

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 September 2014

Public Authority: University of Sussex

Address: Sussex House
Falmer
Brighton
BN1 9RH

Decision (including any steps ordered)

1. The complainant has requested the university to disclose the evidence packs provided to three students subject to disciplinary proceedings. The university refused to disclose this information stating that it was exempt from disclosure under sections 36, 40 and 41 of the FOIA.
2. The Commissioner first considered the application of section 40 of the FOIA. It is the Commissioner decision that the evidence packs in their entirety is exempt from disclosure under section 40 of the FOIA. As he is satisfied that section 40 applies to the requested information in its entirety, there is no need for him to consider sections 36 or 41 of the FOIA in this case and the university is not required to take any further action.

Request and response

3. On 18 January 2014, the complainant wrote to the university and requested information in the following terms:

"Requested information: part one

Please send me an electronic copy of all evidence, exhibits, witness statements, photographs, labels and other contents of the bundles with which you provided [names redacted] and [names redacted] to be used in the 17 January hearing. I would expect you to include in this practical and procedural notes, eg. the planned schedule and allocation of rooms for 17 January.

Requested information: part two

Please provide me with an electronic copy of everything you hold as part of the proceedings of the 17 January hearing which pertains either to the question of (1) whether or not the hearings should have been held in public, or (2) whether or not [name redacted] was a suitable person to chair the Panel. By 'everything you hold', I would expect this to include, but not to be limited to:

- Submissions from lawyers
- Statements from the students being disciplined
- Correspondence between panel members and/or parties
- Any written record of proceedings on either of these subjects on 17 January; if notes were taken by hand and are not yet 'typed up', you may at your discretion provide me with a copy of the handwritten notes or, if available within the 20-working-day timeframe, the typed notes
- Any audio recording that was made of proceedings on 17 January
- Any written rulings or decisions from the panel
- Any notes that members of the panel took
- Evidence submitted in support of or opposition to either topic, eg. I am aware that a BBC interview formed part of the evidence against [named redacted] suitability
- Corroborating material, eg. I am aware that a letter signed by over 40 Sussex academics was provided to cast doubt over [name redacted] suitability

By 'hold as part of the proceedings' I intend to limit my request to information which formed a part or record of the panel's proceedings and deliberations, and therefore to exclude eg. information relating to media enquiries after the decision to disband the panel."

4. The complainant clarified later the same day that:
5. "Further to my email of 2:33pm, I should also have specified that in part one of my request, I would also include interim orders such as the interim order forbidding the five suspended students from having any contact with each other."

6. The university responded on 14 February 2014. In relation to part one of the request the university disclosed a limited amount of information but withheld the majority under sections 40 and 41 of the FOIA. In respect of part two of the request the university withheld all recorded information held under the same exemptions as those cited for part one.
7. The complainant requested an internal review on 14 February 2014. He stated that he disagreed with the application of sections 40 and 41 of the FOIA to the withheld information relevant to part one of his request. In relation to part two of the request, the complainant confirmed that he was withdrawing this element of his request and did not require the university to consider it any further.
8. The university carried out an internal review in respect of part one of the request and informed the complainant on 12 March 2014 that it remained of the opinion that the remaining withheld information was exempt from disclosure under section 40 of the FOIA. It also stated that it wished to rely on section 36 of the FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 13 March 2014 to complain about the way his request for information had been handled. Specifically, the complainant disagreed that the information could not be disclosed and with the application of the exemptions cited.
10. As the complainant withdrew part two of his request at the internal review stage, the Commissioner has only consider part one of the request and the applications of the exemptions cited.
11. The Commissioner will first consider whether the remaining withheld information is exempt from disclosure under section 40 of the FOIA. The Commissioner will only go on to consider section 36 of the FOIA if he finds that section 40 does not apply to some or all of the remaining withheld information.
12. The university has confirmed that the withheld information consists of the evidence packs forwarded to each of the three students concerned prior to the hearing in January 2014. The evidence packs contain the evidence against each student - the summons letters that were issued and accompanying report, witness statements, CCTV evidence, notes that were left at the building that was occupied, evidence of financial loss suffered as a result of the actions taken and a security log.

Reasons for decision

13. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and disclosure of that data would be in breach of any of the data protection principles outlined in the Data Protection Act (DPA).
14. Personal data is defined 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 that individual and any indication of the intentions of the data controller or any other person in respect of the individual...”
15. The Commissioner considers the first data protection principle is most relevant in this case. The first data protection principle states -
- “Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless -
- (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 also met.”
16. The Commissioner must first consider whether the requested information is personal data. If he is satisfied that it is, he then needs to consider whether disclosure of this information would be unfair and/or unlawful. If he finds that disclosure would be unfair and/or unlawful the information should not be disclosed and the consideration of section 40 of the FOIA ends here. However, if he decides that disclosure would be fair and lawful on the data subjects (the students involved and witnesses that gave evidence) concerned, the Commissioner then needs to go on to consider whether any of the conditions listed in schedule 2 and 3 (sensitive personal data) if appropriate are also met.

Is the requested information personal data?

17. The Commissioner has reviewed the withheld information in relation to each of three students concerned. He notes that the contents refer to the students by name, discuss specific actions they are believed to have taken, their whereabouts at particular times and the reasons why they

are subject to disciplinary proceedings. He is therefore satisfied that the evidence packs in their entirety constitute the personal data of the three students concerned. The packs contain information from which the students can be identified either by name or from a description of events and other information that may otherwise be available to the public.

18. The Commissioner also considers that the withheld information contains the personal data of a number of third parties. The evidence packs contain a number of witness statements that were used as evidence against the students concerned. The Commissioner is satisfied that the witnesses concerned could be identified from the statements they provided either by name or from the contents of the statement itself and other information that may otherwise be available to the public.
19. As the Commissioner is satisfied that the withheld information in its entirety constitutes the personal data of the students concerned and the witnesses who provided statements to the university, he now needs to consider whether disclosure of this information would be unfair and/or unlawful.

Would disclosure be unfair and/or unlawful?

20. The Commissioner will first consider the students concerned and whether disclosure of their personal data would be unfair and/or unlawful.
21. The complainant has made detailed submissions explaining why he believes disclosure would be fair and lawful. He states that the three students have publicly identified themselves and provided various quotes and interviews to the Guardian, Independent, local newspapers and a blog the complainant runs to try and raise public awareness and interest in this case. The complainant also states that the three students have also tried to gain the permission of the university to make the evidence packs public. In addition to this, the complainant said that the students also instructed solicitors, junior barristers and two QC's to argue for the disciplinary hearing to be a public hearing thereby waiving their rights to confidentiality and privacy.
22. The complainant has also referred the Commissioner to the First-tier Tribunal case of *Ian Cobain v Information Commissioner and the Crown Prosecution Service* (EA/2011/0112 & EA/2011/0113) and his opinion that the tribunal's approach in *Cobain* should be adopted here. The complainant stated that similar to *Cobain* the three students had a clear preference for publicity, as they tried many times to secure a public hearing and public disclosure themselves. He argued that the students have therefore given consent to disclosure. He also advised that he is a

journalist and he intends to publicise any information he obtains as a result of this request. He considered the *Cobain* decision highlighted that requests made for the purposes of journalism have a legitimate purpose thereby making it more likely that the disclosure of personal data is lawful.

23. The complainant also confirmed that he considers there is a public interest in the disclosure of this information, as disclosure would demonstrate whether or not the university has acted fairly and appropriately in these circumstances in terms of its actions against the students concerned and the expenditure of public funds. He advised that disclosure would also demonstrate whether or not the university's leadership has a healthy attitude to freedom of expression within an academic community.
24. With regards to the personal data of the witnesses involved, the complainant believes the statements they provided could be sufficiently redacted to allow disclosure.
25. The university also made detailed submissions explaining why it considers the disclosure of this information would breach the first data protection principle outlined in the DPA.
26. In relation to the students subject to disciplinary action, the university stated that it has reviewed the First-tier Tribunal case of *Rob Waugh v Information Commissioner and Doncaster College (EA/2008/0038)* and notes the tribunal's view was that:

“there is a recognised expectation that the internal disciplinary matters of an individual will be private”.
27. The university confirmed that it has also reviewed the Commissioner's own guidance and previous decisions in relation to similar requests and notes that it is generally the Commissioner's view that disclosure of information which is private and part of a properly conducted disciplinary and performance management process would not be fair to the individuals concerned.
28. It confirmed that while it may appreciate that the students concerned may not object to disclosure of this information and may consent to the same if they were approached, the university is not obliged to the simply comply with the students' wishes. It can opt to refuse to disclose the information if it still remains of the opinion that disclosure would be unfair on those concerned or if it does not consider that valid and informed consent has been obtained.
29. In this particular case, the university is concerned that it would not be possible to obtain a fully informed and valid consent from each of the

three students concerned. It stated that disclosure under the FOIA is to the world at large and the end result is that the information is in the public domain for anyone to see and for an uncontrolled length of time.

30. The university stated that it is concerned for the welfare of its students and it is conscious that while students may feel that they wish this information to be made public, once it is released there is no longer any control over the way in which the detailed information is used. It may be picked up by media agencies or by potential employers and used in a way that is negative for the individuals concerned.
31. The university considers disclosure would constitute an unwarranted intrusion into the privacy of all the individuals involved and would possibly set a precedent for future cases. The university described the circumstances in which this personal data was obtained and stressed that it was obtained in a confidential manner to be used during a non-public and confidential disciplinary process. The university explained its standard practice with such hearings, the fact that generally individuals have the expectation of privacy due to the sensitivity of issues being explored and the fact that such matters remain private and confidential during and after the event.
32. The university confirmed that it is of the view that it is unable to take responsibility as a data controller for the release of this information to the public at large in terms of compliance with the DPA. It stated that the university considers that the students themselves are free to make representations should they wish to disclose information. However, it is not appropriate for the university itself to take responsibility as a data controller for such release.
33. The university stated that it has considered the complainant's suggestion of redaction. However, it stated that it does not consider this is possible in this particular case. It explained that due to the particular circumstances of this case it felt it would still be possible for individuals to be identified from any redacted information it could potentially release.
34. As a result the university is satisfied that disclosure in this case would be unfair and unlawful, in breach of the first data protection principle and therefore that section 40 of the FOIA applies.
35. Turning now to the personal data of other third parties, the university explained that it obtained a number of witness statements from other individuals within the university as part of its internal investigations. It stated that it regards the information contained in these witness statements as the detailed and personal account of each witness. Disclosure of this information would enable other members of the public

familiar with this case to understand the private representations of the witnesses involved in relation to this contentious matter. It confirmed that it considers such implications would have a negative impact upon the personal relationships and public perception of the witnesses involved.

36. It considers the disclosure of this information would be unfair on the witnesses concerned. The university explained that the statements were obtained as a part of a private disciplinary panel which was held in closed session as per the university's regulations. The witnesses themselves would have no expectation that the evidence they supplied could be released into the public domain. On the contrary, their expectations would be that the information they supplied would remain private and confidential and would not be published outside the closed proceedings.
37. It stated again that it has considered the complainant's suggestion of redaction. However, it is of the view that this would not be possible in this particular case. It stated that the circumstances of the matter are such that the witnesses concerned could be identified from even very limited information if this was disclosed. The university accepts that the identities of some witnesses may already be in the public domain. However, the university stated that this is only to the extent that it is public knowledge that the individuals were involved with the hearing – not the detailed content of their personal representations or a particular individual's connection with a particular piece of evidence or representation.
38. For the above reasons, the university has again decided that disclosure would be unfair and unlawful, in breach of the first data protection principle and therefore that section 40 of the FOIA is engaged.
39. The Commissioner has given the matter detailed consideration. It is the Commissioner's view that the withheld information in its entirety is exempt from disclosure under section 40 of the FOIA in this case and he will now explain why.
40. Dealing with the personal data of the students concerned first, it is generally the Commissioner's opinion that such disciplinary matters do take place in closed session and remain private and confidential. In similar cases he has considered, the Commissioner has generally ruled that the data subjects themselves have the expectation that their personal data relating to disciplinary matters will remain private and confidential and will not be more widely published. In the majority of cases, the data subjects themselves would object to disclosure due to the private and sensitive nature of such issues and the implications that

wider public disclosure could have on their private lives and careers going forward.

41. It is however noted in this case that the complainant has argued that the students concerned wish for the matter to be made public and the evidence packs to be disclosed to the world at large. The complainant has stated that the students have made various press statements, commented on the case itself on Facebook and instructed legal representation to argue for the hearing itself to take place in public.
42. While the complainant may be of this view, this is the only view the Commissioner holds. He does not have the representations of the students involved, their fully informed and valid consent and nor does he consider this would be sufficient in this particular case to warrant disclosure. He accepts that the students may have made press statements and put comments on Facebook about the matter in question. However, it is the Commissioner's view that in these circumstances the students have selected what information they wished to be made public and this cannot be argued to be the same as full disclosure of all and any evidence the university holds against them.
43. The Commissioner agrees that in this particular case and at this particular point there is no need or indeed requirement for the university to obtain the consents of the students concerned or indeed act upon it if it were decided to try and obtain it and it was received. He agrees with the university that as a data controller it has a responsibility for the data it holds, how this is held and processed and in this case it would be reasonable for the university to have doubts as to whether any consent it has obtained is fully and adequately informed.
44. Although the students concerned are of university age and could therefore be regarded as young adults, the Commissioner agrees that it is reasonable to conclude that there would be doubts as to whether the students fully understand and appreciate the implications that disclosure under the FOIA could have. It may well be that the students wished to publicise the case at the time of the request, as the disciplinary hearing had only just taken place. It is also reasonable to say that they may still wish for information to be published now. However, disclosure under the FOIA is to the world at large; it is basically saying that the information can be released into the public domain. There are no time constraints on how long this information remains in the public domain and there is little the university can do once it is released into the domain to control its usage and how it is processed. It is possible that disclosure could have lasting and potentially negative impacts on the students concerned. For example it could be used by other institutions and future employers to the students' detriment. And it is for these reasons and the general expectations of other data subjects involved in disciplinary matters that

the Commissioner has decided that disclosure would be unfair and unlawful and in breach of the first data protection principle outlined in the DPA.

45. The Commissioner notes that the complainant believes a similar approach should be taken here to the First-tier Tribunal case of *Cobain*. The Commissioner has reviewed this hearing and the circumstances of this case and he does not agree. While the data subject openly and without doubt consented to the public disclosure of the requested information in the case of *Cobain* and could be said to have been fully aware and informed of the consequences of such actions, the university and the Commissioner agree that this cannot be sufficiently argued in this case. As stated above, it is the Commissioner's view that there is no requirement for the university to obtain the consent of the students involved. But if it did, it is the university and Commissioner's view that there would be sufficient doubt as to whether consent was fully informed and therefore valid.
46. Turning now to the witnesses who provided statements to the university during its investigations, the Commissioner again considers disclosure would be unfair and unlawful. The Commissioner notes the university's disciplinary procedures and the fact that these take place in closed session and remain a private and confidential matter. He also notes that such processes rely on witnesses coming forward and being willing to cooperate with such investigations so disciplinary issues can be addressed fairly and appropriately. Given the nature of how such processes are undertaken and the sensitive issues that often arise, the Commissioner accepts that those that provide statements and evidence to the university do so on the understanding and with the expectation that they are doing so on a confidential and private basis. Any witnesses involved would have no expectation that their involvement and their evidence would be more widely published.
47. Given the expectation that the witnesses concerned hold, the Commissioner agrees that disclosure of their statements and the information they supplied on a confidential basis would be unfair and an unwarranted intrusion into their private lives. The Commissioner notes that it may be the case that the identity of some or all witnesses is already public knowledge. However, he agrees with the university that this is not the same as the full disclosure of their evidence and their recollections of the issues being discussed. It is the disclosure of these detailed representations and a particular witnesses connection with such representations that would be unfair and unlawful in this case.
48. The Commissioner has therefore again agreed that the disclosure of the personal data of the witnesses concerned would be unfair and unlawful,

in breach of the first data protection principle and is therefore exempt from disclosure under section 40 of the FOIA.

49. The Commissioner has considered the possibility of redaction for both the students' personal data and the witnesses' personal data. He is of the view that due to the publicity of this case and the demonstrations that have taken at the university to date that redaction would not be possible. He has reviewed the withheld information and he considers that the personal data of the students involved is so closely linked that this task would be extremely difficult to achieve and it would be possible from the majority of the information contained within the evidence packs for a member of the public with an interest in this case and the university recently to potentially identify data subjects they believe to the topic of certain elements of it.

Right of appeal

50. 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

51. 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.
52. 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

Rachael Cragg
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF