

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 July 2023

Public Authority: The Governing Body of the University of Essex
Address: Colchester Campus
Wivenhoe Park
Colchester
Essex CO4 3SQ

Decision (including any steps ordered)

1. The complainant requested information about a decision the University of Essex had made. The University of Essex ('the University') disclosed some information and withheld the remainder under sections 40(2), 41(1) and 42(1) of FOIA. These exemptions concern personal data, information provided in confidence and legal professional privilege respectively.
2. The Commissioner's decision is that the University is entitled to withhold information the complainant has requested under section 40(2) and 42(1) of FOIA.
3. It's not necessary for the University to take any corrective steps.

Request and response

4. The complainant submitted an information request to the University on 2 February 2023. The request concerned the reasoning behind a specific decision the University had made. So as to avoid identifying the complainant, the Commissioner will not reproduce the request in this notice.

5. The University disclosed some information with personal data redacted under section 40(2) of FOIA. It withheld the remainder of the information it holds under sections 40(2), 41(1) and 42(1) of FOIA.

Reasons for decision

6. This reasoning focuses on the University's reliance on sections 40(2) and 42(1) of FOIA to withhold information within scope of the complainant's request. The Commissioner will consider the University's application of section 41(1) if necessary. The University has provided the Commissioner with a copy of the information it's withholding.

Section 40 – personal data

7. The University is withholding the following information under section 40(2) of FOIA:
 - Information in the email correspondence it disclosed – a document named 'Appendix 2' in the University's submission to the Commissioner.
 - Information in material named 'Appendix 3' in the University's submission. The University has also applied section 41 and 42 to this particular information in its entirety.
8. Under section 40(2), information is exempt from disclosure if it's the personal information of someone other than the requester and a condition under section 40(3A) is satisfied.
9. In this case the relevant condition is contained in section 40(3A)(a). This applies where disclosing the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation (GDPR).
10. First, the Commissioner must determine whether the withheld information is personal information as defined by the Data Protection Act 2018. If it's not personal information, then section 40(2) of FOIA can't apply.
11. The Commissioner is satisfied here that the information to which the University has applied section 40(2) is personal information. Being names, contact information and other identifying contextual information, it relates to other people who could be identified from it.
12. Second, the Commissioner must establish whether disclosing the information would breach any of the DP principles.

13. The most relevant principle is that under Article 5(1)(a) of the UK GDPR. This states that:

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

Would disclosure contravene principle (a)?

14. Article 5(1)(a) of the UK GDPR states that:

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

15. In the case of a FOIA request, the personal information is processed when it's 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.
16. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

17. Article 6(1) of the UK GDPR sets out the requirements for lawful processing. It says 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.
18. The Commissioner considers that the lawful basis most applicable is basis 6(1)(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”.
19. When he considers the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, the Commissioner has to consider the following three-part test:

- **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information
- **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question

- **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the those referred to in in Appendix 2 and Appendix 3 ('the data subjects').
20. 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

21. In considering any legitimate interest(s) in the disclosing 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.
22. A wide range of interests may also be legitimate interests. They can be the requester's own interests, the interests of third parties, 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.
23. Without going into detail, the Commissioner appreciates that the complainant has an interest in the withheld information, and he considers that, in the circumstances, it's a legitimate interest for them to have. There's also a more general legitimate interest in public authorities being open and transparent about their decision-making.

Necessity test

24. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves considering 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.
25. In its submission the University says that it doesn't consider that disclosing the withheld information in Appendix 2 is necessary as the content of the disclosed email outlines the substance of the decision.
26. The University also says that it doesn't consider that disclosing the withheld information in Appendix 3 is necessary as it's already given the complainant a high-level explanation of the decision it made, in correspondence to them dated 31 January 2023.
27. However, the Commissioner is satisfied that disclosing the data subjects' personal information in both Appendix 2 and 3 would be necessary to meet the complainant's legitimate interest and the more general interest

of transparency. This is because disclosure would show **who** was involved in the decision-making, which is part of the decision-making process.

Balancing test

28. In balancing the complainant's and data subjects' legitimate interests 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.
29. 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.
30. In the Commissioner's view, a key issue is whether the data subjects would 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.
31. It's also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
32. The Commissioner notes that none of the data subjects concerned have given consent for their personal information to be disclosed. The Commissioner is satisfied that in the circumstances of this case, all the data subjects would have the reasonable expectation that their identities wouldn't be disclosed to the world at large as the result of an information request. The Commissioner agrees with the University's position in its submission to him; that in the circumstances, disclosing their personal information would be likely to cause those individuals harm or distress.
33. The Commissioner notes that there is a general interest in public authorities being transparent, and in ensuring certain freedoms are upheld. The Commissioner has taken account of those factors but considers that the matter behind this request is more a personal interest for the complainant. He is satisfied that the complainant's interest, while

entirely legitimate, is not sufficient to outweigh the interests of the data subjects and their fundamental rights and freedoms.

34. The Commissioner therefore finds that there's no Article 6 basis for processing and so disclosing the information in question wouldn't be lawful. Given the above conclusion that disclosure would be unlawful, the Commissioner doesn't need to go on to consider separately whether disclosure would be fair or transparent.
35. The Commissioner's decision is that the University is entitled to withhold information in Appendix 2 and Appendix 3 under section 40(2) of FOIA, by way of section 40(3A)(a). He has gone on to consider the University's application of section 42(1) of FOIA to Appendix 3 in its entirety.

Section 42 – legal professional privilege

36. The University is withholding the following information under section 42(1) of FOIA:
 - All the material in the document named 'Appendix 3' in the University's submission to the Commissioner.
37. Under section 42(1) of FOIA, information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.
38. The purpose of legal professional privilege (LPP) is to protect an individual's ability to speak freely and frankly with their legal advisor in order to obtain appropriate legal advice. It recognises that individuals need to lay all the facts before their adviser so that the weaknesses and strengths of their position can be properly assessed. Therefore, LPP evolved to make sure communications between a lawyer and their client remain confidential.
39. There are two types of LPP – advice privilege and litigation privilege. The University has told the Commissioner that it considers that the withheld information is subject to both advice and litigation privilege.
40. The Commissioner has reviewed the material in Appendix 3. He is satisfied that it can be categorised as confidential communications between client and lawyer, made for the dominant purpose of seeking or giving of legal advice and in anticipation of possible litigation. The Commissioner considers that documents a) and b) are linked as document a) provides context for document b).
41. The Commissioner has taken account of the complainant's arguments in their complaint to him but finds that the University was entitled to apply

section 42(1) of FOIA to Appendix 3. He has gone on to consider the associated public interest test.

42. Of relevance to section 42, in their request for an internal review, the complainant argued that, in the context of their belief that the University wasn't protecting certain of their freedoms, it should be possible to hold public authorities to account.
43. In its submission the University has acknowledged that there's a general public interest in authorities being accountable for the quality of their decision-making. Ensuring that decisions have been made on the basis of good quality legal advice is part of that accountability. It says there's also a public interest, in some cases, in knowing whether or not legal advice has been followed.
44. The University's submission goes on to discuss the public interest arguments for withholding the information. It says that disclosing the information would contradict the concept of LPP and the rationale behind the concept, specifically in relation to free and frank conversation between lawyer and client.
45. The University said its ability to defend its legal interests both in regard to this instance and any future cases that may arise may also be prejudiced should this information be disclosed. It needs to be able to seek legal advice freely in order to conduct its business effectively, and that advice needs to be given in confidence and with a full appreciation of the facts. Disclosing the information could harm the University's ability to seek and receive advice freely, without fear or favour in the future, which is necessary to make sure decisions are strong.
46. Poor decision-making could lead to a serious consequential loss or at least a waste of resources in defending unnecessary challenges that could have been avoided, had legal advice been obtained in the first instance without fear of disclosure. Any waste of public money and time would not be in the public's interest.
47. The University argued that disclosing information provided in a legal capacity to a third party could also breach the confidential status of any such communications sent or received from legal parties. As such and for the reasons given above, disclosure would be detrimental to the University's ability to conduct its affairs.
48. Finally, the University noted that that this information relates to a live and current situation (which persists). As such, it says that the information carries a "higher level of confidential privilege" and this gives the argument for withholding the information additional weight. The Commissioner accepts that disclosure while a situation is 'live'

carries a stronger possibility of detriment to the University than might be the case if the matter had been concluded.

49. The Commissioner agrees with the University that, on balance, the public interest favours withholding the disputed information. LPP carries with it a very strong inherent protection due to the nature of the information that it covers, and the function that it plays in administering justice. The Commissioner has not been presented with any argument in favour of disclosure which is sufficiently strong to overturn the protection that LPP requires. He has also taken account of the fact that the situation that is the focus of the request was current at the time of the request and remains 'live'.
50. The Commissioner's decision is therefore that the University is entitled to apply section 42(1) of FOIA to the information in Appendix 3 and the public interest favours maintaining this exemption.
51. The Commissioner has found that the University correctly applied section 40(2) or 42(1) or both to all the information it's withholding. It has therefore not been necessary to consider the University's application of section 41(1) of FOIA to some of that same information.

Right of appeal

52. 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

53. 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.
54. 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

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