

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 September 2014

Public Authority: Aberystwyth University
Address: Old College
King Street
Aberystwyth
Ceredigion
SY23 2AX

Decision (including any steps ordered)

1. The complainant requested various items of information in respect of the disciplinary process of two named employees of Aberystwyth University. The University provided some information, confirmed that it did not hold a small amount of other information but withheld the bulk of the requested information by virtue of section 40(2) of the FOIA. The Commissioner's decision is that the University correctly relied on section 40(2) of the FOIA. However, the University's failure to consider this request under the FOIA has resulted in a breach of section 1(1), section 10 and section 17(1) of the FOIA. The Commissioner does not require the University to take any steps.

Request and response

2. On 15 October 2013, the complainant wrote to Aberystwyth University ('the University') and requested information in respect of the disciplinary process regarding [named employee A] and [named employee B]. Due to length of the request, it has been reproduced in the Annex to this notice.
3. The University responded on 18 October 2013. It stated that it was bound to observe a number of legal obligations including duties under the Data Protection Act 1998 ('the DPA') and consequently was not at liberty to answer his questions regarding the relevant individuals.

4. Following further correspondence from the complainant, the University wrote to him on 19 December 2013. It stated that although he had provided signed waivers from the two named individuals, those individuals could not know precisely what information it would be disclosing therefore the consent was not fully informed, voluntary and explicit. It therefore continued to refuse the information on the basis of the DPA.
5. Following the intervention of the Commissioner, the University accepted that it should have considered the request under the FOIA and sent the complainant a further response under the FOIA. It provided some information in respect of stage one, questions two and three, stage two, questions one and three, and stage seven, questions one and two. Further, it confirmed that it did not hold information in respect of stage one, questions two and three, and stage six, questions two and three of the request. For the remainder of the information, the University refused to disclose the information by virtue of section 40(2) of the FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 11 February 2014 to complain about the way his request for information had been handled.
7. The complainant stated that it viewed the response as less than frank because the information requested was not of a kind that affected the sensitivities of the two individuals but was of a kind that the university staff and their representative should be able to access readily. The complainant further added that despite disagreeing with the University's original response, he sought to meet the expressed objection by supplying the University with waivers signed by the two individuals.
8. However, the University continued to maintain its stance on the basis that the consent of those who signed the waivers could not have been properly informed.
9. The Commissioner has seen a copy of the above waivers and notes that they agree to the disclosure of the information to the UCU (their trade union). As disclosures under the FOIA are generally considered to be disclosures to the world at large, the Commissioner does not accept these waivers as consent to the disclosure of the requested information under the FOIA.
10. The scope of the Commissioner's investigation is therefore to ascertain whether the University was correct to withhold the information by virtue of section 40(2) of the FOIA.

Reasons for decision

Section 40(2) – personal information

11. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure would breach any of the data protection principles.
12. In order to reach a view regarding the application of this exemption, the Commissioner has firstly considered whether the requested information does in fact constitute personal data as defined by section 1(1) of the Data Protection Act 1998 ('the DPA').

Is the requested information personal data?

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

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

- (a) from those data,*
- (b) from those data and other information which is in the possession of, or 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."*

14. When considering whether the information is personal data, the Commissioner has taken into consideration his published guidance: *"Determining what is personal data"*.¹

15. On the basis of this guidance, there are two questions that need to be considered when deciding whether disclosure of information into the public domain would constitute the disclosure of personal data:

- (i) "Can a living individual be identified from the data, or, from the data and other information in the possession of, or likely to come into the possession of, the members of the public?"*

1

http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/what_is_data_for_the_purposes_of_the_dpa.pdf

(ii) Does the data 'relate to' the identifiable living individual, whether in personal or family life, business or profession?"

16. The Commissioner notes that the information withheld under this exemption is the name of the individual who complained about the conduct of the two individuals in question and information in respect of the subsequent investigation. He is therefore satisfied that this information does constitute the personal data of the individuals concerned, and in the case of the two individuals at the centre of the investigation, that it constitutes their sensitive personal data as defined under section 2 of the DPA.
17. The University considers that disclosure of the disputed information would breach the first principle of the DPA.

Would disclosure contravene the first data protection principle?

18. The first data protection principle requires that the processing of personal data be fair and lawful and,
 - a. at least one of the conditions in schedule 2 is met, and
 - b. in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.
19. In the case of personal data, both requirements (fair and lawful processing, and a schedule 2 / 3 condition) must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data principle.

Would disclosure be fair?

20. In his consideration of whether disclosure of the withheld information would be fair, the Commissioner has taken the following factors into account:
 - a. The reasonable expectations of the data subjects.
 - b. Consequences of disclosure.
 - c. The legitimate interests of the public

a. The reasonable expectations of the data subjects

21. The Commissioner's guidance regarding section 40 suggests that when considering what information third parties should expect to have

disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private life.² Although the guidance acknowledges that there are no hard and fast rules it states that:

"Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned."

22. The Commissioner's guidance therefore makes it clear that where the information relates to the individual's private life (i.e. their home, family, social life or finances) it will deserve more protection than information about them acting in an official or work capacity (i.e. their public life). However, not all information relating to an individuals' professional or public role is automatically suitable for disclosure.
23. In this case, as referred to in paragraph 16 of this notice, the Commissioner notes that the information withheld under this exemption is a) the name of the individual who complained about the two University employees subject to this investigation and b) details of the subsequent investigation.
24. The Commissioner considers that the whistle blower would reasonably expect that his or her identity would remain confidential. He also considers that as the nature of the information regarding the subsequent investigation falls within the category of sensitive personal data, it is likely to hold a much greater expectation of confidentiality than non-sensitive personal data.
25. The Commissioner is also mindful that information regarding disciplinary proceedings would not normally be disclosed into the public domain. He is satisfied that the data subjects would reasonably expect that information regarding an investigation into their conduct would remain confidential. He is also satisfied that the individual who made the complaint would reasonably expect that his/her details would remain confidential as well.

²http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Detailed_speci alist_guides/PERSONAL_INFORMATION.ashx

b. Consequences of disclosure

26. The Commissioner's guidance regarding the disclosure of information about employees states that:

"Disclosure is unlikely to be fair if it would have unjustified adverse effects on the employees concerned. Although employees may regard the disclosure of personal information about them as an intrusion into their privacy, this may often not be a persuasive factor on its own, particularly if the information relates to their public role rather than their private life."

27. The Commissioner acknowledges that the information includes the name of the individual who made the complaint and provides details of an investigation into the conduct of the two named employees. The consequences of disclosure of this type of information into the public domain is therefore likely to cause greater distress to the data subjects than the disclosure of less sensitive information.
28. The Commissioner is also mindful of the potential personal social embarrassment caused to these individuals by disclosure of this information.
29. The Commissioner acknowledges that the individuals have already been subjected to University's disciplinary process. Additional distress as a result of a wider disclosure of the information does not therefore appear to the Commissioner as either proportionate or justified.
30. The Commissioner also considers that the disclosure of the name of the individual who made the complaint is likely to cause that individual distress.

c. The legitimate interest in disclosure

31. Notwithstanding the data subjects' reasonable expectations, or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.
32. The Commissioner notes that it is the two named individuals' trade union representative who has requested this information. He notes that whilst the union may have rights under separate legislation to view this information outside of the FOIA, he can only consider here whether it is appropriate for disclosure under the FOIA. Other than the general public interest that the University's disciplinary procedures have been followed, the Commissioner cannot see what legitimate interest would be served in the disclosure of this information into the public domain.

33. In weighing up the balance between the reasonable expectations of the data subject responsible for submitting the complaint and the consequences of disclosure, against the legitimate interest in disclosure, the Commissioner is satisfied that the balance is weighted in favour of non-disclosure.
34. The Commissioner has also considered the balance between the reasonable expectations of the two named employees and the consequences of disclosure of their sensitive personal information relating to the investigation, against the legitimate interest in disclosure and has concluded that the balance is weighted significantly in favour of non-disclosure, due to the level of its sensitivity.
35. Consequently, the Commissioner is satisfied that the University appropriately withheld the disputed information on the basis of section 40(2) of the FOIA.

Section 1(1) – General right of access to information held by public authorities

36. Section 1 (1) of the FOIA concerns the general right of access to information held by public authorities and states that any person making a request for information to a public authority is entitled to be informed in writing whether the public authority holds information of the description specified, and if that is the case, to have that information communicated to him.

Section 10 - Time for compliance with request

37. Section 10 of the FOIA deals with the time for compliance with a request and states that a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

Section 17 - Refusal of the request

38. Section 17 of the FOIA concerns the refusal of the request and section 17(1) states that a public authority relying on any of the exemptions in part II of the FOIA, must, within the time for compliance issue a refusal notice which states that fact, specifies the exemption and states, (if it would not otherwise be apparent) why the exemption applies.
39. The University's failure to treat this as an FOIA request from the outset represents a breach of sections 1, 10 and 17 of the FOIA.

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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.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

Anne Jones
Assistant Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex

Full request

I am preparing a report for union members locally, and for the national UCU, on the University's dismissal procedure, and in particular how it was applied to the cases of the [specified job title A], [named employee A], and its [specified job title B], [named employee B].

The purpose of what follows is to provide you with an opportunity to correct any errors you perceive in my understanding of the procedure and to provide factual answers to the various key questions that have arisen concerning its application to the cases in point.

I propose to set out the various stages of the statutory procedure, confining myself on this occasion to the process in so far as it culminates in the appointment of a Tribunal. At each stage I shall ask you, the officer responsible for implementing the procedure, to clarify the manner in which you applied it to the cases of [named employee A] and [named employee B]. My aim, as you will see, is to establish a clear chronology and factual record

Stage1. The complaint and 'good cause'

There are two circumstances in which dismissal proceedings may be initiated against a member of the academic staff. One is where there has been 'no satisfactory improvement' following the issuing of a written warning, the other is where a complaint is lodged alleging that the 'conduct or performance' of a member of the academic staff [statute 9 (3) (1) (b)] may constitute good cause for dismissal' and 'seeking the institution of charges to be heard by a Tribunal'. [statute 9 (14) (1)]

The first stage of the procedure, then, is for the Registrar and Secretary to receive a complaint, which he or she then brings to your attention as Vice-Chancellor.

The complaint defined in the statute is one specifically alleging 'good cause for dismissal'. This is because, other than redundancy, the only ground on which an academic may lawfully be dismissed is for 'good cause', which is to say:

- (a) conviction for an offence which may be deemed...to be such as to render the person convicted unfit for the execution of the duties of the office or employment as a member of the Academic Staff; or
- (b) conduct of an immoral, scandalous or disgraceful nature incompatible with the duties of the office or employment; or

(c) conduct constituting failure or persistent refusal or neglect or inability to perform the duties or comply with the conditions of office; or

(d) physical or mental incapacity. [statute 9 (5) (1)]

Questions

1. Who brought the complaint against [named employee A] and [named employee B] alleging good cause for dismissal?
2. When was this complaint received by the Registrar and Secretary?
3. When did the Registrar and Secretary bring this complaint to your attention?
4. Which of the 'good cause' grounds was cited in the complaint?

Stage 2. The investigation

Having received from the Registrar and Secretary a copy of the complaint alleging good cause for dismissal, it was for you as Vice-Chancellor to decide whether an investigation would enable you 'to deal fairly' with the complaint. This stage was not a compulsory part of the procedure; it was left to you as Vice-Chancellor to decide whether it 'appear[ed] to be necessary'. [statute 9 (14) (2)]

Questions

1. When was the investigating officer appointed?
2. Which of the 'good cause' grounds for dismissal was specified in the investigation's remit?
3. When did the investigating officer submit his or her report to you?

Stage 3. Disposing of the complaint

Having received the report of the investigation (if there was one), you as Vice-Chancellor were called upon to decide whether to dispose of the complaint there and then or to proceed further with the dismissal process. The grounds on which you might have disposed of it are that

- (a) it related to conduct or performance which does not meet acceptable standards but for which no written warning has been given; or
- (b) it related to a particular alleged infringement of rules, Regulations or by-laws for which a standard penalty is normally imposed; or

(c) it was trivial or invalid.

Should any of these grounds apply to the complaint, you were entitled to 'dismiss it summarily, or decide not to proceed further'. [statute 9 (14) (3)]

Question

1. Neither [named employee A] nor [named employee B] had ever been given a written warning. What, then, were your reasons for deciding that the complaint should not be disposed of at that stage, since it appeared to fall under the heading of 'conduct or performance which does not meet acceptable standards but for which no written warning has been given'.

Stage 4. Proceeding further, and suspension

This stage of the procedure occurs only if you as Vice-Chancellor decided not to dispose of a complaint in the manner described above. If, in your judgement, none of the relevant grounds applied, you were required to 'treat the complaint as disclosing a sufficient reason for proceeding further'. In the event that you decided to proceed further, this is also the stage at which you were permitted if you saw fit to 'suspend the member on full pay pending a final decision'. [statute 9 (14) (4)]

Questions

1. What is the date on which you communicated to [named employee A] and [named employee B] your decision to suspend them?
2. What were your reasons for deciding that it would be appropriate ('fit') to suspend them in the circumstances?

Stage 5. Inviting comments

After you had decided not to dispose of the complaint at the previous stage but instead to 'proceed further', you were required to write to the academics concerned inviting comments. [statute 9 (14) (5)]

Although the relevant statute does not specify the topic of the solicited comments, it is evident that they must be on the complaint which initiated the proceedings and the report of whatever investigation (if any) took place. If you received no such comments within 28 days of inviting them, you were required to proceed 'as if the member concerned had denied the substance and validity of the alleged case in its entirety'. [statute 9 (14) (7)]

Questions

1. When did you invite [named employee A] and [named employee B] to submit their comments?
2. If they submitted comments, when did you receive these?

Stage 6. Deciding whether to institute Tribunal proceedings

The sixth stage of the procedure was for you to decide, in the light of the report of the investigation and any comments on it you received from the members of staff concerned, whether to

- (a) dismiss the complaint; or
- (b) refer it to the procedure for issuing oral and written warnings; or
- (c) deal with it informally, if the member in question gives written agreement; or
- (d) direct the Registrar and Secretary to prefer a charge or charges to be considered by a Tribunal. [[statute 9 (14) (6)]

Questions

1. What were your reasons for rejecting the statutory alternatives to (d)?
2. When did you direct the Registrar and Secretary to prefer charges?
3. Under which of the 'good cause' categories did you ask him or her to prefer the charges?

Stage 7. Appointing the Tribunal

The final stage in the process leading to the appointment of a Tribunal occurred when, having directed the Registrar and Secretary to prefer charges, you asked the Council to appoint a Tribunal to consider these charges. The Tribunal was comprised of three persons, one of whom was a member of the academic staff nominated by Senate. [statute 9 (15) (1) & statute 9 (16)]

Questions

1. What is the date of the meeting of Council which accepted your proposal to appoint a Tribunal and approved its composition?
2. What is the date of the meeting of Senate which nominated a member of the academic staff for the Tribunal?

Reference: FS50530740

I should be grateful if you would provide straightforward factual answers to these questions. It is reasonable to expect a reply within ten days