

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 June 2017

Public Authority: University of Leeds
Address: Woodhouse Lane
Leeds
LS2 9JT

Decision (including any steps ordered)

1. The complainant has requested the university to provide any recorded information it holds which will confirm whether any disciplinary action was taken against a member of staff in 2006 and if not, why not. The university responded advising the complainant that it does not hold any recorded information of this nature.
2. The Commissioner's decision is that the university does not hold any recorded information falling within the scope of the complainant's request. However, the university failed to respond to the request within 20 working days and therefore breached section 10 of the FOIA.
3. The Commissioner does not require any further action to be taken.

Request and response

4. On 10 October 2016, the complainant wrote to the university and requested information in the following terms:

“(i) Did the University of Leeds take any disciplinary proceedings against [name redacted] for making these remarks?

(ii) If the University of Leeds did take disciplinary proceedings against [name redacted] what were they?

(iii) If the University of Leeds did not take disciplinary proceedings against [name redacted], please set out your reasons for this inaction.”

For context, the request relates to some remarks made about the complainant in an education supplement in 2006.

5. As this was the second request made to the university and the complainant felt he had not received the answers to the questions he had asked, he referred the matter to the Commissioner straight away; on 11 October 2016.
6. The case was allocated to a case officer in December 2016 and as it was noted that the complainant had not received a response, the Commissioner contacted the university on 12 December 2016 to request that a response is issued within 10 working days.
7. The university responded on 13 January 2017. It apologised that it had not responded sooner and stated that this was partially due to the fact that it had responded to the same request back in May 2016. The university confirmed that its response to this second request is the same; it does not hold any recorded information falling within the scope of the questions asked.
8. The complainant requested an internal review and this was completed by the university on 28 February 2017. It stated again that it does not hold any recorded information falling within the scope of the complainant's request.

Scope of the case

9. The complainant contacted the Commissioner again on 28 February 2017 to complain about the way his request for information had been handled. He stated that he requires a direct and explicit answer to question three of his request, which is worded as follows:

"If the University of Leeds did not take disciplinary proceedings against [name redacted], please set out your reasons for this inaction."
10. At the beginning of the investigation the Commissioner outlined the limitations of the FOIA to the complainant where specific and direct questions have been asked. She explained to the complainant (and wishes to remind him again now) that the FOIA provides a right to request access to recorded information held by a public authority. This does not extend to the right to request specific answers to questions or for explanations to be provided *unless* the answers to those questions or the explanations requested are already held by that public authority in recorded form.

11. If the public authority does not hold the answer to a specific question or explanation requested in recorded form, the Commissioner cannot compel it to provide this information to the complainant. This would be creating new information in order to comply with the FOIA and there is no requirement to do that. In these situations, the Commissioner is limited to considering the *scope* of the request and whether the public authority holds any recorded information that is within scope and could provide the answer or explanation requested.
12. The university has informed the complainant that it does not hold any recorded information falling within the scope of question three of the request. As the Commissioner has explained above, she now needs to consider whether, on the balance of probabilities, this statement satisfies the university's obligations under the FOIA.

Reasons for decision

13. The Commissioner has made detailed enquiries to the university to establish exactly what searches it has carried out and where the requested information would be held, if indeed it is.
14. The university explained that it does not hold any recorded information which would provide an answer to question three of the request. It explained that it has searched thoroughly the following information that it does hold but none of these records include any information about whether or not disciplinary action was taken or any information falling within the scope of question three of the request:
 - [name redacted]'s HR file.
 - The digital and paper records of the University Secretary (who has oversight of staff disciplinary cases and was in post during 2006).
 - The digital and paper records of the current Director of HR (who was not in post in 2006).
 - The digital and paper records of the University Legal Adviser (who was in post in 2006).
15. The university also confirmed that it would have consulted the records of the Dean of [name redacted]'s faculty, who would have had a formal role in any disciplinary proceedings (if indeed any took place) and the Director of HR at the time. However, this was not possible because both individuals left the university some years ago and their paper records have not been retained and, in line with the university's policy, their emails accounts have been wiped.

16. It stated that, in any case, its searches would have been limited as the searches of the Secretary's and Legal Adviser's records were limited by the fact that university emails can only be accessed back to 2008.
17. The university advised that it cannot draw any inference from this lack of information. Over 10 years has elapsed since the events in 2006 and it is not unreasonable to assume that people and organisations will "weed out" their files and correspondence from time to time. Furthermore, the university explained that it is not its policy to keep information relating to disciplinary action indefinitely. As set out in its statutes, oral warnings are considered spent after one year, written warnings after two subject to satisfactory conduct and performance during the intervening period. Therefore, the university cannot answer the question, as it does not hold any recorded information which discusses the matter, whether or not disciplinary action was taken and if not why not.
18. The Commissioner referred these submissions to the complainant and asked him to consider withdrawing his complaint.
19. The complainant responded, stating that he was unwilling to do so and believes for a number of reasons that the university will hold recorded information from which the answer to question three of his request can be extracted. He also stated again that he requires "an explicit admission from the University that it did not take any action against [name redacted] – hence why there is nothing in recorded form – and then an explanation why no action was taken in 2006".
20. Again, the Commissioner wishes to highlight the limitations of the FOIA (as explained in paragraphs 10 to 12 above) and the reasons why she cannot compel the university to provide the explicit admission and explanations that the complainant requires. This is not within the Commissioner's remit.
21. The Commissioner did however consider further the different reasons the complainant provided for believing that the university does hold recorded information falling within the scope of this question and she put these further comments to the university.
22. Specifically, the complainant stated that he believes the university's response that it does not hold the information requested in recorded form, specifically whether any disciplinary action was ever taken against [name redacted], is implausible. He commented that if any disciplinary action was taken against [name redacted] information concerning the measures taken and whether that individual or their union challenged any such action would be in their personal file. He stated that the university's continual response that it does not hold any recorded

information is merely another way of saying that no disciplinary action was taken against [name redacted] without admitting it and explaining why.

23. He stated that the Secretary was in post in 2006 and was well aware of [name redacted] remarks about him. He stated that "it is not demanding too much human memory to expect" the Secretary and others who were in post in 2006 to explain why no action was taken against [named redacted].
24. The complainant also confirmed that events in 2006 attracted a great deal of national coverage and much of it, in his opinion, was "orchestrated" by the university. Given the scale of publicity and the fact that solicitors were employed by both parties, the complainant considers it is "utterly implausible" that any material pertaining to this matter would have been destroyed. He stated that such material will be retained in perpetuity for two reasons. First, legal considerations would mandate that all information be retained well beyond 10 years, possibly for at least 50 years or longer. Not to have retained this information would put the university in a very difficult position in certain circumstances. Second, the complainant confirmed that "what befell [him] at Leeds was, and will remain, a part of the history of Leeds University and information pertaining to that episode will not or cannot be just destroyed after a mere 10 years." He therefore believes recorded information will exist in some format as long as the university exists.
25. In response to the university's statement that searches would have been limited as the searches of the Secretary's and Legal Adviser's records were limited by the fact that the university can only access emails back to 2008, the complainant advised that formal notification of impending disciplinary action against a faculty member would have been issued in writing - hard copy - as well as electronic format.
26. In response to the university's statement that information relating to disciplinary action is not retained indefinitely – the complainant wished to question what the university means by "indefinitely". He explained that he strongly disagrees and is of the view that any information in all formats which relates to a disciplinary matter will be retained as long as any person to whom the proceedings relate remains in post and further, and will continue to be retained even after that individual has left the university.
27. The complainant said that [named redacted]'s remarks were of such a nature that an oral *and* written warning would not have been adequate. He stated that what was required was that [name redacted] provide a full explanation for their remarks and a very public apology. He considers failure to comply should have resulted in the individual's

suspension. The complainant states that he can find no such public apology and therefore in his view this is consistent with one conclusion - that the university failed to take any action against [name redacted] and "fully approved" of [named redacted]'s remarks. He considers no other explanation is "plausible or admissible".

28. With regards to the university's submissions in relations to oral and written warnings, the complainant confirmed that just because an oral warning is considered spent after 12 months and a written warning after two years subject to satisfactory conduct and performance, does not mean that the text of the original oral and written warning will have been removed from the file. He also stated that after warnings are spent the faculty member so warned would be notified that the warning is spent in writing or verbally. In their individual file there would be a retained copy of the letter informing the faculty member that the warning issued the previous year or two was deemed spent or a note that the faculty member was informed verbally on a given date that the warning is spent. The complainant believes such information would be retained in the faculty member's file.
29. The complainant commented that if [name redacted] was ever issued a warning of any type, there will be a record in their personal file - a letter from the university to them or a note of a verbal discussion- informing them that disciplinary force of any warning issued in say 2006 was now, in 2007 or 2008, deemed to have expired. If there is not, the complainant believes the only interpretation is that the individual concerned was never issued an oral or written warning in 2006.
30. The complainant then referred to the current statutes and staff handbook and the reference to oral and written warnings. He stated that the current guidance states that oral warnings are spent after 12 months and written warnings after 2 years, but nothing is said about actual retention of recorded information relating to these and when such recorded information is destroyed. He believes the lack of reference to destruction means that the recorded information is not in fact destroyed but retained.
31. The complainant wished to question the university's use of the words "spent" for oral warnings and "disregarded" for written warnings and wishes to question what the difference is and whether either continues to have any impact of the faculty member's professional life after they are "spent" or "disregarded" - so for promotional prospects, internal and external appointments and access to funding.
32. The university considered the complainant's further submissions and informed the Commissioner that these did not alter its response to this

FOIA request. It maintains that it does not hold any recorded information falling within the scope of question three of the request.

33. It explained again that the university's Secretary was consulted about this request and both his paper and electronic records have been searched, as previously advised. The legal department was consulted too, as was the university's Legal Adviser who may have been consulted at the time. No records (both electronic and hard copy) within the scope of the request are held. It stated again that the Dean of the relevant Faculty in 2006 is no longer in post and so could not be consulted about this request.
34. The university confirmed that its 'Guidelines for Retention of Personal Data' are publicly available on its website and there is no requirement therein for the legal department or other departments to retain information about a member of staff's spent disciplinary warnings "well beyond 10 years". They can be consulted at:

http://www.leeds.ac.uk/secretariat/documents/data_protection_appendix_11.pdf.
35. In terms of the complainant's questioning of the use of the word "indefinitely", it stated that it is not sure how it can clarify this further. It stated that it was trying to indicate that disciplinary records can be removed from a file once the matter is considered "spent". As set out in the guidance (link provided above), the maximum period for retention of such records would be six years after somebody has left employment.
36. It further explained that there is no explicit requirement regarding the retention of these records, beyond the maximum retention period set out in the guidance. Senior staff can use their discretion regarding the appropriateness and necessity to retain such personal data. It advised that as set out in the accompanying Code of Practice (paragraph 15), the university discourages the unnecessary retention of personal data:

http://www.leeds.ac.uk/secretariat/data_protection_code_of_practice.html

It confirmed that this is the crux of why it simply cannot say that the absence of any records means that no action was taken or discussed and the only indisputable conclusion that can be drawn from the lack of evidence regarding either disciplinary action or discussion of disciplinary action is that the university holds no records on this matter.
37. It commented further that recorded information is held subject to current internal and external standards rather than historical guidance; it cannot continue to apply any guidance or rules that were extant in

2006 that had been superseded or supplemented by updates either to its own codes or to external requirements or legislation.

38. The Commissioner is satisfied in this case that the university has undertaken detailed and thorough searches of the records it does hold and has consulted all relevant members of staff still in post about this request. It has also explained why it holds no recorded information of the nature specified in the request and, stated, that it has tried on more than one occasion to assist the complainant with his ongoing issues relating to events from 2006. It maintains that it does not hold any recorded information falling within the scope of question three of the request due to the significant passage of time and the Commissioner does not consider that this is unreasonable.
39. For the above reasons, the Commissioner has concluded that, on the balance of probabilities, the university does not hold any recorded information falling within the scope of the request. She considers the university had met its obligations under the FOIA and no further action is therefore required.

Procedural matters

40. The Commissioner does however note that the university failed to respond to the complainant's request within 20 working days and so she has recorded a breach of section 10 of the FOIA.

Right of appeal

41. 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

42. 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.
43. 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

Samantha Coward
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