

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 September 2024

Public Authority: The Governing Body of the University of York
Address: Heslington
York YO10 5DD

Decision (including any steps ordered)

1. The Commissioner's decision is that the University of York ('the University') correctly applied section 40(2) of FOIA to the majority of the requested information associated with a previous FOIA complaint that it's withholding. The University misapplied section 40(2) to a little of the information but this information is exempt under section 40(1). The information is other people's and the complainant's personal data and disclosing it wouldn't be lawful.
2. The University's refusal notice didn't comply with section 17(1) of FOIA as it incorrectly cited section 40(2) in respect of the complainant's own personal data.
3. It's not necessary for the University to take any corrective steps.

Request and response

4. On 9 March 2024, the complainant wrote to the University and requested information in the following terms:

"All the materials you hold related to my previous FOI request, ICO reference IC-282929-F5J6."
5. The University disclosed some relevant information, and its final position is that the remaining information is exempt under section 40(2) of FOIA.

Reasons for decision

6. This reasoning is focussed on the University's application of section 40 of FOIA to some of the information the complainant requested.
7. Under section 40(1) of FOIA information is exempt from disclosure if it's the personal data of the applicant.
8. In this case, some of the information the University is withholding, such as the complainant's name and contact details, is the complainant's own personal data.
9. This information is therefore exempt under section 40(1) of FOIA and not section 40(2). It's an absolute exemption under FOIA. A public authority should go on to handle a request for an applicant's own personal data under the data protection legislation.
10. Under section 40(2) of FOIA information is exempt from disclosure if it's the personal data of an individual other than the applicant and disclosure would contravene any of the principles relating to the processing of personal data that are set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
11. The most relevant principle is Article 5(1)(a). This states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."
12. The Commissioner has first considered whether the remaining information the University is withholding can be categorised as other people's personal data.
13. Personal data is defined as information that relates to a living individual and from which the individual can be identified.
14. As indicated, the Commissioner has reviewed the information the University is withholding. He's satisfied that the remaining withheld information meets the above definition and is the personal data of other people – the 'data subjects.'
15. He's gone on to consider whether disclosure of that data would breach Article 5(1)(a) which, as above, states that personal data must be processed lawfully.
16. Personal data is processed when it's disclosed in response to a FOIA request. In order to be lawful under Article 5(1)(a), the lawful basis

under Article 6(1)(f) of the UK GDPR must apply to the processing. It must also be generally lawful.

17. Article 6(1)(f) 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”¹.

18. In order to determine whether disclosing the personal data would be lawful the Commissioner has considered three ‘tests’: the legitimate interest test, the necessity test, and the balancing test.

19. The Commissioner appreciates that the complainant has a personal interest in this information as it concerns a previous complaint they submitted to the Commissioner. However, there’s little wider public interest in the information, in the Commissioner’s view, save for disclosure demonstrating that the University is open and transparent.

20. The Commissioner has next considered whether disclosing the information would be necessary to meet the identified legitimate interests. The Commissioner considers that the interest in the University demonstrating it’s transparent has been met through its disclosure of other information the complainant requested. However, he accepts that disclosure of the specific information being withheld would be necessary to meet the complainant’s legitimate interests. This information would

¹ 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 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”.

provide a more complete picture of the University's communications about their FOIA complaint.

21. Because he's found that disclosure would be necessary, he's moved on to the third test and balanced the complainant's legitimate interests against the data subjects' rights and freedoms.
22. In doing so, it's necessary to consider the impact of disclosure. For example, if the data subjects wouldn't reasonably expect that the information would be disclosed to the public under 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.
23. 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(s).
24. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information won't 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.
25. It's also important to consider whether disclosure would be likely to result in unwarranted damage or distress to those individuals.
26. The Commissioner has considered the circumstances of the request, not detailed here, and he's satisfied that the data subjects would reasonably expect that their personal data wouldn't be disclosed to the world at large under FOIA. They haven't consented to disclosure and disclosure would therefore be likely to cause them harm and distress. The complainant is pursuing a purely private concern and unrestricted disclosure of the data subjects' personal data to the general public isn't proportionate.
27. Based on the above factors, the Commissioner has determined that there's insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there's no Article 6 basis for processing and so disclosing the information wouldn't be lawful.

28. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he doesn't need to go on to consider separately whether disclosure would be fair or transparent.
29. The Commissioner has therefore decided that the University was entitled to withhold the remaining information under section 40(2) of FOIA.

Procedural matters

30. Section 17(1) of FOIA states that a public authority's refusal notice must state what exemption is being relied on to withhold information, and why the exemption applies. In this case, the University's refusal notice incorrectly stated that it was relying on section 40(2) in respect of information that's the complainant's own personal data. Section 40(1) of FOIA is the correct exemption for such information.

Right of appeal

31. 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

32. 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.
33. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Cressida Woodall
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF