

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 December 2013

Public Authority: The Governing Body of
University of Surrey

Address: Guildford
Surrey GU2 7XH

Decision (including any steps ordered)

1. The complainant has requested information relating to communication with another University regarding a student transfer.
2. The University of Surrey (the University) refused the request by relying on the exemption in section 40(2) of the FOIA. The Commissioner's decision is that the University was not obliged to confirm or deny if the requested information was held under section 40(5)(b)(i) of FOIA.
3. The Commissioner does not require any steps to be taken.
4. The full request and the University's responses, along with further information relating to the background of this case are provided in a confidential annexe.

Request and response

5. On 26 February 2013, the complainant wrote to the University and requested information about communications relating to a student transfer. The full request is included in the confidential annex.
6. The University responded on 14 March 2013. It stated that the information requested at points 1-3 was exempt from disclosure by virtue of section 40 of the FOIA. With regard to point 4, it stated that it did not hold any information relating to the 'wash up' meeting and changes were made to the student disciplinary process in 2012.

7. In a further email to the complainant, the University confirmed that no 'wash up' meeting had taken place.
8. Following an internal review the University wrote to the complainant on 17 April 2013. It upheld its position with regard to the application of section 40.
9. The Commissioner contacted the University on 19 September 2013 to advise the complaint had been received and asking for further information.
10. On 15 October 2013 the University responded to the Commissioner and advised that it had revised its position in relation to part 2 of the request stating that it did not hold any information relating to the specific sharing of disciplinary material. The University stated that it had also advised the complainant of its position.

Scope of the case

11. The complainant contacted the Commissioner on 27 June 2013 to complain about the way her request for information had been handled.
12. Following the further correspondence with the University the Commissioner contacted the complainant to clarify if she still wished to proceed to a decision notice.
13. On 4 November 2013 the complainant confirmed that she would like to proceed to a decision notice. Therefore, the Commissioner considers the scope of this case to be to determine if the University has correctly applied the exemption at section 40(2) of the FOIA to parts 1 – 3 of the request.

Reasons for decision

14. In its response to the Commissioner, the University explained that it was refusing the request under the exemption in section 40(2) of the FOIA which provides that information is exempt if it constitutes personal data of someone other than the applicant and disclosure would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 (the DPA).
15. However, the Commissioner considers that given the nature of the request it is appropriate to first consider whether the University was obliged to confirm or deny if the requested information was held.

16. 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).'

17. 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.

18. 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.

19. 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.'

20. Personal data is defined at section 1(1) of the DPA as:

"...data which relate to a living individual who can be identified-

a) From those data, or

b) From those data and other information which is in the possession of, or is likely to come into the possession of, the data controller

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual"

21. In summary, the information requested in this case consists of the circumstances surrounding the transfer of an individual from one university to another. The information, if held, would constitute the named individual's personal data because it relates to an identifiable living individual.

22. The Commissioner considers that even confirming or denying whether information is held for the 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.

23. 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).

24. 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?

25. 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...'*
26. 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.
27. 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.
28. 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.
29. The Commissioner does consider that the public has a legitimate interest in knowing whether a University is fairly assessing student applications for transfers and following appropriate procedures for such transfers, as competition for places can be fierce.
30. 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.
31. 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).

32. 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.

Right of appeal

33. 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

34. 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.
35. 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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