*
- (i) *the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or*
- (ii) *by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).'*
15. Generally, the provisions of section 40 subsections 1 to 4 exempt personal data from disclosure under the FOIA. In relation to a request which constitutes the personal data of individual(s) other than the applicant, section 40(5)(b)(i) further excludes a public authority from complying with the duty imposed by section 1(1)(a) if complying with that duty would contravene any of the data protection principles or section 10 of the DPA or would do so if the exemption in section 33A(1) of that Act were disregarded.
16. The Commissioner is the regulator of both the Data Protection Act (DPA) and the FOIA. The way the FOIA is worded means that the rights under it cannot prejudice or take precedence over a data subject's rights under the DPA.
17. In *Bowbrick v Information Commissioner* [EA/2005/2006] at paragraph 51 the Information Tribunal confirmed that the Commissioner can use his discretion to look at section 40 when considering cases under the FOIA:
- 'If the Commissioner considered that there was a section 40 issue in relation to the data protection rights of a party, but the public authority, for whatever reason, did not claim the exemption, it would be entirely appropriate for the Commissioner to consider this data protection issue because if this information is revealed, it may be a breach of the data protection rights of data subjects....Section 40 is designed to ensure that freedom of information operates without prejudice to the data protection rights of data subjects.'*
18. 'Personal data' as defined under section 1(1) of the DPA is data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of the

data controller or is likely to come into the possession of the data controller. In summary, the information requested in this case consists of the arrangements that potentially accompanied an individual's departure from employment. The information, if held, would constitute the named individual's personal data because it relates to an identifiable living individual.

19. The Commissioner considers that even confirming or denying whether further information is held for the outstanding requests would reveal personal data about the individual that the request focuses on. He has therefore decided as the regulator of the DPA to use his discretion to consider the operation of section 40(5) first. The Commissioner will not proactively seek to consider exemptions in all cases before him, but in cases where personal data is involved the Commissioner considers he has a duty to consider the rights of data subjects.
20. After considering the submissions put forward by the University in this case, the Commissioner considers that the proper approach would be to first consider whether or not in responding to the request, the public authority would have been excluded from the duty imposed by section 1(1)(a).
21. In line with the provisions of section 40(5)(b)(i), the Commissioner therefore first considered whether or not confirming or denying whether the requested information was held would contravene any of the data protection principles.

Would complying with section 1(1)(a) contravene the first data protection principle?

22. The first data protection principle states in part; '*Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met....*'
23. In considering whether or not confirming or denying whether the requested information was held would contravene the first data protection principle, the Commissioner took into account the reasonable expectations of the individual data subject, whether it would cause damage and distress to them and the legitimate interests of the public at large.
24. Without disclosing any more detail than is necessary in order not to defeat the intention of section 40(5), upon considering the University's submissions, the Commissioner is satisfied that in the context and background of this request, the relevant data subject would have had a reasonable expectation of privacy and would not expect the University to confirm or deny if this information is held. The Commissioner has

detailed the University's submissions in the confidential annex attached to this Notice. This will be provided to the University, but not to the public.

25. Furthermore, again after considering the University's submissions, the Commissioner considers that confirming or denying whether the requested information is held may cause damage or distress to the relevant data subject. The University's submissions are also detailed in the confidential annex.
26. The Commissioner does consider that the public has a legitimate interest in knowing whether the University has entered into any such agreements as there is a public interest in knowing how public money is being spent and what conditions may be imposed as a consequence of spending that money.
27. However the Commissioner considers that under all the circumstances of this case, confirming or denying whether the requested information is held would breach the first data protection principle. The Commissioner is therefore satisfied that any response provided in this regard in line with the provisions of section 1(1)(a) of the FOIA would contravene the fairness element of the first data protection principle.
28. As the Commissioner is satisfied that complying with section 1(1)(a) would in this case contravene the first data protection principle, he finds that the University was not obliged to have responded to the complainant's request in accordance with the duty imposed on it by the provisions of section 1(1)(a) by virtue of the provisions of section 40(5)(b)(i).
29. In light of his decision in relation to section 40(5)(b)(i) the Commissioner has not gone on to consider the other requirements of the first data protection principle or the other data protection principles,.
30. It follows that there the University has no obligation to even confirm or deny whether the remaining information exists and no further information should be provided to the complainant.

Right of appeal

31. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

32. 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.
33. 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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SK9 5AF