

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 January 2019

Public Authority: The University Council
Address: University of Leicester
University Road
Leicester
LE1 7RH

Decision (including any steps ordered)

1. The complainant has requested the University of Leicester (the university) to disclose the distribution of scores given to professors in the department of Neuroscience, Psychology and Behaviour (the department) during the review undertaken by the Senior Staff Pay Committee. The university refused to disclose the information citing section 40(2) of the FOIA.
2. The Commissioner's decision is that the university is entitled to rely on section 40(2) of the FOIA. She therefore does not require any further action to be taken.

Request and response

3. On 22 November 2017, the complainant wrote to the university and requested information in the following terms:

"All information relating to the "Senior Staff Pay Committee – Annual Activity Report 2016/17" within my department. In addition to the number listed of items of information contained in my email to [name redacted], [named redacted] and [name redacted] (attached), to which I've had no reply, please supply me with the distribution of increments awarded to all professors in the department of Neuroscience, Psychology and Behaviour in this round; how many received 0, 1, 2 etc."

4. The university responded on 21 December 2017. It disclosed some information and advised the complainant that some of the information would be provided in response to his subject access request. In relation to information relating to other professors, the university refused to provide this information citing section 40(2) of the FOIA.
5. The complainant requested an internal review on 2 January 2019.
6. The university carried out an internal review and notified the complainant of its findings on 5 February 2019. It remained of the opinion that section 40(2) of the FOIA applied to the information the complainant requested relating to other professors.

Scope of the case

7. The complainant contacted the Commissioner on 27 March 2018 to complain about the way his request for information had been handled. He does not agree that section 40(2) of the FOIA applies to the withheld information. He does not consider it is possible to identify the other professors in the department from the requested information.
8. The Commissioner considers the scope of her investigation to be to determine whether the university is entitled to rely on section 40(2) of the FOIA for the following element of the request:

"...the distribution of increments awarded to all professors in the department of Neuroscience, Psychology and Behaviour in this round; how many received 0, 1, 2 etc."

Reasons for decision

9. Section 40 of the FOIA states that a public authority may refuse to disclose information if it constitutes the personal data of a third party and the disclosure of that information would breach any of the data protection principles outlined in the Data Protection Act 1998 (DPA 1998).
10. It must be noted first of all that the Data Protection Act 1998 has been superseded by the Data Protection Act 2018. However, as this request was made whilst the 1998 Act was in force and the university considered the application of section 40 of the FOIA in conjunction with the 1998 Act because this was the Act in force at that time, it is the 1998 Act the Commissioner will also consider in this notice.
11. In the DPA 1998 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..."

12. The Commissioner considers the first data protection principle outlined in the DPA 1998 is the 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."

13. The Commissioner must first consider whether the requested information is personal data. If she is satisfied that it is, she then needs to consider whether disclosure of this information would be unfair and unlawful. If she finds that disclosure would be unfair and unlawful the information should not be disclosed and the consideration of section 40 of the FOIA ends here. However, if she decides that disclosure would be fair and lawful on the data subject(s) 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, of the DPA are also met.

Is the requested information personal data?

14. The university explained that there are 11 professors within the department. However, only 7 of those 11 were assessed during the review undertaken by the Senior Staff Pay Committee and received a score. The complainant himself is one of those 7, which therefore leaves a pool of 6 professors. The withheld information is how many of those professors scored a 0, 1, 2, 3, 4 and 5.
15. The university confirmed that although FOIA requests are applicant blind it is not able to ignore the fact that the complainant, as a senior internal academic, would be privy to additional information that would not be available to the general public. For example, it confirmed that the complainant would know which of the 11 professors fall outside the

scope of the review and therefore his request, would obviously know what he scored himself and would be left with a small pool of only 6 other professors.

16. It argued that working closely with professor colleagues in the department there would naturally be some individual sharing of personal data relating to scores. It stated that if some of his closer professor colleagues had shared their individual scores with him, in conjunction with other information e.g. experience, publications, internal discussions around performance and the withheld information, if motivated through a process of elimination it would not be difficult for him to deduce the score relating to others. The university confirmed that under these circumstances it cannot ignore that the very small number of professors involved could lead to identification and therefore the disclosure of personal data. It advised that consideration was given to protecting their privacy in accordance with the requirements of the DPA.
17. The complainant strongly disputes that it would be possible to identify the remaining six professors from the withheld information. He stated that even if there were as few as 3 and for arguments sake he had received the withheld information which said that 2 professors scored one score and 1 scored another, he would of course know what he had scored, but would have no way of working out what the other 2 had scored. He stated that he cannot understand how any process of elimination could lead to the professors being identified.
18. For the information to constitute personal data it must be possible or at least very likely that the relevant data subject(s) could be identified from the information. The Commissioner considers a key element of her decision here is the very small numbers of professors concerned. Although the university has confirmed that there are 11 professors in the department, only 7 were assessed and it has explained how the complainant would be able to work out which those 7 are. He is one of them, which then leave 6 professors and the distribution of scores across those 6 professors.
19. Self identification is not enough to determine information as personal data. But if it is possible for the complainant or other members of the public (including other professors in the department) to identify the relevant data subjects from the data it will constitute personal data. The Commissioner agrees with the university it cannot be ignored that the complainant (and in deed others within the same department) will have access to other information which will enable them to work out who likely scored what. The complainant (and in deed the others in the department) will be aware of the work each one has produced, have some idea of how they have performed professionally over the relevant assessment period and the set criteria to which each of them was

assessed. It cannot be ignored that some will discuss the review, how they felt it went and in some cases they may even share scores. This does happen. The Commissioner considers with this sort of insight and additional information, considering the very small numbers being discussed here, it would be possible to identify the professors and their scores from the withheld information.

20. The Commissioner would like to point out that if the number of professors assessed had been more she may have reached a different view. Her decision is based on the very small numbers, the specific circumstances of this case and the need to consider any personal data and its potential disclosure very carefully.

Would disclosure be unfair?

21. The Commissioner considers the professors concerned will hold the reasonable expectation that information relating to their performance at work and their assessment scores will remain private and confidential. They will not expect this type of information relating to their employment with the university to be disclosed to the world at large. She accepts that disclosure would be an unwarranted intrusion into the more private aspects of their employment and could lead to distress and upset.
22. In terms of any legitimate public interest in the disclosure of the information, the Commissioner notes that the information would be of use to the complainant considering what appears to be an ongoing dispute between him and the university over his review assessment. However, the Commissioner is unaware of any wider public interest arguments in favour of disclosure which would warrant overriding the rights and freedoms of the professors concerned. The Commissioner considers disclosure would be an unwarranted intrusion into the more private aspects of the professors' employment and could cause distress and upset. There are no compelling and weightier public interest arguments in favour of disclosure in this particular case.
23. For the above reasons, the Commissioner is satisfied that section 40(2) of the FOIA applies to the withheld information.

Right of appeal

24. 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

25. 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.
26. 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

Samantha Coward
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