

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 29 July 2024

**Public Authority:** The Governing Body of the University of Cambridge

**Address:** The Old Schools  
Trinity Lane  
Cambridge  
CB2 1TN

#### **Decision (including any steps ordered)**

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1. The complainant has requested information from the University of Cambridge (the University) relating to a news article, and to the membership of the University Tribunal. The University has refused to confirm or deny that it holds this information under section 40(5B)(a)(i) of FOIA, as it believes that to do so would disclose personal data, and that this disclosure would contravene data protection legislation.
2. The Commissioner's decision is as follows:
  - The University is not entitled to rely on section 40(5B)(a)(i) to refuse to confirm or deny that it holds any of the information requested.
  - The University has complied with its obligations under section 16 of FOIA.
3. The Commissioner requires the University;
  - to confirm or deny if it holds any information within the scope of part 1 of the request and, if it does, to either provide that information or issue an appropriate refusal notice.
  - either provide any information it holds within the scope of part 2 of the request or issue an appropriate refusal notice.

4. The University must take these steps within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 30 October 2023, the complainant submitted the following request for information to the University:

"I request further information in relation to [name redacted] plagiarism:

1. In reference to the Financial Times article [link to Financial Times article redacted], it has been reported in the press [link to press article redacted] that a lawyer representing [name redacted] said that "the University of Cambridge has already written to the editor of the Financial Times to complain about the factual inaccuracies in their article". However, it has also been asserted in the press that "the University did not seek any correction relating to [name redacted] plagiarism", which implies that the lawyer representing [name redacted] was untruthful.

The University is asked to clarify the matter by disclosing information written on behalf of the University and sent to the Financial Times to complain about factual inaccuracies in their article.

2. I request the membership of the University Tribunal at the precise time of [name redacted] tribunal proceedings."
6. The University responded on 24 November 2023. It refused to confirm or deny whether it held this information under section 40(5B)(a)(i) of FOIA, as it believed that doing so would disclose personal data, and that the disclosure would contravene data protection legislation.
7. On 27 November 2023, the complainant requested that the University carry out an internal review of its response to the request. In particular, the complainant stated that the University routinely discloses information about its membership of the University Tribunal, and that they did not consider that confirming or denying that the information requested was held would disclose any personal data.
8. Following an internal review, the University wrote to the complainant on 21 December 2023 maintaining its original position.

## Scope of the case

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9. The complainant contacted the Commissioner on 1 February 2024 to complain about the way their request for information had been handled. Specifically, the complainant disagrees with the University's application of section 40(5B)(a)(i). The complainant also asked the Commissioner to consider whether the University had complied with its obligation to provide reasonable advice and assistance under section 16 of FOIA.
10. The Commissioner therefore considers that the scope of his investigation is to consider whether the University can rely on section 40(5B)(a)(i) of FOIA to refuse to confirm or deny that it holds the requested information. He will also consider whether the University has complied with its obligation to provide reasonable advice and assistance under section 16 of FOIA.

## Reasons for decision

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### Section 40 - personal information

11. Section 40(5B) of FOIA allows a public authority to refuse to confirm or deny that particular information is held. It will apply where the mere act of confirming or denying would itself reveal the personal data of an individual other than the requester and that revelation 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').
12. The first step for the Commissioner is to determine whether just confirming or denying that the information is held would reveal personal data as defined by the Data Protection Act 2018 ('DPA 2018'). If it would not, section 40(5B) of FOIA cannot be relied upon.
13. Secondly, and only if the Commissioner is satisfied that confirming or denying would reveal personal data, he must establish whether that revelation would breach any of the DP principles.

### Would confirmation or denial reveal personal data?

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

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

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

16. 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.
17. 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.
18. The University has argued that confirming or denying that the requested information is held would reveal whether or not a disciplinary case took place in relation to the individual named in the request.
19. In the circumstances of this case, having considered the requested information, the Commissioner is satisfied that confirming or a denying that the information is held would reveal personal data.
20. In relation to part 1 of the request, confirming or denying that the information is held would reveal whether or not the University wrote to the Financial Times about inaccuracies in an article that the individual named in the request was the subject of.
21. In relation to part 2 of the request, confirming or denying that the information is held about the membership of the University Tribunal at the time that the individual is alleged to have been subject to a disciplinary case, would reveal whether or not a disciplinary case about the individual named in the request took place.
22. However, the Commissioner is satisfied that the fact of a disciplinary case involving the individual is in the public domain.
23. In the news article referred to in the request, an official spokesperson for the University is quoted as saying that "a **panel of members of the University** has considered the issues and the matter is now concluded." [emphasis added] The individual named in the request also confirmed, in the same press article, that a "Tribunal" had considered their case. In the Commissioner's view, these public statements refer to the same process – albeit using slightly different terminology.
24. As the fact that the individual was subject to an investigation by a tribunal is public knowledge, the Commissioner is of the view that confirming whether or not the University holds information about the membership of that Tribunal would not reveal anything else about the individual beyond these facts. Therefore, it would not reveal any personal data. Consequently, the University is not entitled to rely on section 40(5B) to refuse to confirm or deny that it holds information within the scope of part 2 of the request.

25. Given that the fact of the Tribunal's existence is already public knowledge and, as pointed out by the complainant, the University publishes the current membership of its Tribunal on its website, the Commissioner considers it self-evident that the University must hold this information. The University must therefore either disclose this information or issue a refusal notice.
26. In respect of part 1, the Commissioner is satisfied that confirming or denying would reveal information that falls within the definition of 'personal data' in section 3(2) of the DPA 2018.
27. The fact that confirming or denying that information is held would reveal the personal data of an identifiable living individual does not automatically prevent the public authority from doing so. The second element of the test is to determine whether confirming or denying that the information is held would contravene any of the DP principles.
28. The most relevant DP principle in this case is the principle under article(1)(a) of the UK GDPR.

**Would confirming or denying that the information is held contravene article 5(1)(a) of the UK GDPR?**

29. 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".

30. In the case of an FOIA request, the personal data is processed when the confirmation or the denial is provided. This means that confirmation or denial can only be provided where it would be lawful, fair, and transparent to do so.
31. 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**

32. The Commissioner considers that the lawful basis most applicable is that under article 6(1)(f), which states that processing is lawful where it 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>1</sup>.

33. When considering whether Article 6(1)(f) applies to the disclosure of personal 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 confirming or denying that the information is held is necessary to meet the legitimate interest in question; and
  - iii) **Balancing test:** Whether the above interests override the interests or fundamental rights and freedoms of the data subject.
34. 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**

35. In considering any legitimate interests in confirming or denying that the information is held, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
36. 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 commercial interests as well as wider societal benefits. Interests may be compelling or trivial and still be legitimate, but trivial interests may be more easily overridden in the balancing test.
37. The University has argued that it does not consider there to be any genuine legitimate interest in confirming or denying that it holds the requested information. The University accepts that there is a legitimate interest in confirming or denying the existence of, and the disclosure of,

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<sup>1</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 UK GDPR would be contravened by the confirming or denying that the information is held 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".

more general information, such as the number of research misconduct cases that take place at the University and the broad themes of those, as could be supplied in response to a request for statistical information. However, the University does not consider this to be the type of information the complainant is interested in receiving.

38. In relation to part 1 of the request, the complainant has argued that there is no uncertainty as to whether or not there were disciplinary proceedings against the individual named in the request in relation to plagiarism. The complainant stated that this is publicly established, and it is widely known that the disciplinary proceedings took place.
39. Whilst the complainant has not expressly stated any specific legitimate interests, the Commissioner has identified some. Firstly, providing confirmation or denial would give an indication of the accuracy (or inaccuracy) of the article and the facts reported within it. Secondly, it would provide some indication of the steps the University might or might not have taken to protect an employee facing a public accusation of misconduct.
40. Finally, there is also a legitimate interest in understanding whether the individual named in the request has attempted, via their lawyer, to influence the coverage by making misleading statements about the actions the University had or had not taken in relation to the plagiarism complaint.

**Is confirming or denying that the information is held necessary to meet the legitimate interest?**

41. '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 of meeting the legitimate interest which may make confirming or denying that the information is held unnecessary. Confirming or denying that the information is held must therefore be the least intrusive means of achieving the legitimate interest in question.
42. The Commissioner is satisfied that there are no less intrusive means of achieving the legitimate interest identified in this case.

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

43. Finally, it is necessary to balance the legitimate interests in confirming or denying that the information is held against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of this on the data subject. For example, if the data subject would not reasonably expect that the public

would be told that such information was or was not held, or if confirming or denying that the information is held would cause unjustified harm, their interests or rights are likely to override any legitimate interests in confirming or denying that the information is held.

44. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that confirming or denying that the information is held may cause;
  - whether the information that would be revealed by a confirmation or a denial is already in the public domain;
  - whether the information that would be revealed by a confirmation or a denial is already known to some individuals;
  - whether the individual expressed concern about the possible confirmation or denial that the information is held; and
  - the reasonable expectations of the individual.
45. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that the public authority would not reveal whether such information was or was not held. 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 would have provided their personal data (if indeed any was provided).
46. It is also important to consider whether confirming or denying that the information is held would be likely to result in unwarranted damage or distress to that individual.
47. The University has stated that if the requested information were held, it would relate to the individual's public life in the sense that it is about them as an employee.
48. The University has stated that any parties involved in disciplinary proceedings are informed that the process is confidential.
49. The University states that it recognises that some information about the disciplinary proceedings has entered the public domain, through what it considered to be the inappropriate actions of others. However, it does not consider that it should add to the damage and distress caused by confirming or denying whether the requested information is held.



50. The University considers that confirming or denying whether the requested information is held with regard to a disciplinary case against an individual member of staff would cause wholly unnecessary and unjustified damage and distress to that member of staff, and to any individuals who were involved in the case.
51. The Commissioner considers that, on balance, the interests of the data subject are outweighed by the legitimate interest in confirming whether the requested information is held in this case.
52. The information sought in part 1 of the request relates to whether or not the University wrote to the Financial Times about any factual inaccuracies in its article about the plagiarism complaint.
53. In this case, the lawyer representing the individual named in the request wrote to a second newspaper (which was preparing to report the same allegations reported in the Financial Times) claiming that the University had written to the Financial Times about inaccuracies in the article. The full correspondence is not in the public domain, but the version of the second article that was eventually published quotes this statement.
54. The Commissioner considers that the intent of that correspondence, would have been to either prevent or substantially alter the content of the second article. The implication of the statement is that key facts within the Financial Times article were disputed and therefore should not be further reported or should only be reported with heavy caveats. There is nothing inherently improper in seeking to influence coverage. Equally, such correspondence should not be sent with a reasonable expectation that its contents will remain entirely private.
55. In these circumstances, the Commissioner does not consider that confirming or denying whether or not the University wrote to the Financial Times about any factual inaccuracies in its article reveals any significant details about the individual's private life. Nor would providing confirmation or denial that the information was held reveal anything further about the disciplinary process that is not already public knowledge.
56. The Commissioner is therefore of the view that, to the extent that the University would need to process the individual's personal data in providing confirmation or denial, that processing is unlikely to cause them unwarranted damage or distress.
57. However, providing confirmation or denial would reveal whether the University contacted the Financial Times about inaccuracies in the article – which, in turn would shed some light on the veracity of the serious allegations reported in that article. It would also reveal something about

the steps the University took to protect the individual's (and its own) reputation.

58. Finally, providing confirmation or denial would reveal whether the individual, via their lawyer, made accurate representations to the publisher of the second article. The individual was entitled to make such representations, but they were not obligated to do so, nor were they obligated to make the statement that they did. In doing so, the individual has effectively co-opted the public authority as their witness, implying that others, beside themselves, were querying the accuracy of the article. Therefore, there is a strong legitimate interest in knowing whether the public authority's evidence confirms or contradicts the individual's statement.
59. The Commissioner is therefore of the view that, on balance, the legitimate interest in knowing whether the information requested in part 1 is held outweighs the rights, freedoms and interests of the data subject in this case.
60. In view of the above, the Commissioner is satisfied that article 6(1)(f) would provide a lawful basis for processing, and that confirmation or denial that the information requested in part 1 of the request is held would therefore be lawful.
61. Even though it has been demonstrated that confirmation or denial of the requested information under FOIA would be lawful, it is still necessary to show that it would be fair and transparent under article 5(1)(a).
62. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will also be fair for the same reasons.
63. The requirement for transparency is met because, as a public authority, the University is subject to FOIA. The Commissioner has, therefore, decided that the University wrongly relied on section 40(5B) when it refused to confirm or deny whether the information requested in part 1 of the request was held.
64. The University must therefore take the steps outlined in paragraph three of this decision notice in relation to the information requested in parts 1 and 2 of the request.

### **Section 16(1) – The duty to provide advice and assistance**

65. The complainant has also requested that the Commissioner consider whether the University has complied with section 16 of FOIA to provide a requester with reasonable advice and assistance.

66. The Commissioner finds that the University knew who the requester was, that the request did not require clarification, and that the University was not relying on section 12 or section 14 to refuse the request. The Commissioner is therefore satisfied that no obligation to provide advice and assistance arose.

## **Right of appeal**

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67. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

68. 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.
69. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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