

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 January 2022

Public Authority: The Governing Body of
Nottingham Trent University

Address: 50 Shakespeare Street
Nottingham
NH1 4FQ

Decision (including any steps ordered)

1. The complainant has requested information associated with a specific student research project. Nottingham Trust University ('NTU') has disclosed some information and has withheld the research proposal under section 40(2) of the FOIA as it considers it to be the student's personal data.
2. The Commissioner's decision is as follows:
 - NTU is entitled to rely on section 40(2) of the FOIA to withhold the research proposal.
 - NTU breached section 10(1) and section 17(1) with regards to the timeliness of its response to the request.
3. The Commissioner does not require NTU to take any remedial steps.

Request and response

4. On 24 April 2021 the complainant wrote to NTU and requested information in the following terms:

"Please could you provide me with the following information?"

All documentation concerning the research ethics approval for the student project detailed below.

This should include the research ethics application and associated documents along with documentation evidencing the proceedings and decisions of the research ethics committee which approved the project.

Please could you also provide a list of the panel members and their roles.

The project was about "Autism and the effects different characteristics have on the diagnosis process", and it was carried out by a 3rd-year student studying "Early Years along with Special and Inclusive Education" who is called [redacted].

I have been informed that the project received favourable ethical opinion from NTU's Education Research Ethics Committee on 25 November 2020."

5. NTU responded on 19 May 2021. It disclosed some information within scope of the request. NTU withheld the responses to the ethical declaration form provided by the student named in the request under section 40(2) of the FOIA as it considered this to be that individual's personal data.
6. Following an internal review on 21 June 2021, NTU disclosed further relevant information it had identified (with personal data redacted) – an informal "Teams thread" of a committee meeting at which the student's submission was discussed. NTU confirmed it held no other information within scope of the request and that it continued to rely on section 40(2) in respect of the 'A3' form – that is, the ethical declaration form.
7. On 21 September 2021, following their complaint to the Commissioner, NTU advised the complainant that it would disclose the 'A3' form completed by the student with the name of the student redacted. On 2 December 2021, NTU disclosed this redacted A3 form and, addressing a question the complainant had raised, advised that a revised A3 form was not submitted and so it does not hold such information.
8. Finally, NTU acknowledged that it had identified further information within scope of the request – the research proposal - but advised that it considered that this information is exempt from disclosure under section 40(2).

Scope of the case

9. The complainant contacted the Commissioner on 25 June 2021 to complain about the way their request for information had been handled.
10. Having confirmed the scope of their complaint with the complainant, the Commissioner's investigation has focussed on whether NTU is entitled to withhold some of the information the complainant has requested – the research proposal - under section 40(2) of the FOIA. He has also considered the timeliness of NTU's response to the request.

Reasons for decision

Section 40 - personal information

11. The information being withheld under section 40(2) in this case is the research proposal of the student named in the request. The Trust has provided the Commissioner with a copy of the proposal.
12. 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.
13. 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 General Data Protection Regulation ('UK GDPR').
14. 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.
15. Second, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

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

Is the information personal data?

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

“any information relating to an identified or identifiable living individual”.

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. 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.
19. 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.
20. The Commissioner has reviewed the research proposal being withheld in this case. In the document the student gives an explanation of their research proposal against a series of questions, including: the study rationale; methodology; study timeline; ethics and peer feedback.
21. In its submission to the Commissioner, NTU has confirmed what it had advised the complainant; that the proposal represents the subjective state of mind (and/or intellect) of the student. It is a product of the student’s cognition as an individual, which differentiates them from all other students. The content is inextricably linked to, and is an expression of, their unique personality in an academic context, setting out their academic preferences and interests, their analyses of problems, their perception of deficiencies in current academic literature, and their individual approach to conducting their chosen research. That individuality, in NTU’s view, is the clear focus of the research proposal, which was assessed by the student’s supervisor to determine whether the student possessed the requisite academic ability to conduct a research study. The content is, therefore, quintessentially biographical, manifested in academic activity.
22. NTU goes on to say that the research proposal also includes a list of the key literature that the student has read in pursuit of their research interest. It reveals the student’s understanding of what literature is relevant to their chosen research subject, and the specific material that they have consulted. It too is inextricably linked to them as an individual. It is for these reasons that NTU concluded that the research proposal amounted to the student’s personal data.

23. The Commissioner accepts NTU's arguments and, given that the student is also named in the request and in the research proposal, the Commissioner is satisfied that the information relates to that specific student. He is satisfied that this information both relates to and identifies the student concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
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).

Would disclosure contravene principle (a)?

26. Article 5(1)(a) of the UK 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.
28. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

29. Article 6(1) of the UK 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"².

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

31. In considering the application of Article 6(1)(f) of the UK 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.
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

"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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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".

be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

34. In correspondence to the Commissioner dated 7 December 2021, and in relation to the research proposal, the complainant indicated that they were interested in the research project in question as it concerned what they categorised as “potentially vulnerable members of the public”. In the complainant’s view, research participants have the right to information about any project they agree to participate in so that they can give fully informed consent as to how their potentially sensitive personal data is used. The complainant considers that NTU may be “embarrassed” by their having drawn attention to what they consider to be NTU’s “poor research and data protection practices”.
35. In its submission to the Commissioner, NTU says it recognises that there is a public interest in ensuring that proper scrutiny of research projects is exercised by the University’s ethics committee, particularly in respect of projects that involve processing special category personal data or human subjects who may be considered to be vulnerable. It acknowledges that this interest was also being pursued by the complainant.
36. NTU considers that there is a further public interest in being accountable to those subjects who have agreed to participate in research projects. It went on to give a little more detail about how the complainant became aware of the research project.

Is disclosure necessary?

37. ‘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.
38. From their correspondence to him, it appears to the Commissioner that the complainant’s interest was initially focused on the ethical aspect of the research project – how and why the project was given ethical approval. Following disclosure of information associated with that aspect that NTU had previously withheld, the complainant’s later correspondence also discusses data protection concerns. In addition, the complainant puts forward their view that NTU does not wish to disclose the research proposal because, they say, the project was found to have been inappropriately approved and disclosing it may make NTU “look bad”.

39. NTU considers that disclosure is not necessary and would be unwarranted. It notes that the legitimate interest being pursued is the institutional ethical framework within which student research projects are permitted to proceed, and ethical oversight of students' work. That interest has been fulfilled, in NTU's view, through the information it has disclosed to the complainant, and which is published on its website, such as a guide for ethical approval for research projects. NTU confirmed that it has also investigated the complainant's concerns regarding ethical oversight and has provided the complainant with details of its findings.
40. Having reviewed the research proposal, the Commissioner is not completely convinced that disclosing it is necessary to meet what appear to be the complainant's main interests. Interests associated with ethical aspects and handling of personal data are not discussed to any degree in this particular document. And the merits or otherwise of the proposal would be difficult for anyone without the necessary background, qualifications and experience to gauge. However, for the sake of completeness and in the general interest there is in public authorities being open and accountable, the Commissioner will accept that disclosure is necessary.

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

41. It is necessary to balance the legitimate interests in disclosure against the interests or fundamental rights and freedoms of the data subject – the student in this case. 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.
42. 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.
43. In the Commissioner's view, a key issue is whether the individual concerned has 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.

44. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
45. The complainant disputes that disclosing the research proposal would cause distress to the student who prepared it. The research project was a final year dissertation at degree level. At that level, the complainant says, student work could quite possibly be published externally and, in the complainant's view, it is important that the student was aware of the "accountability of the research process". The complainant has also noted that the student is an adult.
46. In its submission to the Commissioner, NTU has said that the student possessed a reasonable expectation of privacy with regard to the various stages of their learning journey. A very important part of this journey was their research proposal, which presents the greatest academic challenge for most undergraduate students. Further, undergraduate research proposals are only seen by those academic staff assigned to supervise individual students. They are not disseminated more widely and never put into the public domain.
47. The student would, therefore, have had no expectation whatsoever that their research proposal would be the subject of public scrutiny. The spectre of such scrutiny would cause them real upset and distress, in particular considering their status as an undergraduate and their relative inexperience in drafting research proposals. That the product of their individual academic effort would also be scrutinised by those who have no academic expertise would serve only to compound their distress.
48. The student has not been asked for consent to disclose their research proposal. NTU concluded that it is not relevant to the legitimate interest being pursued in this case, which concerns institutional ethical oversight. Further, it would cause the student considerable distress to be informed that their research proposal was the subject of such discussion and would be very likely to have an adverse and inhibiting effect on the final year of their studies. This would be wholly unwarranted in the circumstances. In addition NTU has concluded an investigation into concerns the complainant had about the research project.
49. The Commissioner appreciates that the complainant has a personal interest in the research project in this case and in the withheld research proposal. However, he considers that the research proposal is of limited wider public interest and that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms.

50. The Commissioner accepts that the student would not expect their research proposal – that is, their personal data – to be placed into the public domain as the result of an FOIA request. Such a disclosure is very likely to cause that individual anxiety and distress for the reasons NTU has given. The Commissioner considers that the complainant's legitimate interests have been addressed through the information disclosed to them and through the investigation NTU conducted. He therefore considers that there is no Article 6 basis for processing and so disclosing the information would not be lawful.
51. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's view

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

Section 10 – time for compliance / Section 17 – refusal of request

53. Under section 10(1) of the FOIA, a public authority must communicate non-exempt information that it holds to an applicant promptly and within 20 working days following the date of receipt of a request.
54. Under section 17(1) of the FOIA, a public authority that is relying on an exemption to refuse to disclose information must give the applicant a refusal notice to that effect within the same timescale.
55. In this case the complainant submitted their request on 24 April 2021. NTU disclosed further relevant information on 21 June 2021 and 2 December 2021. On 2 December 2021 NTU also advised the complainant that it was refusing to disclose the research proposal that it had identified. NTU's response to the request therefore breached section 10(1) and section 17(1) of the FOIA.

Right of appeal

56. 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

57. 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.
58. 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

Cressida Woodall
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