

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 July 2019

Public Authority: The Council
Address: University of Hull
Hull
HU6 7RX

Decision (including any steps ordered)

1. The complainant has made a 12 part request for information relating to the rejecting and rescinding of places on courses offered to disabled applicants.
2. The Council of the University of Hull (the University) provided information falling within the scope of parts two, three, four and 12 of the request.
3. The University explained that it does not hold information falling within the scope of parts one, eight, nine, 10 and 11 of the request.
4. The University refused to confirm nor deny whether it held the information requested in parts five, six and seven of the request by virtue of section 40(5) (personal data) of the FOIA.
5. The Commissioner's decision is that, on the balance of probabilities, the University does not hold the information requested in parts one, five, six and seven of the request. However, the Commissioner has recorded a procedural breach of section 10 of the FOIA, as the University failed to respond to the complainant's request within the statutory time limits.
6. The Commissioner does not require any further steps to be taken as a result of this decision notice.

Request and response

7. On 28 December 2017, the complainant wrote to the University via the "WhatDoTheyKnow" website and requested information in the following terms:

"I am writing to make a request for information to which I am entitled under the Freedom of Information Act 2000. Please send me:

- Why you consider it to be acceptable that you choose not to complete health assessments and use that as a reason for rescinding offers from disabled applicants (written evidence from your Head of Admissions Service, that you do so, has been obtained).*
- The percentage of applicants for entry in each of the following years: 2010, 2011, 2012 and 2017 who were disabled under the Disability Discrimination Act/ Equality Act 2010.*
- The percentage of students admitted in each of the following years: 2010, 2011, 2012 and 2017 who were disabled under the Disability Discrimination Act/ Equality Act 2010.*
- For both of the above, the percentage of the disabled applicants or disabled students whose condition or impairment was not Dyslexia.*
- The number of applicants who were rejected on the grounds of disability, for each of the following years: 2010, 2011, 2012 and 2017.*
- The number of conditional offers made that were rescinded on the grounds of disability for each of the following years: 2010, 2011, 2012 and 2017.*
- The number of unconditional offers made that were rescinded on the grounds of disability, thus preventing affected applicants from taking up their insurance offers, for each of the following years: 2010, 2011, 2012 and 2017.*
- The number of offers made that were rescinded for each of the following years: 2010, 2011, 2012 and 2017 and the reasons.*
- The Participation of Local Areas (POLAR) classification of postcodes or other measure of socioeconomic or educational disadvantage for the applicants who were rejected on the grounds of disability or who had offers rescinded on the grounds of disability, for each of the following years: 2010, 2011, 2012 and 2017.*
- The academic performance of disabled students with Dyslexia who you did admit, compared to non-disabled students for the following intakes: 2010, 2011 and 2012.*
- The academic performance of disabled students, grouped by condition and impairment if possible, who did not have Dyslexia, who you did admit, compared to non-disabled students for the following intakes: 2010, 2011 and 2012.*

- *The percentage of your employees who are disabled under the Equality Act 2010.*
8. The University responded on 12 February 2018. In response to part one of the request it stated that *"The University conducts full health assessments for applicants who have been otherwise selected for a place on certain professional training programmes to assess their fitness for practice in accordance with professional standards. Every endeavour is made to ensure that health assessments are completed in a timely manner."*
 9. It provided the percentage figure for parts two, three and 12 of the request.
 10. In response to part four of the request it stated that *"The University includes students with Dyslexia in the category 'Specific Learning Disability', which also covers learning difficulties such as dyspraxia and ADHD."*
 11. The University stated in response to parts five, six and seven of the request that *"There have been no rejections and we are not aware of any rescinded offers on the grounds of disability. The only instance where an offer be rescinded would be if someone was not cleared through medical checks that were applied to a professional programme. This would be a process worked through with Occupational Health, where all avenues of reasonable adjustments and recommendations would be considered."*
 12. The University stated that it does not hold any information falling within the scope of parts eight, nine, 10 and 11 of the request.
 13. On 15 February 2018, the complainant requested an internal review of the University's response to her information request. In particular, she raised concerns about the University's response to parts one, five, six and seven of her request.
 14. Following an internal review the University wrote to the complainant in September 2018. It stated that it did not hold the information that had been requested in part one of the request, and it neither confirmed nor denied whether it held any information in relation to parts five, six and seven of the request by virtue of section 40(5) of the FOIA.

Scope of the case

15. The complainant initially contacted the Commissioner on the 11 March 2018 to complain about the way her request for information had been handled.
16. The Commissioner wrote to the complainant on 19 April 2018 to request further information to support her complaint.
17. Upon receiving the further information from the complainant, it became apparent to the Commissioner that the University had not responded to the complainant's request for an internal review dated 15 February 2018.
18. The Commissioner therefore wrote to the University on the 3 May 2018 and requested that it issue an internal review decision as soon as was practicable and within 20 working days.
19. On 14 May 2018, the University wrote to the Commissioner attaching the internal review response sent to the complainant on 26 February 2018.
20. The Commissioner wrote to the University and the complainant on 14 May 2018 informing them that the complaint had been deemed eligible for formal consideration under section 50 of the FOIA.
21. On 24 August 2018, the Commissioner wrote to the University about its internal review response. She explained that it appeared that the complainant had made two requests for information to the University which had been allocated two separate reference numbers. One of the reference number's related to a 12 part request, and the other reference number related to a four part request. The Commissioner clarified that the complaint she was investigating related to the 12 part request. She went onto explain that the internal review response dated 26 February 2018, which the University provided to the Commissioner on the 14 May 2018, related to the four part request. The Commissioner therefore asked the University to confirm whether it had issued an internal review decision to the complainant in relation to the 12 part request and, if so, to provide the Commissioner with a copy of the response.
22. The University wrote to the Commissioner on 11 September 2018, providing a copy of the internal review decision sent to the complainant.

23. On 5 October 2018, the complainant confirmed that she would like the Commissioner to consider whether the University had responded to the request in a way that was compliant with the FOIA.
24. The Commissioner initially considered the scope of this case was to determine whether the University was correct when it said that it did not hold information in relation to part one of the request, and whether providing confirmation or denial that information within the scope of parts five, six and seven of the request was held would contravene any of the Data Protection Principles.
25. However, during the Commissioner's investigation the University advised the Commissioner that it did not necessarily hold the information requested in parts five, six and seven of the request. The University explained that because the complainant advised in her internal review request that the University did hold the information, it therefore now held that data. The Commissioner understands that this was the reason that the University changed its position from no information held in relation to parts five, six and seven of the request, to neither confirming nor denying whether information was held.
26. The Commissioner reminded the University that when public authorities are responding to an FOIA request, the request only covers the recorded information held at the time of receiving the request. Therefore, the University needed to consider whether it held the requested information at the time of receiving the complainant's request on 28 December 2017, not whether it held it at the time of receiving the complainant's request for internal review.
27. With regards to section 40(5) of the FOIA, the Commissioner explained to the University that when a public authority receives a request for information under FOIA, it normally has a duty under section 1(1)(a) of the FOIA to tell the requester whether it holds the information. This is called "the duty to confirm or deny". However, in certain circumstances, this duty does not apply and the public authority is not obliged to say whether or not it holds the information; instead, it can give a "neither confirm nor deny" response.
28. Section 40(5) of FOIA sets out the conditions under which a public authority can give a "neither confirm nor deny" response where the information requested is, or would be, personal data. It includes provisions relating to both personal data about the requester and personal data about other people.
29. If the information would constitute personal data relating to the requester, then the public authority does not have to confirm or deny whether it holds it under section 40(5)(a).

30. If the information would constitute personal data relating to someone other than the requester, then the public authority does not have to confirm or deny whether it holds it if one of the conditions in section 40(5)(b)(i) or (ii) applies.
31. Consideration of section 40(5) involves two steps: first, whether providing the confirmation or denial would itself involve the disclosure of personal data and secondly, if so, whether disclosure of that personal data would be in breach of any of the data protection principles.
32. Having reviewed the matter further, the Commissioner did not agree that section 40(5) of the FOIA applied to parts five, six and seven of the complainant's request.
33. In particular, the Commissioner did not agree that disclosing whether or not the University held the number of applicants who were rejected on the grounds of disability for the specified years, and held the number of conditional/unconditional offers made that were rescinded on the grounds of disability for the specified years was, or would be, personal data and would therefore be in breach of the Data Protection Act 1998.
34. In light of this, the Commissioner asked the University to reconsider the matter. The University revised its position from section 40(5) neither confirm nor deny to information not held.
35. The Commissioner therefore considers the scope of this case is to determine whether the University is correct when it says that it does not hold information in relation to parts one, five, six and seven of the request.

Reasons for decision

Section 1 – general right of access

36. Section 1(1) of FOIA says that an individual who asks for information from a public authority is entitled to; (a) be informed whether the authority holds the information and; (b) if the information is held, to have that information communicated to them.
37. In scenarios where there is some dispute between the amount of the information identified by a public authority, and the amount of information that a complainant believes might be held, the Commissioner – in accordance with a number of First-Tier Tribunal decisions – applies the civil standard of the balance of probabilities.

38. In this case the dispute is over what information is held in relation to parts one, five, six and seven of the request, which state:

- *"Why you consider it to be acceptable that you choose not to complete health assessments and use that as a reason for rescinding offers from disabled applicants (written evidence from your Head of Admissions Service, that you do so, has been obtained)."* (Part one);
- *"The number of applicants who were rejected on the grounds of disability, for each of the following years: 2010, 2011, 2012 and 2017."* (Part five);
- *"The number of conditional offers made that were rescinded on the grounds of disability for each of the following years: 2010, 2011, 2012 and 2017."* (Part six); and
- *"The number of unconditional offers made that were rescinded on the grounds of disability, thus preventing affected applicants from taking up their insurance offers, for each of the following years: 2010, 2011, 2012 and 2017."* (Part seven)

39. It is important to explain that the FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.

40. In its initial submission to the Commissioner, the University stated that it had *"... no way of giving any data on this as it is not something we have recorded anywhere. If any offers have to be rescinded or changed as a consequence of the professional course health assessment they are handled as an individual instance and the information kept highly confident to a very small number of staff. It would not be recorded on the systems from which data analysis is done. Any analysis through systems data would show all offers that move from an acceptance state to reject or withdrawn and that change could happen for many reasons including applicant choice to go elsewhere"*.

41. The University stated that there was no recorded information ever held relevant to the scope of the complainant's request that had subsequently been deleted or destroyed.

42. The University confirmed that it did not actually hold the information in question.

43. The Commissioner asked the University if it had something written down or a policy about the completion of health assessments and the rescinding of offers. The University confirmed that it did not have a policy in relation to this.
44. Having considered the points raised by the complainant and having reviewed the evidence she provided, the Commissioner understands why the complainant may be of the view that the University holds information falling within the scope of parts one, five, six and seven of the request.
45. The evidence provided by the complainant consists of communications the University sent to an applicant for the 2011 intake for the Advanced Diploma Nursing Programme. The University explains in these communications that it requires a health assessment as a condition of offer for entry for this programme. The University explained that it was unable to offer the applicant a position on this programme because its Occupational Health Consultant was unable to offer a health opinion based on the medical information made available to them at that time.
46. In this case, the complainant has requested information relating to the rejecting and rescinding of places on courses offered to disabled applicants.
47. The Commissioner is therefore of the view that the evidence provided by the complainant with her complaint does not demonstrate that the University refuses to complete health assessments, or rejects or rescinds offers, on the grounds of disability, and therefore holds information that falls within the scope of parts one, five, six and seven of the complainant's request.
48. Having considered the information provided by the complainant and the responses from the University, it is the Commissioner's view that, on the balance of probabilities, the University does not hold any information relevant to parts one, five, six and seven of the request.

Procedural matters

Section 10 – Time for compliance

49. Section 10(1) of the FOIA states that a public authority shall respond to information requests promptly and, in any event, no later than 20 working days from receipt.

50. The Commissioner notes that, from receipt of the request, the University took 31 working days to respond to the request for information. The Commissioner has therefore recorded a breach of section 10 of the FOIA against the University as a result.

Other matters

51. The Commissioner notes that the University's response to the internal review exceeded 40 working days. Although there is no statutory time set out in the FOIA within which public authorities must complete a review, the Commissioner takes the view that a reasonable time for completing an internal review is 20 working days from the date of the request for review, and in no case should the total time taken exceed 40 working days. The Commissioner therefore recommends that the University review the Section 45 code of practice¹.
52. The Commissioner also has concerns about the way in which the University responded to her enquiries and in particular, that the University failed to respond to the Commissioner's enquiries within any of the deadlines set by the Commissioner.
53. The Commissioner therefore recommends that the University review its handling of this request and complaint to ensure lessons are learned and improvements made.

¹ <https://ico.org.uk/media/for-organisations/documents/1624144/section-45-code-of-practice-request-handling-foia.pdf>

Right of appeal

54. 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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

55. 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.
56. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF