

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 December 2015

Public Authority: King's College London
Address: Strand
London
WC2R 2LS

Decision (including any steps ordered)

1. The complainant has requested information from King's College London ("the University") broadly concerning the University's practice in respect of meeting actuarial strain and redundancies within the Health Schools at the University.
2. The Commissioner's decision is that the University has correctly applied section 12 of the FOIA to requests 1, 8 and 9. He has also determined that the University was correct to apply section 40 of the FOIA to requests 12, 13 and 14. However, the Commissioner has decided that the University was incorrect to apply section 12 to request 11(c).
3. With respect to request 11(c), the University argued that if section 12 did not apply, it was seeking to rely upon section 40(2). The Commissioner has considered whether the information sought in request 11(c) can be withheld under section 40. He has determined that individuals cannot be identified from the information in question and therefore section 40(2) is not engaged.
4. The Commissioner requires the University to take the following steps to ensure compliance with the legislation.
 - disclose the information sought in request 11(c).
5. The University 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

6. On 17 February 2015, an information request was made to the University. A copy of this can be found in Annex A.
7. The University responded on 17 March 2015. The University disclosed the information falling within the scope of requests 2, 3, 4, 5, 7, 10, 11(a), 11(b) and 15. It also partially responded to request 1. However, it applied section 12 to the remainder of request 1, request 8, 9 and 11(c) and section 40(2) to requests 11(c), 12, 13 and 14.
8. An internal review was requested on 25 March 2015. In relation to request 1, the request was refined in an attempt to allow the University to comply with it within the appropriate cost limit. A copy of this request can be found in Annex B. The complainant also disagreed with the application of section 40(2) to requests 12, 13 and 14.
9. The University sent the outcome of its internal review on 24 April 2015. It considered that to comply with the refined version of request 1 would still exceed the appropriate cost limit. It further upheld its previous decision in relation to requests 11(c), 12, 13 and 14.

Scope of the case

10. The complainant contacted the Commissioner on 21 May 2015 to complain about the way his request for information had been handled.
11. Specifically he disagreed with the University's application of section 12 to requests 1, 8, 9 and 11(c), and section 40(2) to requests 11(c), 12, 13 and 14.
12. The Commissioner has had to consider whether the University was correct to apply section 12 to the revised version of request 1 and requests 8, 9 and 11(c). He has also had to consider whether the University was correct to apply section 40(2) to requests 12, 13 and 14.
13. With reference to request 11(c), the Commissioner will first consider whether the University was correct to apply section 12 to this request. If he determines that section 12 does not apply, he will then consider whether the information sought in request 11(c) is exempt under section 40(2).
14. Please note that the revised version of request 1 detailed in Annex B will be referred to in the subsequent paragraphs as request 1.

Reasons for decision

Section 12(1) –Request 1, 8, 9 and 11(c)

15. Section 12(1) allows a public authority to refuse to comply with a request for information if the authority estimates that the cost of compliance would exceed the 'appropriate limit', as defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Regulations.)
16. This limit is set in the fees regulations at £600 for central government departments and £450 for all other public authorities. The fees regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 18 hours in this case.
17. In estimating whether complying with a request would exceed the appropriate limit, regulation 4(3) states that an authority can only take into account the costs it reasonably expects to incur in:
 - a. determining whether it holds the information;
 - b. locating a document containing the information;
 - c. retrieving a document containing the information; and
 - d. extracting the information from a document containing it.
18. The four activities are sequential, covering the retrieval process of the information by the public authority.

Request 1

19. The University provided some context to request 1. It advised the Commissioner that for redundancies before 1 October 2014, the University was required to pay actuarial strain for employees aged 50 or over. For redundancies which occurred on or after 1 October 2014, the University was no longer obliged to pay actuarial strain for employees aged 50 or over. The University confirmed that there has never been a requirement for actuarial strain to be paid for anyone under 50.
20. The University explained that it does not hold a central record of instances where actuarial strain has been met. In order to comply with the request, the University explained that members of staff that work in the HR department would have to search through electronic and manual personnel files using their tacit knowledge to locate, retrieve and extract information falling within the scope of request 1. This would then have

to be cross referenced with the payroll department, who operate on another system in order to determine if actuarial strain has been paid, and where relevant the amount paid. The University confirmed that there is no central cost code for identifying where actuarial strain has been paid, and it is not able to identify individuals through this method.

21. To support its position that section 12 applied to request 1, the University provided the Commissioner with an estimate of time it would take to locate, retrieve and extract the information in one individual circumstance. The University explained that in order to provide a reasonable estimate, it contacted the relevant departments and conducted a retrieval exercise. It confirmed that its estimate is that it would take 30 minutes to locate, retrieve and extract the information from a relevant file. It would then take a further 10 minutes to determine if and how much actuarial strain had been met by the University.
22. The University explained that as part of a recent restructure within the Health Schools, the jobs of 57 individuals were at risk. The University confirmed that since October 2014, 1021 staff have left employment at the University, and any number of these may have been dismissed or made redundant and actuarial strain been paid. The University therefore argued that it would not be unreasonable to assume that a proportion of all leavers' files within this period may have to be searched and checked in order to comply with this request.
23. On the basis that a minimum of 57 files would need to be located, retrieved and information extracted from them, which would take over 38 hours. The University maintained its position that it was correct to apply section 12(1) to request 1.
24. The Commissioner considers it would be reasonable to assume that tacit knowledge may not be sufficient enough to identify all dismissals where actuarial strain was paid. The Commissioner considers that it is more reasonable to consider that the University would have to search through 1021 staff files to determine whether actuarial strain was paid.
25. The Commissioner considers that the University's estimate that it would take 30 minutes to locate, retrieve and extract the information may be excessive. However, the Commissioner considers that even if it took the University two minutes to locate, retrieve and extract the information falling within the scope of request 1, it would still exceed the appropriate limit of compliance. The Commissioner is therefore satisfied that section 12 applies to request 1.

Request 8 and 9

26. The University explained that it does not hold a central record of individuals placed at risk of redundancy. This means that in order to locate the information sought in these requests, 11 HR advisors (including two individuals that have since changed roles) would need to search through both electronic and manual files, some of which would need to be retrieved from the University's Record Management service.
27. The University confirmed that as there is no centralised database or index across the organisation, staff would be required to rely on their individual tacit knowledge, or tacit knowledge held collectively by the team. As the information that has been requested is for January 2012 onwards, it is not unreasonable to assume that due to staff turnover, HR advisors may not have sufficient tacit knowledge to identify the appropriate files and may need to conduct a wider search.
28. As the University does not hold a central system, its calculations have been estimated on the basis of determining, locating, retrieving and extracting the information in one individual instance. The University explained that it would take 30 minutes to locate, retrieve and extract the information from a relevant file where an individual had sufficient tacit knowledge. The University considered that this estimate would increase to an hour where there was little or no tacit knowledge for the individual to rely upon. It also considered that if manual files had to be retrieved from its Records Management service, it would take an additional 25 minutes per file to identify, retrieve and transfer the file to staff in HR. The University confirmed that it was standard practice that leaver's files would be held by HR for 15 months and then transferred to storage for the remainder of their retention period.
29. The University explained that since January 2012, 5708 members of staff have left the University, although not all of these were through redundancy. As the University was aware that at least 57 posts were at risk of redundancy within the Health Schools, it made a conservative estimate that 3% of the 5708 members of the staff could have been made redundant.
30. Based on this estimate, the University explained:

"We would be required to search 171 files. In the instance where only electronic files had to be searched, and the individual in question had sufficient tacit knowledge to easily identify the employees who had been made redundant, this would take 85.5 hours to complete."
31. The Commissioner contacted the University regarding this estimate as he was unsure where the 3% estimate had derived from. The University

explained that the estimate was very conservative and it would be more reasonable to assume that all of the 5708 employee files would have to be searched to determine which employees at the University have been placed as at risk of redundancy.

32. The Commissioner considers that it is reasonable to assume that the University would not have sufficient tacit knowledge to know the exact number of individuals out of 5708 members of staff that were either at risk of redundancy or had been dismissed (or whom a notice to dismiss had been served) by reason of redundancy since January 2012. The Commissioner considers that even if it took the University one minute to review each of the 5708 files, it would take over 95 hours. Even if the University removed the 57 members of staff that it was aware were at risk of redundancy within the Health Schools, it would still take the University over 94 hours to locate, retrieve and extract the remaining files. This is in excess of the appropriate cost limit and the Commissioner is therefore satisfied that the University was correct to apply section 12 to requests 8 and 9.

Request 11(c)

33. The Commissioner returned to the University a number of times regarding its position in relation to request 11(c). The reason for returning to the University was that the Commissioner was not satisfied with the University's submissions regarding its application of section 12.
34. Originally it appeared that the University had misinterpreted the request and considered that the complainant was seeking the age and gender of the members of staff within the health schools that were at risk of redundancy. After clarifying the scope of the request with the complainant, he confirmed that he was seeking the following information:

"...request 11(c) refers to all members of staff in the Health Schools from which the 57 employees were selected as being at risk".

35. The University explained that in order to identify all the members of staff in the Health Schools from which the 57 employees were selected as being at risk from, it would need to interrogate the communications sent to members of staff to confirm that they were not at risk of redundancy as part of the Health Schools restructure.
36. The University explained that at the time of the request, it did not have a centralised database where this information could be located. It would therefore be necessary to carry out searches on email accounts to determine which employees received an email stating that their job was not at risk.

37. The University explained that these emails were not sent out via a central email account and therefore a number of email accounts would need to be searched. The University also confirmed that the emails were sent over a period of a few weeks and it would therefore be required to search across a '*significant date range*'. It further considered that it would take 10 minutes to correctly identify an individual and a further 10 minutes to cross reference this with its HR system to determine the individuals age and gender.
38. The University explained that there were over 770 members of staff in the Health Schools and 57 of these were at risk of redundancy. Therefore approximately 713 members of staff were classed as not at risk and the University would therefore need to determine who the 713 members of staff are, and the age and gender of these individuals.
39. The University therefore argued that it would take over the appropriate limit to comply with request 11(c).
40. Despite returning to the University for further arguments, the Commissioner is not convinced that compliance with request 11(c) would exceed the appropriate limit.
41. The Commissioner considers that the University's estimate in this instance is not realistic. He does not consider that it would take 10 minutes to carry out a search on an email account for one email sent to an individual and then a further 10 minutes to cross reference the name of the individual on its HR system to determine their age and gender.
42. In light of this, the Commissioner has determined that section 12 does not apply to request 11(c). As the University explained that if section 12 does not apply, it will seek to rely upon section 40, the Commissioner will now go on to consider whether section 40 applies to request 11(c).

Section 40(2) – requests 11(c), 12, 13 and 14

43. Section 40 of FOIA specifies that the personal information of a third party must not be disclosed if to do so would contravene any of the data protection principles.
44. Taking into account his dual role as regulator of both the FOIA and the Data Protection Act 1998 (the "DPA") the Commissioner has considered whether the University was correct to withhold the information sought in requests 11(c), 12, 13 and 14 under section 40.

Is the withheld information personal data?

45. Personal data is defined by section 1 of the Data Protection Act 1998 ("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 data controller or any person in respect of the individual..."

46. In order for the exemption to apply the information being requested must constitute personal data as defined by section 1 of the DPA.
47. With reference to the information sought in request 11(c), the Commissioner accepts that the age and gender of an individual is their personal data if the individual can be identified from this information. However, request 11(c) relates solely to the age and gender of approximately 713 individuals. Given the large number of individuals the Commissioner considers that disclosing the age and gender of 713 individuals would not lead to their identification. As such he does not consider that this information is personal data, and as such section 40 does not apply to request 11(c). He requires the University to carry out the steps outlined in paragraph 4 and 5.
48. The information sought in parts (a) and (b) of requests 12, 13 and 14 seeks the age and gender of employees in the University's Health School who were at risk of redundancy. In part (c) of requests 12 and 13, the complainant seeks the reasons why an employee's risk of redundancy was withdrawn and the reasons why an employee was offered alternative employment.
49. Due to the small number of individual's that this information relates to, and bearing in mind the fact that the complainant is a previous employee at the University and he may have information available to him or previous experience which will enable him to identify the individuals in question, the Commissioner is satisfied that information falling within the scope of requests 12, 13 and 14 is personal data as it is likely that these individuals could be identified from the information in question.

Would disclosure breach the data protection principles?

50. The data protection principles are set out in schedule 1 of the DPA. The Commissioner considers that the first data protection principle is most relevant in this case. The first principle states that personal data should only be disclosed in fair and lawful circumstances, the conditions of which are set out in schedule 2 of the DPA.

51. The Commissioner's considerations below have focused on the issues of fairness in relation to the first principle. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the data subject and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

Reasonable expectations of the data subject

52. When considering whether a disclosure of personal data is fair, it is important to take account of whether the disclosure would be within the reasonable expectations of the data subject. However, their expectations do not necessarily determine the issue of whether the disclosure would be fair. Public authorities need to decide objectively what would be a reasonable expectation in the circumstances.
53. The University argued that there is a legitimate and reasonable expectation of confidentiality between all relations and negotiations between employee and employer, and disclosure of such information would not be fair on the data subject concerned. It was the University's view that the information relates to the individuals private lives rather than any activity they may undertake in the public domain.
54. The University referred the Commissioner to its settlement agreement regarding confidentiality. It also made reference to financial information being confidential. The Commissioner has not taken into account this argument as he considers that the information requested at requests 12, 13 and 14 does not relate to settlement agreements or financial information.
55. The Commissioner acknowledges that information relating to an individual's risk of redundancy does not relate to employees' official functions and responsibilities. Instead this information signals the potential end of the relationship between an employee and employer, which carries a strong expectation of privacy.
56. Taking above into consideration and the risk of identification, the Commissioner considers that the data subjects would have a reasonable expectation that the information sought in requests 12, 13 and 14 would not be disclosed in response to an information request.

The consequences of disclosure

57. The University explained that it is not unreasonable to assume that the release of personal information relating to redundancy negotiations and redeployment would cause distress to individuals.
58. The University referred to the case *Bousfield v Information Commissioner and another*¹ where the Tribunal stated that there would be a "likelihood of harm and distress that would be caused to any and all relevant data subjects by disclosure" [of compromise agreements]. The University explained that similar information regarding employment circumstances may be obtainable through the re-identification of the data subjects concerned.
59. The University explained that whilst disclosure under the FOIA must be viewed as disclosure to the public rather than an individual, the requester is a former employee of the University and it would not be unreasonable to assume that they would have additional organisational knowledge and would be able to identify the individuals with much greater ease.
60. The Commissioner does accept that there is a risk of re-identification due to the small numbers involved and due to the inside knowledge that the complainant has. In light of this, the Commissioner recognises that disclosure of the requested information could cause harm and distress to the data subjects.

The legitimate public interest

61. The Commissioner considers that the public's legitimate interests must be weighed against the prejudices to the rights, freedoms or legitimate interests of the individual concerned. The Commissioner has considered whether there is a legitimate interest in the public (as opposed to the private interests of the complainant) accessing the withheld information.
62. The University acknowledges that the FOIA is applicant blind. However, in this case the applicant is a former member of staff and as such disclosure of the requested information is a personal interest rather than a public one, and not in the spirit of the FOIA.
63. The University confirmed that none of the information sought in requests 12, 13 and 14 has previously been made publicly available and

¹ [128 BMLR 184]

there is no intention to make public information regarding the age, gender or any other contextual information regarding the recent restructure with the Health Schools.

64. The Commissioner recognises that the complainant does have a specific interest in the requested information. However, this interest appears to be a personal one rather than a legitimate public interest and disclosure of this information is therefore of little public interest. The Commissioner has therefore determined that the University was correct to apply section 40(2) to requests 12, 13 and 14.

Right of appeal

65. 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

66. 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.
67. 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

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