

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 8 July 2019

**Public Authority:** University of Nottingham  
**Address:** University Park  
Nottingham  
NG7 2RD

#### **Decision (including any steps ordered)**

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1. The complainants made an information request to the University of Nottingham ("the University") for information about training courses attended by specific groups of staff, and about the recruitment of legal staff. The University initially refused the first part of the request under section 12(1) of the FOIA, stating that the cost of compliance would exceed the appropriate limit. It provided some information relating to the second part of the request. After the complainants resubmitted the first part of the request in a refined form, the University provided some information to them, but withheld some information under section 40(2) of the FOIA – third party personal data. It also provided some further information relating to the second part of the request.
2. The Commissioner's decision is that the exemption at section 40(2) of the FOIA is not engaged in respect of the withheld information, since it is not personal data as defined by the Data Protection Act 2018. She is satisfied that, on the balance of probabilities, the University has disclosed all of the information which it holds in respect of the recruitment of legal staff.
3. In addition, she has determined that the University breached section 17(5) of the FOIA, since it did not issue its initial refusal notice within 20 working days.
4. The Commissioner requires the University to take the following steps to ensure compliance with the legislation:
  - Disclose the information which was withheld under section 40(2) to the complainants.

5. The University must take this step 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

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6. The Commissioner has numbered and broken down the complainants' request and the University's responses, for clarity.
7. *The first part of the request (Requests 1, 2 and 3)*

On 25 June 2018, the complainants wrote to the University to request information of the following description:

*"As agreed, we are setting out key pieces of information that we believe will be necessary to facilitate a full investigation of our concerns and with respect to which we seek disclosure from the University:*

*(1) Details of all training and development activities attended by all University Executive Board members and Level 7 staff across Professional Services in the last three years in relation to the policies and procedures of the University (including, without limitation, Equality and Diversity, Grievance, Dignity, Worklife Balance, Job-Matching, Assigning a Level and Virtual Panel Process and External Working).*

*(2) Details of all training and development activities attended by all Level 7 members staff across Professional Services in the last three years in relation to Equality and Diversity issues (including, without limitation, the Staff Equality and Diversity Strategy, Equal Opportunities and Unconscious Bias).*

*(3) Details of all training and development activities attended by all Level 7 members staff across Professional Services in the last three years in relation to their responsibilities as officers of the organisation (including, without limitation, Directors' Duties)."*

8. On 23 August 2018, the University provided its substantive response. Requests 1 – 3 were refused under section 12 of the FOIA: cost of compliance exceeds appropriate limit.
9. On 5 September 2018, the complainants requested an internal review. They queried the refusal of these requests under section 12, and provided some suggestions of searches to conduct.

10. The University responded on 5 October 2018. It stated that these requests had been considered together, and that the University considered that section 12 had been correctly applied. The complainants were offered an opportunity to refine these requests. The University suggested:

*"I would invite you to indicate whether you would wish us to produce statistics from the Central Short Courses system to indicate where training has been undertaken by relevant staff during the period in question. It would be helpful if you could indicate from the Central Short Courses catalogue which courses you wish to be considered. Please note, this will not identify the training undertaken by individuals as this would be personal data and therefore exempt under Section 40(2) of the Freedom of Information Act."*

11. On 23 October 2018, the complainants submitted a refined request in respect of requests 1 – 3. They specified that the information they required related to:

*"all courses listed under the following categories on the Central Short Courses website:*

- *Equality,*
- *Diversity and Inclusion,*
- *Health and Safety, and*
- *Leadership and Management".*

12. On 6 December 2018, the University provided them with some information about training courses attended by the University Executive Board ("UEB") and level 7 Professional Services staff from November 2015 – November 2018.

13. On 9 December 2018, the complainants explained that they had requested information for the three years leading up to the date of the original request, and asked for an annual breakdown of the figures, together with the total number of UEB and level 7 Professional Services staff, for context.

14. On 20 December 2018, the University provided information showing *"all attendances for UEB/Level 7 PS staff for the reporting periods 01/06/2015 to 31/05/2106, 01/06/2016 to 31/05/2107 and 01/06/2017 to 31/05/2108"*.

15. It stated that the information was drawn from total pools of 88, 64 and 68 staff (this included UEB staff and level 7 Professional Services staff) respectively for the three years.
16. It withheld the exact number of participants for those courses where the number was 10 or fewer, since it considered that this was exempt information under section 40(2) of the FOIA – third party personal data. It explained that in no instance was the number of attendees zero.
17. The University also explained that no record is kept (unless an individual adds it to their individual training record) of attendances and engagement with external opportunities such as conferences, external training courses and external briefings, nor of one-to-one briefings received by members of the group.
18. On 20 December 2018, the complainants queried the accuracy of the information regarding the total number of relevant staff. They also stated that they disagreed with the University's decision to redact the exact number of participants where this was fewer than 11 people.
19. On 9 January 2019, in correspondence with the complainants, the University addressed the apparent discrepancies relating to the total number of relevant staff which had been questioned, and provided some amended figures. It explained that the total number of level 7 Professional Services staff for the three years was, respectively, 51, 48 and 56. The Commissioner notes that the complainants still consider this to be inaccurate.
20. The University maintained its position regarding the information which had been redacted under section 40(2).
21. *The second part of the request (Request 4)*

On 25 June 2018, the complainants also requested:

*"(4) Role profile forms and supporting documentation (including, without limitation, advertisements (internal or external), Authority to Fill forms, interview questions and practical tests set for candidates) for each of the following positions:*

- *General Counsel*
- *Director of Legal Services*
- *Head of Legal Services*
- *Inhouse Commercial Lawyer*
- *Inhouse Commercial Lawyer and Data Protection Officer*

- *Legal Advisor*”.

22. On 23 August 2018, the University provided its substantive response. It provided role descriptions for four of the above six named posts.
23. On 5 September 2018, the complainants requested an internal review. They considered the University would hold more information in respect of this request.
24. On 5 October 2018, the University provided some further relevant information which it stated should have been attached to its original response. However, it stated that it could not provide role descriptions in respect of *General Counsel* or *Head of Legal Services* since these functions were fulfilled by the *Director of Legal Services* and so did not exist as separate posts.
25. *Additional request (Request 5)*

On 25 June 2018, the complainants also requested:

*“(5) Details of all PAY02a forms processed by the University in the last three years including a breakdown of the staff these have been processed in relation to by gender, age, ethnicity and level/grade.”*

26. Part 5 was, subsequently, superseded by a fresh request for information and has not formed part of the scope of this investigation.

## **Scope of the case**

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27. The complainants contacted the Commissioner on 19 November 2018 to complain about the way their request for information had been handled. At that stage, they were waiting for the University’s response to their refined request dated 23 October 2018.
28. Following further correspondence with the University, the complainants informed the Commissioner in March 2019 that they were dissatisfied that the number of participants (if 10 or fewer) had been withheld under section 40(2) in respect of requests 1 – 3. They also considered that more information may be held by the University in respect of request 4.
29. The following analysis covers whether the University correctly withheld some of the information requested in requests 1 – 3 (as refined on 23 October 2018) under section 40(2) of the FOIA and whether the University holds more information relevant to the scope of request 4, dated 25 June 2018. It also considers the time taken to respond to the requests of 25 June 2018.

## Reasons for decision

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

30. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester, and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
31. In this case, the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public (if it is personal data) would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
32. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
33. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she would establish whether disclosure of that data would breach any of the DP principles.

#### ***Is the information personal data?***

34. Section 3(2) of the DPA defines personal data as:

*"any information relating to an identified or identifiable living individual"*.

35. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
36. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
37. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

38. In this case, on 20 December 2018, the University provided the complainants with "*a table showing all attendances for UEB/Level 7 PS staff for the reporting periods 01/06/2015 to 31/05/2016, 01/06/2016 to 31/05/2017 and 01/06/2017 to 31/05/2018*". It also provided information about the total number of staff on the UEB, and/or employed at Level 7 working in Professional Services.
39. The table is in two columns, headed *Row labels* and *Count* respectively. It is divided into three sections, one for each relevant reporting period. Approximately 230 rows of information are presented in total.
40. *Row label* is populated with the names of courses (for example, *A Practical Look at Core Teaching Skills*). This column was disclosed to the complainants in full.
41. *Count* is populated with the number of staff who attended each course. This information was redacted by the University if there were 10 or fewer participants, in which case the University replaced the exact number with "*10 or fewer*". The University disclosed the exact number of participants if it was 11 or greater; this was the case in fewer than 20 of the rows.
42. The University has explained that it considers the redacted numbers are the personal data of the individuals who attended the courses. Since they are not explicitly named, the University has explained why it considers that individuals are identifiable from the withheld information.
43. The University informed the complainants that it considered that revealing the exact number of staff attending training courses, if the number was 10 or fewer, "*would greatly increase the likelihood of individuals being identified*".
44. The University stated to the complainants that: "*there may be other information which you could obtain from the University, either through further Freedom of Information requests or other means, that could be used to identify the individuals here. The risk of this is greatly increased where numbers are less than 10 and it is for this reason that we do not specify such small numbers of individuals*".
45. The University explained that the requested information relates to two relatively small cohorts of staff: the UEB, and Level 7 staff who work in Professional Services. The Commissioner understands that the total number of relevant staff was between 70 and 80 for each of the years.
46. The University commented "*the request was not about general staff training figures but was limited to a specific and smaller group of staff members, who could then be identifiable*".



47. The University considered that it was "*entirely possible*" that the staff attending the various courses could be identified by individuals with knowledge of the University. Specifically, it considered that the complainants could identify individuals by obtaining other information; for example, through making subject access requests.
48. The Commissioner is aware that the University also has concerns that the complainants may also be seeking to ascertain who did *not* attend specific courses, in an effort to support accusations that individuals are insufficiently trained. Although the University has not argued that the withheld information is, as such, the personal data of individuals not attending the courses, it has suggested that motivated individuals may have an interest in this.
49. The Commissioner has considered the withheld information, which, as previously set out, comprises the exact number of participants on each course where the number was 10 or fewer. She has considered whether the nature of the information is, in fact, sufficiently anonymised not to be the personal data of any specific individuals.
50. In this case, as previously explained, a large number of courses are listed for each of the years mentioned in the request: 70 or more courses for each year. The names of the courses have already been disclosed in response to the request.
51. The Commissioner notes that a large majority of these courses were, evidently, attended by 10 or fewer members of staff.
52. The Commissioner has, therefore, considered whether, in this case, a number fewer than 11 could be connected to any specific individual or individuals attending the courses.
53. The Commissioner agrees with the University that a motivated individual making an information request of this type may have an interest in identifying either a) those individuals who attended specific courses, or b) those who did not. She notes that identification of individual attendees may potentially lead to the identification of non-attendees to a motivated individual with knowledge of staff in the workplace.
54. However, considering the large number of training courses attended by staff throughout any one year, the Commissioner considers that the possibility of identifying an individual, or individuals, who attended any specific course, or courses, from the withheld information, to be extremely remote.
55. Whilst the titles of some of the courses suggest that they would have been intended for all, other course titles suggest a more specific focus – for example, "*First Aid at Work Refresher*" or "*Recruitment and Selection*



(Pharmacy)". It is perhaps the case that only certain employees from the overall cohort would have been likely to attend courses such as these, which may somewhat increase the possibility of identification.

56. The University has explained that all of the listed courses were non-mandatory, and considers that this also increases the likelihood of participants being identifiable.
57. The Commissioner notes that the University is concerned that a motivated requester and/or person with knowledge of the relevant University staff could discover the specific identities of attendees by obtaining further related information. However, the University has not provided examples or specific arguments in relation to this.
58. The University appears to consider that disclosing a number which is 10 or fewer, in relation to a workplace activity (such as training) carried out by individuals, may lead to the identification of those individuals by a person with knowledge of the workplace.
59. In some workplace situations, and depending on the nature of the withheld information, this would be a reasonable approach to take. For example, the Commissioner has previously found that a small number (usually, less than five) could lead to the identification of individuals; for example in the context of information about a recruitment process or disciplinary situation. In such a situation, it is reasonable to expect that individuals with knowledge of the workplace might be aware which colleagues had potentially been through a specific process of this type. If it was disclosed that, for example, three individuals had been through such a process, there would be a more than remote possibility of them being identifiable.
60. The Commissioner's guidance on anonymisation<sup>2</sup> (page 25) sets out that it is good practice when releasing anonymised data to try to assess the likelihood of motivated individuals having and using the prior knowledge necessary to facilitate re-identification. The University has evidently considered this in this case.
61. However, the guidance also states: "*Small numbers in small geographical areas present increased risk, but this does not mean that small numbers should always be removed automatically... always removing numbers relating to five or 10 individuals or fewer may be a reasonable rule of thumb for minimising the risk of identification... but in*

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<sup>2</sup> <https://ico.org.uk/media/1061/anonymisation-code.pdf>

*the context of a specific freedom of information request a different approach may be possible”.*

62. The Commissioner addresses this issue on a case-by-case basis. In this case, a very large number of non-mandatory training courses were evidently available over each of the three 12-month periods to the relevant cohort of staff. It is possible that any member of the cohort may have chosen to attend any (or several) of the training courses at some point during the three years.
63. The Commissioner considers that the possibility of identifying an individual attendee from the withheld information - a specific number between 1 and 10 - is extremely unlikely, even by a motivated individual.
64. The University has not provided evidence of other 'linkable' information that is easily accessible and could be used to identify individuals from the withheld information.
65. In the circumstances of this case, having considered the withheld information, while it may potentially 'relate to' individuals, the Commissioner is not satisfied that any such individuals are identifiable from the information.
66. The withheld information, therefore, does not fall within the definition of personal data in section 3(2) of the DPA.
67. In this instance, the Commissioner has decided that section 40(2) is not engaged.
68. She therefore orders the University to disclose the withheld information to the complainants.

### **Section 1 – is further information held?**

69. The University stated that it had disclosed to the complainants all information which it held relevant to request 4. Request 4 was for information about job descriptions and other recruitment information for six specific legal posts. However, the complainants considered that more information may be held.
70. In cases where there is a dispute over the amount of information which is held, the Commissioner applies the civil test of the balance of probabilities in making her determination. This test is in line with the approach taken by the Information Rights Tribunal when it has considered whether information is held (and, if so, whether all of the information held has been provided) in cases which it has considered in the past.

71. The Commissioner asked the University to explain what searches were carried out for relevant information.
72. It explained that searches were carried out of its central Human Resources (HR) system, using the job titles specified in the request as search terms. As previously stated, it found that no information was held with regard to *General Counsel* or *Head of Legal Services*; the University explained that this is due to these being alternative names for the post of *Director of Legal Services*. No further relevant information other than that which was disclosed to the complainants was located.
73. The University explained that information would be stored only on the central HR system.
74. In the circumstances of this case, the Commissioner is satisfied that the University carried out adequate and appropriately-targeted searches, and that, on the balance of probabilities, no further information relevant to the scope of request 4 was held.

### **Section 17(5) – refusal of request**

75. Section 1(1) of the FOIA states that:

*"any person making a request for information to a public authority is entitled:*

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

*(b) if that is the case, to have that information communicated to him".*

76. Section 10(1) of the FOIA 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.
77. Section 17(5) of the FOIA states that a public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
78. In this case, the complainants submitted their requests on 25 June 2018 in an email to a professor at the University. He acknowledged the following day that an information request had been submitted and stated that it would be dealt with by the University. Despite this, following chasing correspondence from the complainants, the University wrote to them on 1 August 2018 to state that it had only just understood that a freedom of information request had been submitted.

A substantive response was then issued on 23 August 2018, in which the University refused the request under section 12.

79. From the evidence presented to the Commissioner in this case, it is clear that the University did not issue its refusal notice to the requests of 25 June 2018 within the statutory timeframe.
80. The Commissioner's decision is that the University breached section 17(5) of the FOIA. As a response was subsequently issued, the University is not required to take any steps in respect of this.

## Right of appeal

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81. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

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

82. 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.
83. 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 .....**

**Ben Tomes**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**