

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 September 2021

Public Authority: Council of the University of Birmingham
Address: Edgbaston
Birmingham
B15 2TT

Decision (including any steps ordered)

1. The complainant requested a copy of legal advice sought in relation to disciplinary regulations. The Council of the University of Birmingham ("the University") relied on section 40(1) of the FOIA (personal data of the requestor) to withhold the information, before later arguing that it was also exempt under section 42 of the FOIA (Legal Professional Privilege).
2. The Commissioner's decision is that the University was only entitled to rely on section 40(1) of the FOIA to withhold some of the requested information. However, the remaining information engages section 42 and the public interest favours maintaining the exemption. As the University failed to respond to elements of the request, that were not seeking personal data, under FOIA within 20 working days, it therefore breached section 17 of the FOIA.
3. The Commissioner does not require further steps.

Background

4. Prior to making his request, the complainant had submitted a formal complaint to the University. The complaint contained two main strands: firstly that the University's disciplinary system "BUDS" had not been applied correctly in his case; secondly, he argued that BUDS did not comply with various pieces of legislation and was more generally unfair because it was an affront to the principles of natural justice.

5. On 29 October 2020, an officer of the University ("the Officer") responded to the complainant to inform him that his complaint had not been upheld. In that response, the Officer wrote:

"With regards your complaint as outlined above that certain Regulations are unfair, unreasonable and in breach of the University's statutory and regulatory obligations, I sought legal advice to understand the process followed in the drafting and review of said Regulations. On the basis of the information provided to me in response to my above request I am satisfied that the process followed ensures continued compliance with the University's statutory and regulatory obligations, through a robust process of review, consultation and approval."

Request and response

6. On 17 November 2020, referring to the Officer's letter of 29 October 2020, the complainant requested information of the following description:

"Please supply me with all correspondence and documentation associated with the attached document.

"In particular, please supply the 'legal advice' upon which [the Officer] claims to have relied and any other 'information' which [the Officer] says was 'provided to me in response to my above request.'"

7. The University dealt with this request as a Subject Access Request (SAR) and responded to the complainant on 17 December 2020. It provided some information but withheld the legal advice – which it claimed would engage Legal Professional Privilege (LPP).
8. On 21 January 2021, the complainant challenged the decision not to disclose this information. He also noted that he considered his original request to have been submitted under the FOIA.
9. On 1 April 2021, the University responded again. It was confident that it was correct to have dealt with the request as a SAR and maintained that the withheld information was covered by LPP. A further letter from the University's Senate Review Panel maintained that stance on 25 May 2021.
10. At this point, the Commissioner intervened and asked the University to re-consider the request under the FOIA. The University issued a fresh

response on 25 June 2021. It relied on section 40(1) (personal data of the requestor) and section 42 (LPP) of the FOIA to withhold information.

Scope of the case

11. The complainant first contacted the Commissioner on 2 February 2021 to complain about the way his request for information had been handled. He believed that the request should have been dealt with under the FOIA and that any privilege which might have attached to the correspondence had now been waived.
12. The complainant has not challenged any other aspect of the response and did not object when the Commissioner set out the intended scope of her investigation.
13. The Commissioner considers therefore considers that the scope of her investigation is to determine whether the particular legal advice is the complainant's personal data. If it is, section 40(1) of the FOIA will apply. If, to any extent, it is not the complainant's own personal data, the Commissioner will then consider whether section 42 of the FOIA applies and, if it does, where the balance of the public interest lies.

Reasons for decision

14. Section 40(1) of the 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."

15. Section 2(2) of the Data Protection Act 2018 defines personal data as:-

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

16. The Commissioner's guidance on the contents of complaint files explains that it cannot be assumed that all information contained within a complaint file will be the personal data of the person who either made or is the subject of the complaint. The guidance explains that:

"the context in which information is held, and the way it is used, can have a bearing on whether it relates to an individual and therefore whether it can be the individual's personal data. Even if information is used to inform a decision about someone, this does not necessarily mean that the information is personal data."

17. Prior to having viewed the withheld information and based purely on description, the Commissioner invited the University to reconsider whether the withheld information in its entirety remained the complainant's own personal data. In particular, she drew the University's attention to the ruling by the Court of Appeal in *Durant v Financial Services Authority* [2003] EWCA Civ 1746:

"Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject's involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person's or body's conduct that he may have instigated. In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity."

18. The University argued that the *Durant* test was too restrictive and that this approach had been modified by the High Court in *R (Kelway) v The Upper Tribunal (Administrative Appeals Chamber) & Northumbria Police* [2013] EWHC 2575 in which the Court, whilst acknowledging the *Durant* test, should also consider:

"(2) Does the data "relate" to an individual in the sense that it is "about" that individual because of its:

- (i) "Content" in referring to the identity, characteristics or behaviour of the individual?*
- (ii) "Purpose" in being used to determine or influence the way in which the individual is treated or evaluated?*
- (iii) "Result" in being likely to have an impact on the individual's rights and interests, taking into account all the circumstances surrounding the precise case (the WPO test)?*

*"(3) Are any of the 8 questions provided by the TGN are applicable?
These questions are as follows:*

- (i) Can a living individual be identified from the data or from the data and other information in the possession of, or likely to come into the possession of, the data controller?*
- (ii) Does the data 'relate to' the identifiable living individual, whether in personal or family life, or business or profession?*
- (iii) Is the data 'obviously about' a particular individual?*
- (iv) Is the data 'linked to' an individual so that it provides particular information about that individual?*
- (v) Is the data used, or is it to be used, to inform or influence actions or decisions affecting an identifiable individual?*
- (vi) Does the data have any biographical significance in relation to the individual?*
- (vii) Does the data focus or concentrate on the individual as its central theme rather than on some other person, or some object, transaction or event?*
- (viii) Does the data impact or have potential impact on an individual, whether in a personal or family or business or professional capacity (the TGN test)?*

"(4) Does the data "relate" to the individual including whether it includes an expression of opinion about the individual and/or an indication of the intention of the data controller or any other person in respect of that individual. (the DPA section 1(1) test)?"

19. The University pointed out that the withheld information in this case formed part of a broader request the complainant had made for information pertaining to the way his earlier complaint had been handled. It therefore argued that the information was:

"about his activities and the University was processing it for the purpose of determining or influencing the way in which [he] was to be treated"

20. It was not completely clear from its submission whether the University was referring to all the information within the scope of the complainant's request or the particular document being withheld in this case.
21. The withheld information comprises a memo sent to the Officer by a Legal Advisor. In broad terms, the body of that memo can be divided into two distinct parts. The first part refers to the complainant (by name) and the nature of his complaint. The second part refers to the process by which the University devises, reviews and amends its policies and internal regulations.
22. Having viewed the withheld information, the Commissioner is not persuaded that the second part of the document has sufficient connection to the complainant to make it his personal data. The information reveals nothing of any biographical significance about the complainant and does not affect his privacy in anyway. It is certainly not "obviously about" the complainant and nor does it affect his rights and freedoms in any significant sense.
23. Nor is the Commissioner sufficiently persuaded that the contents of the memo were intended to "influence" a decision affecting the complainant. The memo focuses on the University's policies. Those policies (and the processes for amending and reviewing them) are already set out. They establish a framework within which all complaints and disciplinary matters are determined, but they do not change dependent on the outcome of the complainant's complaint. Whilst the choice of matters discussed would be dictated by the grounds of complaint, the advisor's view (as to legality) would not (or, at least, should not) be determined by the grounds of complaint. Therefore the memo does not "influence" the decision.
24. The Commissioner is therefore satisfied that the final four paragraphs of the memo are not the complainant's personal data and she has therefore gone on to consider whether this information is exempt under section 42. The remainder of the document is covered by section 40(1) of the FOIA as it is the complainant's personal data.

Section 42 – Legal Professional Privilege

25. Section 42(1) of the FOIA states that:

Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

26. As the Commissioner's guidance on section 42 explains:

"The client's ability to speak freely and frankly with his or her legal adviser in order to obtain appropriate legal advice is a fundamental requirement of the English legal system. The concept of LPP protects the confidentiality of communications between a lawyer and client. This helps to ensure complete fairness in legal proceedings."

27. In *Bellamy v Information Commissioner* (EA/2005/0023), the First Tier Tribunal expanded on the types of material covered by LPP:

"In general, the notion of legal professional privilege can be described as a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communications or exchanges come into being for the purposes of preparing for litigation. A further distinction has grown up between legal advice privilege and litigation privilege. Again, in general terms, the former covers communications relating to the provision of legal advice, whereas the latter, as the term suggests, encompasses communications which might include exchanges between those parties, where the sole or dominant purpose of the communications is that they relate to any litigation which might be in contemplation, quite apart from where it is already in existence."

28. The University noted that the memo had been written by one of its legal advisors for the sole purpose of providing advice to the Officer on the legality of the University's regulations and BUDS. As the Commissioner has seen no evidence to contradict this position, she is satisfied that the document does attract LPP as it attracts legal advice privilege.
29. The complainant appeared to accept that the document may *originally* have been privileged, but he argued that, in providing the statement set out in paragraph five of this decision notice, the Officer had waived privilege. He argued that privilege could not be partially waived. Once privilege had been waived in respect of part of a document, it could no longer be claimed in relation to any of that document.
30. The Commissioner does not accept that privilege has been waived in this case. The Officer's statement does not confirm explicitly what the legal advice said. The first part of their statement merely refers to the fact that advice had been sought. The second part states:

*"On the basis of the information provided to me in response to my above request **I am satisfied that** the process followed ensures*

continued compliance with the University's statutory and regulatory obligations, through a robust process of review, consultation and approval." [emphasis added]

31. The wording of the statement makes clear that, although informed by the information provided, the Officer is giving their own opinion. It does not amount to the disclosure of even a summary of the legal advice provided – and even if it had, the Commissioner does not consider that informing a person of the overall outcome of legal advice amounts to having waived privilege over the entire contents of that advice.
32. The Commissioner is therefore satisfied that the withheld information engages section 42 of the FOIA.

Public interest test

33. Information which attracts LPP must still be disclosed under the FOIA unless the balance of the public interest favours maintaining the exemption.
34. LPP is a fundamental concept of the British legal system. A client (including a public authority) must be free to discuss sensitive and confidential matters with their legal advisor(s) without needing to be concerned that such discussions may be made public. Public authorities must also be free to seek (and legal advisors free to provide) good quality, frank legal advice to inform their decisions without being concerned that the advice might in future be turned against them.
35. Whilst the public interest factors in favour of disclosure do not need to be exceptional, because of the inherent importance of LPP, it thus follows that such factors must be considerable if they are to outweigh the strong interest in protecting the principle of LPP.
36. The Commissioner does not consider that there is any appreciable wider public interest in understanding the grounds of the complainant's complaint or the University's handling of it – although as noted above, the memo says little about either.
37. Whilst the Commissioner does recognise that there is some public interest in understanding whether the University's policies and regulations are fit for purpose, she does not consider that the withheld information adds much of significance to that debate.
38. Legal advice has no status in law. The fact that one legal advisor considers a particular course of action to be legal or illegal does not make it thus. Legality is not determined by lawyers, but by courts.

39. The advice that has been provided does not appear to be stale and the number of people who are potentially affected by its contents is not particularly large. The Commissioner does not consider that the University has in anyway mis-represented the advice contained in the withheld information.
40. Therefore, in the Commissioner's view, the public interest in disclosure of this particular information is weak – whereas there is a very strong public interest in protecting the principle of LPP. She is therefore satisfied that, in the circumstances of this case, the balance of the public interest favours maintaining the exemption.

Procedural Matters

41. Section 17(1) of the FOIA states that when a public authority wishes to withhold information or to neither confirm nor deny holding information it must:

within the time for complying with section 1(1), give the applicant a notice which—

- (a) states that fact,*
- (b) specifies the exemption in question, and*
- (c) states (if that would not otherwise be apparent) why the exemption applies.*

42. The Commissioner notes that the University did originally deal with the request as a SAR and did issue a response within the statutory time period for responding to a SAR. However, as the Commissioner has noted that part of the information within the scope of the request fell within the scope of the FOIA, the University was obliged to issue a FOIA-compliant refusal notice. As it failed to issue a refusal notice, relying on section 42, within 20 working days, the University breached section 17 of the FOIA.

Right of appeal

43. 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

44. 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.
45. 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

Roger Cawthorne
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