

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 29 June 2017

**Public Authority:** King's College London  
**Address:** James Clerk Maxwell Building  
57 Waterloo Road  
London, SE1 8WA

#### Decision (including any steps ordered)

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1. The complainant requested information about the number of students disciplined after a disrupted talk. King's College London (KCL) withheld the information, citing the exemption under section 40(2) of the FOIA (third party personal data) as its basis for doing so. The Commissioner's decision is that KCL has correctly applied this exemption and does not require KCL to take any steps.

#### Request and response

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2. On 16 September 2016 the complainant made the following request for information under the FOIA for:

*'I write under the Freedom of Information Act 2000 and request the following information.*

*a) Following the disruption of the talk by Ami Ayalon on 19th January how many King's College London students were disciplined (whether formally or informally) for their behaviour by KCL?*

*b) Please state what specific disciplinary measures were taken against the students disciplined (if any were disciplined)?*

*c) Were any members of King's College London Action Palestine disciplined by KCL?'*

3. On 11 October 2016 KCL responded citing section 40(5) to neither confirm nor deny that it holds this information, which it said would be the personal data of third persons.

4. On 16 October 2016, the complainant requested an internal review and after the intervention of the Commissioner, KCL provided the outcome of the internal review on 7 April 2017. KCL confirmed that it held the requested information and withheld it under section 40(2) (Personal Information) of the FOIA.

## Scope of the case

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5. The complainant contacted the Commissioner on 2 May 2017 to complain about the way his request for information had been handled.
6. Therefore the focus of the Commissioner's investigation is to determine whether KCL is entitled to rely on section 40(2) of the FOIA as a basis for refusing to disclose the withheld information.

## Reasons for decision

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### Section 40(2) – Third party personal data

7. This exemption provides that any third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act (DPA).

#### **Is the withheld information personal data**

8. Under section 40(2) by virtue of section 40(3)(a)(i), personal data of a third party can be withheld if it would breach any of the data protection principles to disclose it.
9. Personal data is defined in section 1(1) of the DPA as:

“data which relate to a living individual who can be identified –

  - (i) from those data, or
  - (ii) 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 intention of the data controller or any other person in respect of the individual.”
10. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions

affecting them, and has them as its main focus or impacts on them in any way.

11. Therefore the Commissioner has first considered whether the information in question does relate to an identifiable individual who is still living.
12. KCL explained that the information relates to internal disciplinary matters which are personal data and KCL initially applied section 40(5) to refuse to confirm or deny that the information was held.
13. On review KCL confirmed that the requested information is held and applied section 40(2). Referring to the first part of the request KCL confirmed that the number of students disciplined by KCL is less than or equal to five.
14. KCL noted that the request did not ask for the names of any individual involved in the incident, but stated that the requested information could be combined with other information to identify a living individual. KCL considered that it is reasonably likely that students could be identified from the low numbers and therefore decided to suppress the actual figure.
15. The Commissioner has been informed by the public authority and the complainant that there has been considerable interest in this incident. KCL has conducted and published a review of the incident in a redacted form:  
<http://www.kcl.ac.uk/newsevents/news/newsrecords/docs/Investigation-Report---19-January-2016.pdf>). The Commissioner has also been provided with links to newspaper articles, social media posts and a Magistrate's court case of common assault following the incident.
16. In a previous decision notice about bullying ([FS50499612](#)) the Commissioner agreed that 'the disputed information refers to a very small number' and that the 'disputed information could potentially be sensitive personal data' and therefore upheld the public authority's decision to withhold the information under section 40. The Commissioner is satisfied that the same rationale on small numbers applies in this case.
17. The Commissioner refers to her own guidance <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>
  - A question faced by many organisations, particularly those responding to Freedom of Information requests, is whether, in disclosing information that does not directly identify individuals, they are nevertheless disclosing personal data if there is a

reasonable chance that those who may receive the data will be able to identify particular individuals.

- whether or not the individual is nevertheless identifiable will depend on all the means likely reasonably to be used either by the controller or by any other person to identify the said person
  - It is important to note that, where the ability to identify an individual depends partly on the data held and partly on other information (not necessarily data), the data held will still be "personal data".
18. In this case, the Commissioner is satisfied that the numbers involved are so small that, if combined with other publicly available information, the individuals concerned could be identified. The Commissioner is also satisfied that internal disciplinary matters are personal information. The Commissioner therefore accepts that the disputed information is personal data within the meaning envisaged in section 1 of the DPA.

### **Sensitive personal data**

Any consideration of fairness must first determine whether the requested information is defined as sensitive under the DPA. Section 2 of the DPA defines sensitive personal data as information which relates to:

- (a) racial or ethnic origin
  - (b) political opinions
  - (c) religious beliefs
  - (d) trade union membership
  - (e) physical or mental health
  - (f) sexual life
  - (g) criminal offences, sentences, proceedings or allegations.
19. The requested information falls into some of these categories of sensitive personal data: (b) protesting at an event organised by the KCL Israel Society indicates political opinions and (g) details of any disciplinary investigations or sanctions.
20. Information relating to an internal investigation or disciplinary hearing carries a strong general expectation of privacy. This was recognised by the Information Tribunal in the case of *Rob Waugh v Information Commissioner and Doncaster College* (EA/2008/0038, 29 December 2008) when it said at paragraph 40 that:

*'there is a recognised expectation that the internal disciplinary matters of an individual will be private. Even among senior members of staff*

*there would still be a high expectation of privacy between an employee and his employer in respect of disciplinary matters.'*

21. Having viewed the withheld information the Commissioner considers that the number itself may not be clearly sensitive personal data but the context and details of the incident that are publicly available surrounding the number requested are potentially sensitive personal data.

### **Would disclosure breach the Data Protection Principles?**

22. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness.
23. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual, the potential consequences of the disclosure and whether there is legitimate public interest in the disclosure of the information in question.

### **Reasonable expectations and Consequences of disclosure**

24. Disclosure is unlikely to be fair if it would have unjustified adverse effects on the individuals. 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.
25. The complainant has argued that he is only seeking '*details of whether disciplinary measures were taken against any student and what actions have been taken*' and is not seeking the names of students.
26. KCL stated that to provide information which may lead to those who have been subject to internal investigations being identified would not be fair. The individual(s) concerned would also expect information of this nature to remain private. This is highlighted in the KCL Misconduct Regulations:

*'2.7 The College will do all in its power to limit the disclosure of information as is consistent with conducting an investigation and the provisions of the Human Rights Act 1998, the Data Protection Act 1998, the Freedom of Information Act 2000 and any other relevant legislation.*

*2.8 All disciplinary proceedings will normally be held in private.'*

27. Therefore the Commissioner understands that KCL would not routinely make public such information.
28. KCL has also pointed out that when students graduate, any release of information regarding any disciplinary against them would be likely to have a damaging effect on them as they try to progress in their career.
29. The Commissioner is satisfied that the individual(s) would have a reasonable expectation that the disputed information would not be placed into the public domain by disclosure under the FOIA. Therefore she considers that disclosure of this information would be an unfair invasion of the privacy of the individual(s), and as such may cause them some distress.

**Balancing the rights and freedoms of the individual with the legitimate interests in disclosure**

30. Notwithstanding the reasonable expectations or any damage or distress caused by disclosure, it may still be fair to disclose the requested information if there is a more compelling public interest in disclosure.
31. However, the Commissioner considers that the public's legitimate interests must be weighed against the prejudices to the rights, freedoms and legitimate interests of the individual(s) 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.
32. Given the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(2) has been cited is in favour of protecting the privacy of the individual. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure which would make it fair to do so.
33. The complainant has argued that even if the numbers involved are so small that there is a risk of individual(s) being identified:
  - There is a pressing social need to ensure that those who criminally disrupt Jewish Society and Israel related events...are robustly dealt with by the university authorities
  - Much is said when an event is violently disrupted but we want to know (as an activist group) whether words turn into action.
  - It is a primary purpose of FOIA to ensure that public authorities can be held to account on the basis of accurate information about what they have or have not done to address important issues

34. The complainant also provided links to a number of newspapers showing concern about *'intimidation of Jewish students at some British universities and the failure of universities to address it'* including *'the concerns expressed by Sir Eric Pickles MP...that Universities have shown "grave cowardice" over dealing with antisemitism on university campuses.'* The complainant also provided the Commissioner with a witness statement from a student at the event.
35. KCL have stated that the particular information requested by the complainant is not in the public domain:
  - The published report was heavily redacted ... Though the report was published to highlight that the university takes free speech and the safety of all individuals very seriously, it was important that the privacy of individuals involved was respected... The university was mindful to ensure as much transparency as possible without breaching the data rights of the individuals involved.
36. KCL also stated that disciplinary hearings are considered to be internal and private matters and KCL does not consider there to be a wider public interest in disclosure that outweighs the rights of the data subjects involved.
37. The Commissioner accepts that there is a legitimate interest in the overall transparency in the way a public authority such as KCL conducts its business and the Commissioner notes that KCL has already published a redacted review of the incident which provided much detail. (see link at paragraph 15). However, there is no presumption that this should automatically take priority over personal privacy. The Commissioner judges each case on its merits.
38. In this case, the Commissioner is not convinced that the specific information requested, while of significant interest to the complainant, is of sufficient wider public interest to warrant overriding the protection of the third party personal data.
39. Having considered the complainant's and KCL's submissions, the Commissioner is satisfied that the complainant's arguments for disclosing the specific information in this case are not as compelling as those that KCL has put forward for protecting the individual(s)' personal data, namely:
  - the individual(s)' likely expectation about how their personal data will be managed;
  - the individual(s) lack of consent to its release; and
  - the possible negative consequences to the individual(s) of releasing the information.

40. The Commissioner is satisfied that on balance, the legitimate public interest would not outweigh the interests of the small number of individuals and that it would not be fair to disclose the requested information in this case.

### **Conclusions**

41. Balancing the above, the Commissioner is satisfied that disclosing the number of students disciplined is personal data and that the individual(s) would have no reasonable expectation that the information in question would be disclosed to the world at large. The Commissioner therefore considers section 40(2) FOIA was correctly applied to the withheld information in this case.

### **Other Matters**

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42. The Commissioner's guidance explains that when a public authority receives an internal review request, it should ensure the review takes no longer than 20 working days in most cases, or 40 in exceptional circumstances.
43. The Commissioner notes that in this case KCL took over 120 working days to respond to the internal review request. The Commissioner would advise KCL to follow her guidance on this matter to ensure good practice when dealing with internal review requests.



## Right of appeal

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44. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

45. 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.
46. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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