

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 November 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 information from University of Leicester ("the University") about external examiners for the department of engineering between the years 2010 to 2018. The University withheld the information, citing section 40(2) (personal information) of the FOIA.
2. The Commissioner's decision is that the University was entitled to rely on the exemption at section 40(2) FOIA.
3. The Commissioner therefore does not require the University to take further steps.

Request and response

4. On 7 March 2019, the complainant wrote to the University and requested information in the following terms:

"I would like to make a freedom of information request for the names of all external examiners, examining any masters and undergraduate course at the department of engineering at Leicester University in the period 2010 2018. I would also like to know the dates each external examiner made their report, and which engineering stream the examiner was responsible for."

5. The University responded on 4 April 2019. It provided some information within the scope of the request but refused to provide the remainder. It cited the section 40(2) of the FOIA (third party personal data) as its basis for doing so.
6. Following an internal review the University wrote to the complainant on 17 April 2019. It stated that it upheld its original position but did include some further information that was not personal data.

Scope of the case

7. The complainant contacted the Commissioner on 25 April 2019 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of her investigation to be to establish whether the University is entitled to withhold the requested information under section 40(2) of the FOIA.

Reasons for decision

Section 40 personal information

9. 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.
10. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public 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').
11. 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.

¹ As amended by Schedule 19 Paragraph 58(3) DPA

12. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

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

14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. 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.
16. 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.
17. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subjects. The names of the data subjects quite obviously is information that both relates to and identifies those concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
18. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
19. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

20. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

21. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

22. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

23. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"².

24. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
25. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

26. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.

² Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

27. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
28. The University has considered whether there is any legitimate interest for the University itself, the requestor or the wider public, societal interest. The University acknowledges therefore that there is a legitimate interest under the broad principles of accountability and transparency to the public in general and to students of the University in particular, of understanding the standards of quality that apply to higher education institutions, and of being transparent throughout the process of verifying papers which count towards the award of a degree.
29. The University concludes that in the context of publishing the personally identifiable information of past external examiners, it cannot identify a legitimate interest under the general principles of transparency and accountability, either for itself, for the requestor or for wider public society.
30. The complainant states that there is a legitimate interest in publishing the information regarding past external examiners as students may only identify conflicts of interest at a later stage, once the external examiner is no longer in post.
31. The Commissioner is satisfied in this case that there is a legitimate interest in the disclosure of the information under the broad principles of accountability and transparency as they relate to individuals who have held posts as external examiners in a public capacity. The Commissioner also notes that the University confirmed there is a legitimate interest in the names of current external examiners being published on its website, due to promoting transparency, and identifying any conflicts of interest which the complainant has expressed their concerns with.
32. In her view, there is a legitimate interest in the disclosure of information about external examiners while in post, and that this can remain the case even after examiners have ceased to serve, since the impact of those examiners' decisions may still be relevant.

Is disclosure necessary?

33. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under

the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

34. The Commissioner understands that the University does publish names and institutions of its current external examiners. She is also aware that the names and institutions of external examiners would likely have been in the public domain during their time in post. The Commissioner agrees that disclosure of some of the information could be necessary. However, the Commissioner finds that the timeframe the requestor has asked for (2010 – 2018) may be excessive considering an average tenure of an external examiner is three years.
35. The University has explained that as the information was requested under FOIA, it has been treated as motive blind. However, the University advised that should a concern arise about any conflicts of interest for previous external examiners, it would be able to treat concerns like that on a case by case basis. The University informed the Commissioner that it handles these types of concerns differently, rather than making the names of people who are no longer affiliated with the University public.
36. The University was vague about how it might achieve this by less intrusive means. In the absence of a less intrusive means of achieving the legitimate interest, the Commissioner considers the necessity test to be met and has gone on to consider the balancing test.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

37. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
38. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.

39. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
40. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
41. In this particular case, if there were concerns, students would have been able to identify the details of external examiners and whether there would be a conflict of interest on the run up to the exam or not long after the exam took place.
42. The Commissioner recognises that the longer the time gets from the external examiners' time in post, the more the balance between the rights of the individuals and the wider legitimate interest tips towards the individuals.
43. Because the complainant requested information from 2010 to 2018, the Commissioner views this to be more of an infringement on the rights of the individuals considering the amount of time has passed since 2010, for example.
44. Within the University's response to the Commissioner's enquiries, it outlined that at the time of the request, the external examiners for that academic year had also been the external examiners for the previous two academic years. Therefore, the University argued, any student who had concerns about any conflicts of interest an external examiner might have had, would already have had two years in which to complain.
45. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
46. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's conclusion is that the exemption provided by section 40(2) of the FOIA was engaged and so the University was not obliged to disclose the requested information.

Right of appeal

47. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

48. 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.
49. 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

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