

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 February 2019

Public Authority: University Council
Address: University of Cambridge
The Old Schools
Trinity Lane
Cambridge
CB2 1TN

Decision (including any steps ordered)

1. The complainant has requested copies of any email discussion between April 2014 and July 2014 regarding the use of a psychometric database by a named individual, who he understands was given access to it as a researcher working at the University of Cambridge (the university). The university refused to disclose the information citing section 40(2) of the FOIA.
2. The Commissioner's decision is that the university is entitled to rely on section 40(2) of the FOIA in this case. She therefore does not require any further action to be taken.

Request and response

3. On 1 June 2018, the complainant wrote to the university and requested information in the following terms:

"I would like to get a copy of any email discussion between April 2014 and July 2014 regarding the use by [name redacted] (then employee of the University of Cambridge) of a psychometric database to which he was given access as a researcher working at the University of Cambridge. The conversation might also relate to attempts at the time, or explicit requests, to erase the logs associated to [name redacted]'s use of that database.

Note that my request is not limited to discussions that would have involved [name redacted]. Indeed it is wider than that, but I am limiting my request (for the sake of costs) to any conversation having involved at least two of the following parties:

- [named redacted] himself, acting either as a co-founder of a private entity called [company name redacted] or as an employee of the University of Cambridge;
- [name redacted], similarly acting either as a co-founder of a private entity called [company name redacted] or as an employee of the University of Cambridge;
- [name redacted] or [name redacted], acting either as employees of the University of Cambridge or individual rights holders to intellectual property;
- [name redacted] as Director of the Psychometrics Centre.

For the purpose of this request, and the sake of costs, I exclude any conversation having involved [name redacted] and [name redacted] only."

4. The university responded on 28 June 2018. It refused to disclose the requested information citing section 40(3A)(a) of the FOIA.
5. The complainant requested an internal review on 28 June 2018. He stated that with regards to [name redacted] and [name redacted] it would not be unfair to disclose the requested information as they are public figures. With regards to the other persons named in the request, the complainant questioned why their roles and identities could not be sufficiently obscured to prevent them being identified.
6. The university carried out an internal review and notified the complainant of its findings on 26 July 2018. It remained of the view that the requested information is exempt from disclosure under section 40(3A)(a) of the FOIA. It informed the complainant that in this case redaction was not possible.

Scope of the case

7. The complainant contacted the Commissioner on 26 July 2018 to complain about the way his request for information had been handled.

8. The Commissioner's investigation has focussed on whether the withheld information is exempt from disclosure under section 40(2) of the FOIA by way of section 40(3A)(a) as the university has claimed.
9. As the request was received and dealt with after 25 May 2018, the date the new Data Protection Act 2018 (DPA 2018) and General Data Protection Regulation (GDPR) legislation came into force, the Commissioner considers that the DPA 2018 applies.

Reasons for decision

10. 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(3) or 40(4) is satisfied.
11. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where disclosure of information to any member of the public would contravene any of the principles relating to the processing of personal data set out in Article 5 of the GDPR ('the DP principles').
12. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA 2018. If it is not personal data then section 40 FOIA cannot apply.
13. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA 2018.

Is the information personal data?

14. Section 3(2) of the DPA 2018 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. 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

¹ As amended by Schedule 19 Paragraph 58(3) of the Data Protection Act 2018

more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual. 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.

16. The university argued that unlike much internal correspondence held by a public authority, the events under discussion in the information have been the subject of widespread media and regulatory attention, including from the ICO. Details about these events and the specific individuals involved are publicly available in online fora such as newspapers, blogs and reports from regulators including the ICO. It stated that coupled with the standard online profiles maintained by the individual academics involved, it would be very easy for an interested and motivated observer (such as the complainant himself, who named the individuals in question and so is aware of their identities) to ascertain both who is corresponding at any one time and who they are corresponding about, even if the information was redacted to remove the most obviously identifying features such as names, job titles and contact details.
17. The Commissioner has reviewed the withheld information and she is satisfied that it constitutes 'personal data' as set out in section 3(2) of the DPA 2018. There is the obvious personal data, such as the data subjects' names and contact details, from which they can be easily identified. In respect of the contents, due to the events under discussion, the topics discussed, the online profiles those involved have, the widespread media coverage and regulatory investigation being undertaken by the Commissioner herself, the Commissioner is satisfied that it would be possible to identify the data subjects' concerned from the contents of the withheld information and other information otherwise available.
18. Due to the fact that the personal data of the data subjects is intrinsically linked, the Commissioner agrees with the university that it would not be possible to sufficiently anonymise the withheld information in order to allow disclosure.
19. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the data protection principles.
20. The most relevant data protection principle in this case is principle (a).

Would disclosure contravene principle (a)?

21. Article 5(1)(a) GDPR states that:-

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

22. In the case of an FOI 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.

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

Lawful processing: Article 6(1)(f) GDPR

24. Article 6(1) of the 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.

25. The Commissioner considers that the lawful basis most applicable is basis (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:-

"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 GDPR would be contravened by the disclosure of information, Article 6(1) of the 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".

26. In considering the application of Article 6(1)(f) GDPR in the context of a request for 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 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.
27. 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

28. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
29. 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
30. The university stated that it understands the complainant is pursuing a legitimate interest in making enquiries about matters that have received widespread media and regulatory attention and that disclosure would promote overall openness, transparency and accountability.
31. The complainant himself also made reference to the significant public interest in the disclosure of the requested information in light of the recent media coverage and the ongoing investigation being conducted by the ICO. He made reference to some of those named in the request being public figures.
32. The Commissioner accepts that there is a legitimate interest in the disclosure of the requested information, especially as the events described have attracted significant press coverage and relate to an ongoing investigation the Commissioner is conducting herself. Disclosure would promote openness and transparency and provide the public with more insight into the matters under investigation.

Is disclosure necessary?

33. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
34. The university has said that it does not consider it is necessary to disclose the requested information in order to aid public debate. It is of the opinion that the significant media coverage and the information already available to the public is sufficient to further public debate.
35. The Commissioner considers the information already publicly available does go some way to meeting the legitimate interests identified. However, in this case the Commissioner accepts that disclosure would further public debate and give the public more insight into the issues currently being investigated and is therefore necessary to fully address and meet the legitimate interests identified. She does not consider there are any alternative measures which may make disclosure of the requested information unnecessary.

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

36. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not 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 the legitimate interests in disclosure.
37. 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.

38. In the Commissioner's view, a key issue is whether the individuals concerned have 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.
39. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
40. The university said that the withheld information relates to the data subjects' broadly defined professional lives, though it does not regard this as equating to "their work as a public official or employee", both because of the precise information in scope and because of the relative peculiarities of universities as public authorities under the FOIA given their wide range of non public and non publicly funded activities. It explained that in much of the withheld information, the data subjects were not acting as university employees but instead as private individuals pursuing their outside business interests. The university confirmed that others were involved in the correspondence (the withheld information) in their capacities as university employees pursuing or managing their individual research interests, rather than as "officials" running the university.
41. The university went on to say that all staff are informed of the uses that will be made of their personal data as an employee in relevant privacy notices. These notices do not include the disclosure of their personal or professional correspondence to a member of the public. It stated that no employee (other than those at very senior managerial levels in the central university) would reasonably anticipate this to occur. It confirmed that some of the individuals have consented to the information being disclosed but others have not. Because redaction is not possible in this instance due to the personal data being intrinsically linked, the university does not consider that disclosure can fairly and lawfully take place without the consent from all parties named in the request.
42. The university advised that disclosure would cause unnecessary further distress to the individuals involved, who have already been placed under significant strain by the intensive media interest of their actions. It stated that whilst it has accepted that the complainant is pursuing a legitimate interest in seeking the disclosure of the withheld information, in this case, it does not consider such interest overrides the rights and freedoms of the data subjects concerned.
43. The Commissioner notes that some of those named in the request have consented to disclosure. But equally she acknowledges that some of

those named have not. She has already agreed with the university that redaction is not possible in this instance due to the personal data of those involved being intrinsically linked. She therefore has to consider what the reasonable expectations are of those that have not consented and what adverse effects disclosure would cause.

44. The Commissioner notes that it is the general expectation of staff at the university that their personal data will remain private and confidential and not be disclosed to the world at large. In this particular case, considering the data subjects involved and the contents of the withheld information, the Commissioner considers such expectations are reasonable and in accordance with university's policy on privacy and Data Protection. The Commissioner accepts that disclosure would cause those involved further distress and upset, considering the extensive press coverage they have already received for their actions and the ongoing regulatory investigation.
45. The Commissioner also notes that the university has said that much of the correspondence relates to the data subjects acting in a private capacity rather than as officials of the university, whether for their own private business needs or research. She considers in this instance the withheld information attracts more protection and rights to privacy and confidentiality.
46. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms and that the disclosure of the information would not be lawful.
47. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair and transparent.
48. The Commissioner has therefore decided that the university was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Right of appeal

49. 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

50. 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.
51. 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

Mrs Pamela Clements
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