

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 23 March 2016

**Public Authority:** Office for Fair Access  
**Address:** Nicholson House  
Lime Kiln Close  
Stoke Gifford  
Bristol  
BS34 8SR

#### Decision (including any steps ordered)

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1. The complainant has requested from the Office for Fair Access ('OFFA') information relating to the educational background of its Director, Assistant Director and other members of the Senior Management Team (SMT). OFFA disclosed information to parts of the request and applied section 40(2) of the FOIA to the remaining parts.
2. The Commissioner's decision is that OFFA has correctly applied the exemption for personal data at section 40(2) to parts of the request. Therefore the Commissioner does not require OFFA to take any steps.

#### Request and response

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3. On 16 July 2015 the complainant wrote to OFFA and requested information in the following terms:

*"Firstly I would like to understand the background and in particular the education background of the directors / senior management team of the "Office for Fair Access". To explain the reason for this request I would like to understand this, as you are the "gate keepers" for "Fair access" so I would like to understand from what backgrounds the people making the decisions come from?"*

*My second question relates to the mix of students at the traditional Oxford and Cambridge universities (Not the old Polytechnics and Higher education colleges that have been converted to universities). I do not*

*believe the mix of students at these institutions reflects the mix in society. In particular, the disproportionate number of students who have previously attended private (fee paying) schools. By default apart from the odd few students who have gained a bursary or similar funding this would suggest the student mix at these institutions is skewed towards a particular socio-economic grouping. This would seem to go against the aims of your organisation? So can you please tell me what you are doing about this?*

*Obviously I could be wrong as I do not have detailed statistics in front of me. So if I am, please just let me have this information as it will in effect answer my second question. Some sort of comparison of the mix of students compared to society in general would do."*

4. On 30 July 2015 OFFA responded. It provided information to the first part of the request and asked the complainant to clarify the second part of his request.
5. On 3 August 2015 the complainant argued that OFFA had not supplied information to the first part of the request and he clarified his request for both parts.
6. On 20 August 2015 OFFA provided information relating to OFFA's Director and applied section 40(2) of the FOIA to the information relating to the educational background of its Assistant Director and other SMT members.
7. The complainant expressed his dissatisfaction with the response and OFFA interpreted this as a request for an internal review.
8. Following an internal review OFFA wrote to the complainant on 17 September 2015. OFFA stated that it would provide information to part of the request and it maintained its decision to uphold section 40(2) to the remaining parts of the request.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 17 September 2015 to complain about the way his request for information had been handled.
10. The Commissioner considers the scope of the case is to determine whether OFFA was correct to apply section 40(2) of the FOIA to the requested information.

## Reasons for decision

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### Section 40(2) – personal information

11. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the Act would breach any of the data protection principles or section 10 of the Data Protection Act 1998 (the “DPA”).
12. In order to rely on the exemption provided by section 40(2), the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

*“personal data”* means data which relate to a living individual who can be identified –

  - (a) from those data, or
  - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”
13. 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 data protection principles under the DPA. The Commissioner notes in this case that, OFFA considers that disclosure would breach the first data protection principle.
14. OFFA considers that section 40(2) of the FOIA applies to the entirety of the information by virtue of section 40(3)(i) and that the information is personal data of the individuals.

### Would disclosure breach the data protection principles?

15. The data protection principles are set out in schedule 1 of the DPA. The Commissioner considers that the first data protection principle is most relevant in this case. The first principle states that personal data should only be disclosed in fair and lawful circumstances, the conditions of which are set out in schedule 2 of the DPA.
16. The Commissioner’s considerations below have focused on the issues of fairness in relation to the first principle. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of

the data subject and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

### **Anonymising the information**

17. OFFA considered the potential for disclosing information relating to the educational backgrounds of the SMT in an anonymised form. However, OFFA is of the view that given the small number of individuals in the SMT it would not be possible for this information to be fully anonymised. It said that providing statistical information may lead to an unbalanced statistical bias as one if only one member of the SMT attended a fee paying school there would be 20% attendance.

### **OFFA's position**

18. OFFA argued that it would be unfair to disclose full details of what educational background information it held relating to SMT members. OFFA said that the decision not to provide the information was made as the educational background was obtained as part of the recruitment process and staff would not expect it to be shared outside this process.
19. OFFA upholds the use of section 40 of the FOIA as it considered releasing the requested information would breach Principles 1 and 2 of the Data Protection Act 1998.
20. OFFA said that the details of the SMT's secondary school, university and degree relates to their private life. OFFA is of the view that the secondary school attended would have been determined by someone with parental responsibility and the university attendance was not funded by OFFA.
21. In reference to the part of the request relating to individual's attendance at schools, OFFA argued that the individuals would have had limited ability to influence as they were children at the time. OFFA considered it to be unfair to disclose this private information due to both the time elapsed and the fact that as the individuals were children, decisions about their education were made for them and this does not have a bearing on their ability to perform their current job roles.
22. It explained that within OFFA the decision making powers in relation to regulating fair access to higher education are invested in the Director. It said that it is the Director who approves access agreements, which is how Fair Access is monitored, in accordance with the Higher Education Act 2004 sections 32 and 34.
23. OFFA stated that it is a small organisation of less than 25 people and the SMT do not act in the same way as a management board of a larger organisation. OFFA considered it fair, under the DPA, to disclose

information relating to the educational background of the Director and the Assistant Director as they represent where decisions are made and the public face of OFFA.

24. However, OFFA would not consider it fair to disclose the same information for the rest of the SMT as they do not perform the same decision make functions in relation to approving and regulating fair access to higher education.
25. OFFA argued that the release of the educational background of its SMT would be unfair as this is information that relates to activities they performed within a personal capacity. OFFA stated that the information was provided within the context of recruitment activities and there has never been any expectation by the individuals that this information would be used or disclosed for purposes outside of their recruitment or other personnel management activities.
26. OFFA said that the attendance at any specific school or university is not a requirement for OFFA SMT positions but it does ask for a degree or similar qualification where further education is a requirement of the post.
27. OFFA reported that an individual's previous work experience is considered when OFFA decides on the suitability for an appointment to one of the SMT roles. It explained that formal education may have finished several years ago and OFFA believes that attendance at previous education is not relevant to the SMT's ability to conduct work within OFFA's remit of promoting and safeguarding fair access to higher education in England.

### **The consequences of disclosure**

28. OFFA is of the view that the requested information could provide an unfair representation of individual members of its SMT and that it could lead to mistaken assumption about the social background of individuals concerned. It said particularly given OFFA's status as regulator of fair access to higher education.
29. It added that as OFFA does not hold the contextual information to provide the full social status of individuals, so to comply with the request without providing additional background information could give misleading representation of individual members of the SMT. Therefore, OFFA had not placed this information in the public domain.

### **Reasonable expectations of the individual**

30. When considering whether the disclosure of personal data is fair, it is important to take account of whether the disclosure would be within the

reasonable expectations of the data subject. However, their expectations do not necessarily determine the issue of whether the disclosure would be fair. Public authorities need to decide objectively what would be a reasonable expectation in the circumstances.

31. OFFA argued that the expectation from individual members of staff is that personal data would be used only for personnel management purposes by OFFA and HEFCE (the Higher Education Council for England). OFFA explained that HEFCE manage its personnel information through a service level agreement and that the guidance provided to HEFCE staff about the management of their personal data is also applicable to OFFA.
32. OFFA added that the guidance provided to staff makes it clear that personal data will be used only for purposes in line with managing personnel activities, which would include sharing relevant details with the pension provider.
33. OFFA said that it had not asked individual members of staff whether they would be willing to consent to their personal data being disclosed. However, OFFA reported that all members of the SMT are aware of this request for their personal information and said that some of them expressed concern about this information being made publicly available. It also said that there were no members of staff willing for this information to be disclosed.
34. OFFA stated that the individuals in the SMT would have a clear expectation of their personal data remaining confidential. It argued that there was limited public interest in disclosing the information and that there was no reason for requesting disclosure.

### **The complainant's position**

35. The complainant argued against OFFA's application of section 40 to his request as he considered his questions to be reasonable. He said that he would like to understand the background of the people who are in charge of trying to deliver/develop the OFFA strategy.
36. The complainant is of the view that it is a public interest to know the educational background of the people who manage OFFA and he believed it to be important to understand what background they are from.
37. The complainant does not consider the information requested (attendance at a public run university) to be private information. He said that the results of degrees are published and are public knowledge.



38. The complainant rejects OFFA's argument that it would be unfair to disclose the information as the individuals would have had limited ability to influence as they were children at the time. He also rejects OFFA's view that decisions about the individual's education were made for them.
39. The complainant stated that *"a large part of what makes us adults is the environment that we have been brought up in / educated in so this is relevant to my underlying question."* He argued that when he went to university, it was *his* decision and not his parents, and he did not understand OFFA's reference to being a child or how it can be relevant.
40. In reference to OFFA's argument that the SMT do not perform the same decision making functions in approving and regulating fair access to higher education, the complainant contended this and he questioned the role of the SMT.
41. The complainant argued that this public authority is the office for fair access to higher education and he considers it to be relevant to the public interest on who manages it. The complainant said that he would expect an organisation *not* focused on fair access to higher education, to have its own education background remain private. Therefore, he considers the understanding of the background of this group of senior managers is relevant and wholly of the public interest.
42. The complainant accepts that junior members of staff would expect their personal details to remain private and argued that the SMT are not junior members of staff and that the information should be disclosed. The complainant stated that all university results are published in national papers when they are achieved and that they are already public. He therefore considers that most of the information requested is not private.
43. The complainant said that he was not asking for information about results which the SMT had achieved but for information regarding the establishments in which they had attended. He added that neither was he requesting the information to be linked to the individual's names.

**Balancing the rights and freedoms of the individuals with the legitimate interests in disclosure**

44. There is always some legitimate public interest in the disclosure of any information held by public authorities. This is because disclosure of information helps to promote transparency and accountability amongst public authorities. This in turn may assist members of the public in understanding decisions taken by public authorities and perhaps even to participate more in decision making processes.

45. The Commissioner considers that the public's legitimate interests must be weighed against any prejudice to the rights of freedoms and legitimate interests of the individuals concerned. The Commissioner has considered whether there is a legitimate interest in the public (as opposed to the private interest of the complainant) accessing the withheld information.
46. OFFA considers that there is a public interest in understanding the social background of the people making decisions on promoting and safeguarding Fair Access to higher education. It also considers there to be a public interest in understanding the decisions and views of people making decisions on promoting and safeguarding access to higher education. However, OFFA stated that it does not believe that the social background and the educational background would be derived from the same set of information.
47. OFFA argued that the educational background would give some insight into the social background but the interpretation may be incorrect without additional information and therefore could be misleading to the public. OFFA considers there to be limited public interest in the disclosure of the educational background of SMT members.
48. OFFA stated that it publishes a register of interests for the Director for Fair Access. It considers that on balance it would be an unfair intrusion into the private affairs of members of OFFA's SMT to disclose *their* educational background, especially as it believes there is limited public interest in the disclosure of this information.
49. During the investigation, OFFA had been asked to clarify the role of its SMT and how it differs from a management board of a larger organisation. It explained that in OFFA the functions of a management board are that the Director acts as both CEO and Corporate Sole, although some decision making may be delegated to the Assistant Director.
50. OFFA further explained that the SMT acts more like an Executive Management Team in that it has oversight of the operational management and the daily workings of OFFA. It is responsible for the development and implementation of business plans, policies, procedures and budgets.
51. OFFA provided an example of how this works and said:

*“...in the approval of Access Agreements which are the mechanism used by OFFA to regulate Higher Education Institutions charging above the £6000 threshold. The agreements are developed by institutions in discussion with OFFA staff. Final approval of each institution's Access*



*Agreement sits with the Director, although the decision will be informed by OFFA staff."*

### **The Commissioner's position**

52. The Commissioner accepts that there is legitimate interest in OFFA demonstrating transparency in how it makes decisions and publishes biographical information relating to the Director and Assistant Director. It is clear that OFFA has already disclosed information about these individuals.
53. There is a legitimate interest in the education background of the people responsible for approving and regulating fair access to higher education. The Commissioner therefore considers there is a strong argument in support of the disclosure of the education background of OFFA's SMT.
54. However, in this case the Commissioner is of the view that the individuals in question would have no expectation that details of their education background and the establishment in which they studied would be made public. He considers that the release of this information would be an invasion of privacy and, as such, prejudice the rights of the individuals concerned.
55. The Commissioner has considered OFFA's arguments and has viewed the withheld information. He is therefore satisfied that providing the education background of the SMT at OFFA would be unwarranted by reason of prejudice to the rights, freedoms and legitimate interests of the individuals. The Commissioner considers the public interest in disclosure does not outweigh the interests of the individuals concerned.
56. In view of the above, the Commissioner is satisfied that OFFA is correct to withhold the requested information under section 40(2) of the FOIA.

## Right of appeal

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57. 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](mailto:GRC@hmcts.gsi.gov.uk)

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

58. 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.
59. 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** .....

**Chris Hogan**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**