

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 April 2024

Public Authority: University Council of the University of Warwick

Address: University Road
Coventry
CV4 7AL

Decision (including any steps ordered)

1. The complainant has requested information regarding the number of individuals with disabilities that applied for a specific course and all PhD and DPhil Courses and were successful in their application. The University of Warwick ('the University') relied on section 40(2) of FOIA (third party personal information) to withhold the information.
2. The Commissioner's decision is that the University has correctly relied on section 40(2) of FOIA to withhold the information.
3. The Commissioner does not require further steps.

Request and response

4. On 3 August 2023, the complainant wrote to the University and requested information in the following terms:

"With regard to the position(s) that my son, [name redacted], applied for :-

- How many of the applicants had disabilities?
- How many of the applicants who made it to interview had disabilities and did any of those applicants have Asperger's Syndrome?

- How many of the successful applicants had disabilities and did any of those applicants have Asperger's Syndrome?

Furthermore, relating to all positions rather than just [name redacted] application:

- How many successful applicants to all PhD and DPhil courses in all subjects in the last three years had disabilities?
- How many successful applicants to all PhD and DPhil courses in all subjects in the last three years had Asperger's Syndrome?"

5. The University responded on 19 September 2023. It provided some information within the scope of the request, but redacted figures below 5.
6. Following an internal review the University wrote to the complainant on 17 October 2023. It stated that it was maintaining its position, but explained it redacted information under section 40(2).

Scope of the case

7. The complainant contacted the Commissioner on 11 November 2023 to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of his investigation is to establish whether the public authority 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). 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').

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 FOIA cannot apply.
12. Secondly, 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.

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 does relate to the data subject(s). This is because the withheld information amounts to a small number of individual(s) (below 5) with a disability, that applied for specific courses, then were offered a placement, the number of these individual(s) who accepted the offer and then actually attended the courses over the last three years.
18. Whilst the Commissioner acknowledges that numbers below 5 may not lead to the immediate identification of a third party, he recognises that small numbers, carry a greater risk of identification than larger ones. However, that does not mean that every small number identifies any individual. Whether individuals can be identified will depend on the particular facts, such as the size of the overall dataset, the number of data points that have been requested and the information, already in the public domain, that could potentially be cross-referenced with the disclosed information. It is not sufficient for there to be only a hypothetical risk of identification. If there is no realistic route to identification, the information is not personal data, regardless of its sensitivity

19. When considering the possibility of identification, the Commissioner applies the "Motivated Intruder Test." This test starts with a hypothesis that there exists a person who wishes to identify the individuals covered by the disputed information. The person is willing to devote a considerable amount of time and resources to the process of identification. They may have some inside knowledge (i.e. information not already in the public domain) but will not resort to illegality – they are determined but not reckless. The Commissioner looks to see how such a person would go about identifying the individuals involved.
20. In this case, the Commissioner notes that it must be remembered that a disclosure under FOIA is a disclosure to the world at large. The motivated intruder in this case could simply be a pupil/staff member who were present at the interview or actually attended the same course as the data subject(s). The Commissioner considers it is possible for someone with knowledge of these disabilities and how they may present in people to work out with some accuracy who the information relates to.
21. The Commissioner is therefore satisfied that it would be possible for a motivated intruder to link the small number to an identifiable living individual who attended the specific course/interview
22. For argument's sake (and no inference should be taken from the following statement of the likely numbers and/or if the number is the same for each question), due to the low numbers, even disclosing the number of applicants with disabilities that made it to interview would encourage a motivated intruder to piece this information together with other information to work out with a level of accuracy who the information relates to. Even if that figure is not the same as the number of students that were ultimately successful, because it is a small number a motivated intruder could attach or relate that information to a student or students on the course, even if they are not completely correct. Due to the close-knit nature of the academic community, it would be possible for a motivated intruder to link any disclosure from this request to other pieces of information already available publicly or widely known within the sector itself.
23. 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 a 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.

Is the information special category data?

29. Information relating to special category data is given special status in the UK GDPR.

30. Article 9 of the UK GDPR defines ‘special category’ as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person’s sex life or sexual orientation.

31. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include special category data. He has reached this conclusion on the basis that disclosure of the requested information could lead to the identification of an individual(s) that have a diagnosed disability. A diagnosed disability such as Asperger’s Syndrome is information concerning an individual’s health. It therefore falls within the definition of health data.

32. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.

33. The Commissioner considers that the only conditions that could be relevant to a disclosure under FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.

34. The Commissioner has seen no evidence or indication that the individual or individuals concerned have specifically consented to this data being disclosed to the world in response to FOIA request or that they have deliberately made this data public.

35. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a).

The Commissioner's Decision

36. The Commissioner is satisfied that the University was entitled to withhold numbers below 5 under section 40(2), by way of section 40(3A)(a).

Right of appeal

37. 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

38. 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.
39. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Michael Lea
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