

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 29 October 2020

**Public Authority:** University of Leeds  
**Address:** Woodhouse Lane  
Leeds  
LS2 9JT

#### Decision (including any steps ordered)

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1. The complainant requested information from the University of Leeds ("the university") about the candidates invited to interview for a post as Lecturer in Commercial Law. The university withheld the majority of the information under section 40(2) of the FOIA – third party personal data.
2. The Commissioner's decision is that the withheld information is the personal data of the candidates and it would not be lawful to disclose it. The university therefore correctly withheld the information under section 40(2).
3. The Commissioner does not require the university to take any steps.

#### Request and response

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4. On 10 March 2020, the complainant wrote to the university and requested information in the following terms (numbers added for ease of reference):

*"I have applied for the position below [Lecturer in Commercial Law, reference number provided]. Could you please provide answers under the Freedom of Information Act to the following questions.*

- 1) *How many people applied for this position and how many of them were invited to an interview?*
- 2) *What are the names of the universities where the candidates invited to interview completed their doctoral degrees?*

- 3) *How many publications in peer reviewed journal do the candidates invited to interviews have?*
- 4) *What was their experience in academic positions after the completion of their doctoral degrees?"*
5. The university responded on 1 April 2020. It stated that there had been 41 applicants for the post, out of which six had been selected for interview as well as one reserve candidate. It stated that the remainder of the information was exempt from disclosure under section 40(2) of the FOIA – third party personal data.
6. Following an internal review, the university wrote to the complainant on 21 April 2020. It explained that, while it considered there was a legitimate interest in the disclosure of the remainder of the information, this could be met by providing the additional explanation that *"all candidates invited to interview met the essential criteria as set out in the candidate brief. All applications were reviewed by the hiring managers and assigned scores according to the candidate brief. The top-scoring candidates were invited to interview. This demonstrates how the recruitment process was carried out, and that the strongest candidates were shortlisted for interview."* The university therefore upheld its position that, under section 40(2) of the FOIA, the remainder of the requested information could not lawfully be disclosed.

## **Scope of the case**

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7. The complainant contacted the Commissioner on 21 April 2020 to complain about the way his request for information had been handled.
8. This decision covers whether the withheld information was correctly withheld under section 40(2).

## **Reasons for decision**

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### **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)<sup>1</sup>. 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.
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 or 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 this case, the university has explained that the withheld information relates to seven individuals, being the six people invited to interview and the one reserve candidate.
18. The Commissioner has viewed the withheld information. It includes details of the universities attended by the candidates at doctorate level, and the names of institutions at which they have worked. It also

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

contains information about the number of publications in journals for each candidate.

19. The Commissioner is satisfied that this information relates to the individuals, and contains both biographical and geographical information.
20. The Commissioner has therefore considered whether or not the seven individuals are identifiable from the information. She has noted that, in effect, the data tracks their studies and careers, which have, naturally, been different for each candidate. The combination of place of study and place(s) of work is unique to each individual, meaning that the information effectively provides a trail that may lead to the identification of the candidates by persons connected with any of the institutions, and/or persons known to the individuals. While the information about the number of publications in journals may be said to be less likely to lead to identification, when it is combined with the remainder of the withheld information, the Commissioner considers that it builds a unique picture of each individual.
21. When considering identification, the Commissioner will also consider the possibility of identification by a *"motivated intruder"*, defined in the Anonymisation Code<sup>2</sup> as *"a person who starts without any prior knowledge but who wishes to identify the individual from whose personal data the anonymised data has been derived"*. A motivated intruder, the Code explains, is someone who may undertake standard investigative techniques, such as use of the internet or making their own enquiries, to use *"anonymised"* data to identify people.
22. Taking these factors into account, the Commissioner considers that the information renders the individuals indirectly identifiable.
23. The information therefore falls within the definition of *"personal data"* in section 3(2) of the DPA, set out previously.
24. 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.
25. The most relevant DP principle in this case is principle (a).

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<sup>2</sup> *Anonymisation: managing data protection risk code of practice* <https://ico.org.uk/media/1061/anonymisation-code.pdf>

### **Would disclosure contravene principle (a)?**

26. 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."*

27. 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.

### ***Is processing lawful?***

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

29. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in the Article applies.

30. 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"<sup>3</sup>.*

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<sup>3</sup> 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".*

31. 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 therefore 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.
32. 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*

33. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern, unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
34. In this case, the complainant suggested that the interview candidates may not have been selected solely on merit and wished to scrutinise their data. While this is partly a private interest, the Commissioner has identified that there is a legitimate interest in ensuring that the university is applying its recruitment policy fairly. The university has acknowledged that this legitimate interest exists, as indicated in its internal review response.

*Is disclosure necessary?*

35. "Necessary" means more than desirable, but less than indispensable or of 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.

36. The university explained that it advised the complainant that applicants for the post were scored against the published Candidate Brief, which was publicly available to download when the job was advertised. It explained that it selected the highest-scoring candidates for interview. In the university's view, disclosure of the individuals' data was not necessary to meet the legitimate interest.
37. The Commissioner accepts that the university has provided reassurances that it applied its policy fairly. However, she has considered whether it is possible for the public to "test" this. She is not aware that its application of its recruitment policy is regulated in a way that it is accessible to the public, and she has therefore concluded that, in this case, disclosure of the information requested by the complainant under the FOIA would be necessary to meet the legitimate interest.
38. She has therefore considered the balancing test.

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

39. 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. Disclosure under the FOIA is the equivalent of disclosure to the world at large. If the data subjects would not reasonably expect that the information would be disclosed to the public under the FOIA in response to a request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
40. In considering this balancing test, the Commissioner may take 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.
41. 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.

42. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
43. In this case, the Commissioner does not consider that the shortlisted candidates would have any expectation that details of their credentials would be disclosed to the world at large. As a general point, it is not normal practice for public authorities to publish details relating to shortlisted candidates for a specific post. The Commissioner notes, further, that the post in this case was a lecturing post, which does not appear to be at a particularly senior level.
44. Also, in the case of applicants to the university, the Commissioner notes that the university website explains that candidates' information "*will be used to shortlist and select for each position [they] apply for*" and also explains that it will normally be deleted after six months. Candidates therefore, in the Commissioner's view, have no expectation that the details they provide on an application would be disclosed to the world at large.
45. While some factual information about particular candidates may already be in the public domain, in the context of published information about them on the websites of their current places of work, or in journals in which their work is published, essentially it is a personal matter when an individual decides to apply for a new job. The framing of the request in this case means that the relevant biographical details would relate to the individuals in a personal way.
46. The university has also argued that candidates may suffer distress and harm from the publication of the information, since their current employers may be unaware of the application, and in certain circumstances individuals may even be seeking to move away from a stressful domestic situation. It argues that publication in these circumstances, where there is no prior expectation, may lead to significant distress and harm.
47. The Commissioner has therefore considered whether the legitimate interest in the disclosure of the information, which she identified previously, is sufficient to outweigh the rights and freedoms of the individuals, taking the above factors into consideration.
48. The Commissioner has no evidence that the university is failing to recruit candidates in an unfair manner; based on its website, it appears to recruit well-qualified staff from a variety of backgrounds.
49. 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.

50. 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 decision**

51. The Commissioner has therefore decided that the university was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

### **Other matters**

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52. The university advised the Commissioner that, in the event that disclosure was found to be lawful, fair and transparent not in breach of principle (a), it considered that the information may also be exempt from disclosure under section 41(1) of the FOIA – information provided in confidence. The Commissioner has not found it necessary to consider that in this notice, since she has found that disclosure would be in breach of principle (a).

## Right of appeal

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53. 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)

54. 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.
55. 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**  
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**Information Commissioner's Office**  
**Wycliffe House**  
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