

Freedom of Information Act 2000

Decision notice

Date: 23 December 2021

Public Authority: Queen's University, Belfast
Address: University Road
Belfast
BT7 1NN

Decision (including any steps ordered)

1. The complainant requested an investigation report produced following allegations he had made under the University's whistleblowing policy. The University provided the complainant with some information under FOIA and some information outside FOIA but refused the remainder under FOIA, citing the exemption at section 40(2) (third party personal data).
2. The Commissioner's decision is that the University was entitled to refuse to disclose the outstanding withheld information under FOIA. However, some of the requested information is the complainant's personal data and is therefore exempt from disclosure under section 40(1) of FOIA. The Commissioner finds that the University ought to have cited section 40(5A) and refused to confirm or deny that it held this information under FOIA.
3. The Commissioner finds that the remaining requested information comprises third party personal data, and its disclosure into the public domain would contravene a data protection principle. The Commissioner finds that the University was entitled to rely on section 40(2) in respect of this information.
4. The Commissioner does not require any steps to be taken.

Background

5. The complainant submitted a 13 part complaint to the University in December 2019 under the University's whistleblowing policy. The Commissioner cannot discuss the detail of the whistleblowing complaint because it arose from the way the University dealt with an individual student in a particular case. However the Commissioner can say that the whistleblowing complaint related to the extent to which the University complied with its disciplinary procedures in regard to its handling of a case of student misconduct.
6. The complaint was investigated by external consultants, PWC. The complainant declined to co-operate with the investigation because he had concerns that PWC may not be independent, given that they ran joint degree programmes with the University. Following the investigation a report was produced and provided to the University in December 2020. Of the 13 grounds for complaint, five were found to have no substance, and with regard to the remaining eight the investigators found insufficient evidence to allow them to reach a substantive conclusion.
7. The complainant exchanged correspondence with the University between October 2020 and January 2021 regarding access to the report. On 19 October 2020 the University advised the complainant that it did not routinely publish this kind of information but would consider whether any part of it could be disclosed under FOIA once it was finalised.
8. The complainant contacted the Commissioner on 7 January 2021 to complain about the University. The complainant maintained that the "investigation findings" ought to be disclosed to him under the whistleblowing policy, "outside the scope of the FOIA and/or DPA" (the Data Protection Act 2018).
9. The Commissioner advised the complainant that he could not investigate the University's compliance with its whistleblowing policy, and he could not require the University to disclose information outside the legislation he regulates. The Commissioner clarified his role regarding complaints made under section 50 of FOIA.

Request and response

10. On 6 February 2021 the complainant submitted the following request to the University:

"This is a freedom of information request for (i) a copy of an investigation report prepared by PwC in its role of investigator of my whistleblowing complaint dated 16 December 2019, and (ii) a copy of written findings and the judgement of [named individual], head of internal audit, arising from his consideration of the PwC report."

11. The complainant reiterated his view that the information ought to be disclosed to him under the whistleblowing policy. The complainant also advised the University of his opinion that:

"...the requested information is reasonably accessible to me otherwise than under the FOIA, given that the whistleblowing policy clearly provides that I am to be kept informed".

12. The University responded on 23 February 2021, advising that the requested information was exempt from disclosure under FOIA by virtue of the exemption at section 40(2) of FOIA (third party personal data).
13. However the University did provide the complainant with a redacted extract from the report comprising the recommendations made.
14. The Commissioner is also aware that the University separately provided the complainant with another extract from the report, comprising the executive summary, again in a redacted format.
15. The complainant submitted a further request to the University on 14 February 2021 for the following information:

- (i) The date of the PwC report and when it was finalised;*
- (ii) The grounds on which [named individual] disclosed the executive summary to me (ie under the whistleblowing policy or FOIA);*
- (iii) Why the whole report (redacted of personal data) was not disclosed to me on the same grounds; and*
- (iv) An explanation for any gap in time between the date of the PwC report and [named individual]'s disclosure.*

16. The University responded to the complainant on 2 March 2021, answering each part of his request. The University confirmed that it had disclosed the executive summary outside of the whistleblowing policy and outside FOIA.

Scope of the case

17. The complainant confirmed to the Commissioner on 1 April 2021 that he wished to pursue his complaint.
18. The Commissioner does not usually accept complaints for investigation unless the complainant has exhausted the public authority's internal review process. However, in this case the Commissioner is mindful that the complainant has been in prolonged correspondence with the University regarding his whistleblowing complaint. The University has had a number of opportunities to consider whether the report could be disclosed to the complainant. Therefore the Commissioner considered it appropriate to accept the complaint as eligible without requiring that an internal review be conducted.
19. The complainant asked the Commissioner to consider whether the University ought to have cited the exemption at section 21 of FOIA. Section 21 provides an exemption from disclosure under FOIA where the requested information is reasonably accessible to the applicant. The complainant argued that he was entitled to receive the requested information under the University's whistleblowing policy.
20. The complainant further alleged that the University had "misused FOI/DPA to deliberately undermine the university's compliance with the disclosure provisions of the Whistleblowing Policy. This was done to protect the university because the investigation's findings are harmful to the university."
21. The Commissioner clarified to the complainant that his role is to decide whether a particular request has been handled in accordance with the requirements of FOIA. This does not extend to determining whether an exemption not relied upon by the public authority ought to have been applied, save in exceptional cases such as where the failure to rely on an exemption would result in the inappropriate disclosure of personal data.
22. As indicated at paragraph 9 above, the Commissioner cannot comment on the University's handling of the whistleblowing complaint, nor can he

require the University to disclose information to the complainant under its whistleblowing policy.

23. The complainant also argued to the Commissioner that if the University was entitled to withhold the requested information under FOIA then it had contravened data protection legislation by disclosing the executive summary to him.
24. The Commissioner has emphasised to the complainant that FOIA only allows for information to be disclosed into the public domain. The Commissioner cannot require a public authority to disclose information to the complainant under FOIA unless it could be disclosed to any person who requested it.
25. The Commissioner has also provided the complainant with advice on how to pursue any data protection concerns he has about the University's disclosure of the executive summary. Such concerns cannot be addressed within this decision notice since they fall outside the scope of FOIA, but they will be considered by the Commissioner's data protection complaints service under a separate complaint.
26. Accordingly the scope of the Commissioner's investigation was to determine whether or not the University was entitled to refuse to disclose the withheld information in response to his request of 6 February 2021, in reliance on the exemption at section 40(2) of FOIA.

Reasons for decision

Section 40(1) and section 40 (5A): personal data of the requester

27. The University claimed reliance on section 40(2), which applies to third party personal data. However, on examining the requested information the Commissioner observed that some of it related to the complainant in his capacity as whistleblower. The Commissioner has therefore considered whether the University ought to have relied on section 40(1) and section 40(5) in its response to the complainant.
28. Section 40(1) of FOIA states that:

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

29. Section 40(5A) of FOIA states that:

"The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1)."

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

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

31. An identifiable living individual is one who can be identified, directly or indirectly. This may be by reference to an identifier such as a name, an identification number, location data, an online identifier. Or it may be by reference to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
32. 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.
33. In this case the Commissioner is satisfied that some of the requested information relates to the complainant in his capacity as the whistleblower. Although the complainant is not named the Commissioner considers that he is identifiable because anyone with knowledge of the whistleblowing complaint would be able to identify the complainant as the whistleblower. The information in question relates to the complainant in that it comprises information, opinions and allegations put forward by him.
34. This information is clearly the complainant's personal data within the meaning of section 2(2) of the DPA; therefore the exemption at section 40(1) of FOIA is engaged. Section 40(1) provides an absolute exemption and the Commissioner is not required to consider the public interest.
35. Furthermore, the Commissioner considers that the University ought to have cited section 40(5A) in its refusal notice. The University ought to have stated that it was refusing or confirm or deny under FOIA that it held information that is the complainant's personal data. This is because disclosure under FOIA constitutes disclosure into the public domain, and section 40(5A) states that a public authority is not required to confirm or deny under FOIA whether it holds a requester's personal data.
36. The Commissioner has advised the University of his view, and the University has undertaken to provide the complainant with the personal data he would be entitled to receive in response to a subject access

request made under the UK General Data Protection Regulation (the UK GDPR).

Section 40(2): third party personal data

37. Section 40(2) of 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.
38. The Commissioner is satisfied that the information which is not the complainant's personal data relates to a number of other individuals, or data subjects. These include a student, University staff and other professionals involved in the misconduct matter that led to the whistleblowing complaint. Not all of the individuals are named but the Commissioner is satisfied that they are identifiable individuals.
39. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
40. 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 UK GDPR.
41. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The test is whether disclosure would contravene any of the DP principles.
42. The most relevant DP principle in this case is principle (a), which is set out at Article 5(1)(a) of the UK GDPR:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
43. 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.
44. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing.

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

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

45. The Commissioner considers that the lawful basis most applicable to a disclosure under FOIA is Article 6(1)(f) of the UK GDPR 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.

46. In considering the application of Article 6(1)(f) in the context of a request for information under 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.

47. The Commissioner further considers that these tests should be considered in sequential order, ie if the legitimate interest is not met then there is no need to go on to consider the necessity test, and so on.

Legitimate interests

48. In considering any legitimate interest(s) in the disclosure of the requested information under 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.

49. 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

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".

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.

50. The complainant maintained that he was entitled to the findings of the investigation under the terms of the University's whistleblowing policy.

51. The Commissioner has examined this policy and notes the following extract:

"Where possible, the individual making the disclosure will be advised of the outcome of the investigation and on any action that will be taken as a result. It may not, however, be appropriate to tell the discloser the precise action to be taken where this would infringe a duty of confidence owed by the University to someone else or where it might prejudice any future action the University might take (including legal action)."

52. The Commissioner considers, and the University accepts, that the complainant does have a legitimate interest in being advised of the outcome of the investigation, and action taken as a result. This is to some extent recognised in the whistleblowing policy. The Commissioner agrees that it is reasonable to identify a legitimate interest in informing a whistleblower of the outcome of an investigation into their concerns.

53. The Commissioner has had sight of the executive summary as provided to the complainant, and observes that it concludes that the investigators were unable to substantiate any of the complaints made. The executive summary does however set out a number of recommendations, which have been provided to the complainant.

54. Neither the complainant nor the University identified any wider public interest in disclosing the requested information, although the complainant stated that:

"The public interest attached to whistleblowing clearly favours disclosing as much of the contents of these documents as possible."

55. The Commissioner understands that the whistleblowing complaint concerned the way the University dealt with one student in a case of alleged misconduct. The Commissioner therefore acknowledges that the complainant has a legitimate interest in accessing information relevant to his whistleblowing complaint, and that the legitimate interest test is met on this basis. However, having inspected the information in question the Commissioner is not persuaded that there is a wider legitimate interest in the public being informed about this particular case.

Is disclosure necessary?

56. The Commissioner has carefully considered whether disclosure of the requested information is necessary to meet the legitimate interest identified above. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
57. The Commissioner has taken into account that the legitimate interest identified relates only to the complainant in his capacity as the whistleblower in this case. The Commissioner does not consider there to be a wider societal benefit or public interest, given that the report relates to one specific matter rather than the University's conduct more generally. As indicated above, the Commissioner has inspected the requested information and considers that its disclosure would only inform the public about the particular case, as opposed to the University's processes or procedures, etc. The Commissioner is not persuaded that the circumstances of this case, or the content of the requested information, indicate that there is a wider benefit to disclosure.
58. The Commissioner has also borne in mind that the University has provided the complainant with information setting out the findings and recommendations in response to his complaint. The Commissioner is of the opinion that this disclosure, albeit that it occurred outside FOIA, is sufficient to meet the limited legitimate interest in disclosure. The Commissioner understands that the complainant is of the view that he is entitled to receive the requested information, and that disclosure may assist him in understanding why his whistleblowing complaints were not upheld. However, the Commissioner must consider whether disclosure of the information under FOIA is necessary, and he has not seen sufficient evidence to persuade him that it is in fact necessary in this case.
59. In light of the above the Commissioner finds that the necessity test is not met, therefore the University would not be able to rely on Article 6(1)(f) as a lawful basis for processing the personal data in question. It follows that disclosure of this information would not be lawful, and would contravene principle (a). For this reason the Commissioner finds that the University was entitled to rely on the exemption at section 40(2) of FOIA.

Right of appeal

60. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

61. 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.
62. 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

**Sarah O’Cathain
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SK9 5AF**