

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 26 March 2024

**Public Authority:** Northumbria University  
**Address:** Pandon Building  
Newcastle upon Tyne  
NE1 8ST

### **Decision (including any steps ordered)**

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1. The complainant has requested information from Northumbria University (NU), regarding positions their son had applied for. NU disclosed information in scope of the request and explained that it was withholding the remainder under section 40(2) – personal information, due to small numbers and the fact it constituted special category data.
2. The Commissioner's decision is that NU was entitled to withhold the requested information under section 40(2) of FOIA.
3. The Commissioner does not require any steps as a result of this decision.

## Request and response

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4. On 12 October 2023, the complainant requested information in the following terms:

"I hereby require under Section 1 (a) & (b) of the Freedom of Information Act 2000:

With regard to the position(s) that (name redacted), applied for :-

- How many of the applicants were there?
- How many of the applicants had disabilities?
- How many of the applicants had Asperger's Syndrome?
- How many of the applicants who made it to interview had disabilities?
- How many of the applicants who made it to interview have Asperger's Syndrome?
- How many of the successful applicants had disabilities?
- How many of the successful applicants have Asperger's Syndrome?

Furthermore, relating to all positions rather than just (name redacted) application:

- How many applicants to all PhD and DPhil courses in all subjects in the last four years?
- How many applicants to all PhD and DPhil courses in all subjects in the last four years had disabilities?
- How many successful applicants to all PhD and DPhil courses in all subjects in the last four years had disabilities?
- How many successful applicants to all PhD and DPhil courses in all subjects in the last four years had Asperger's Syndrome?

The last four years being: 2020/2021, 2021/2022, 2022/2023, 2023/2024. If the figures for 2023/2024 are not yet finalised, please provide the figures up to the date of this email.

I require the University to provide the full answers to these questions within 20 working days from Thursday 12th October 2023 inclusive, in accordance with Section 10 (1) of the Freedom of Information Act 2000. Please be aware that stating you will pass the request onto any

relevant department and when they respond the 20 days will start is not allowed under the act. You are the responsible person to which the request is made and as such, under FOIA, the 20 days starts as soon as your inbox receives this email.”

5. NU responded on 9 November 2023. It disclosed some information in scope of the request and advised that returns of fewer than five is being withheld by virtue of section 40(2) of FOIA – personal information.
6. Following an internal review NU stated that it upheld its original position, but also stated: “In addition to this, the request asked for statistical information in relation to applicants with ‘disabilities’ and specifically, applicants with ‘Asperger's Syndrome.’ The requested information, if identifiable would therefore also fall under the definition of ‘special category data’ in that disability data relates to “data concerning health.’

### **Scope of the case**

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7. The complainant contacted the Commissioner on 29 December 2023, to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of the investigation is to determine if NU correctly withheld the information under section 40(2) of FOIA.
9. As the Commissioner is also the regulator of data protection legislation, he has decided that he has sufficient information to reach a decision in this case, based on the internal review arguments and his own expertise, without seeking further arguments from NU.

### **Reasons for decision**

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#### **Section 40(2) – third party personal data**

10. Section 40(2) of 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(3A)(3B) or 40(4A) is satisfied.
11. In this case the relevant condition is contained in section 40(3A)(a) . This applies where the disclosure of 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 (“UK GDPR”).

12. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ("DPA"). If it is not personal data, then section 40 of the FOIA cannot apply.
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 DP principles.

**Is the information personal data?**

14. Section 3(2) of the DPA 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.
16. 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 more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of the individual.
17. 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.
18. In the circumstances of this case, having considered the nature of the withheld information, the Commissioner is satisfied that the information relates to the data subjects. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
19. The complainant has argued that releasing the number involved would not be personal data. They do not agree that an individual could be identified either from the actual number or from a banded number.
20. On the face of it, the withheld information does not directly identify any individual. However, because NU has implied that the withheld numbers are low (five or fewer), the Commissioner has considered whether this information, when combined with other information either already in the public domain, or known to particular individuals, may nevertheless make identification possible.
21. The Commissioner is aware that disclosure under FOIA is considered as being made to the world at large, rather than to the requester only, and this includes to those individuals who may have a particular interest in

the information (and additional knowledge of the specific circumstances of those involved) which is not shared by the wider public.

22. In considering this point, the Commissioner recognises that different members of the public will have different degrees of access to the 'other information' which would be needed for re-identification of apparently anonymous information to take place. In the Code of Practice<sup>1</sup> on Anonymisation, he acknowledges that "...there is no doubt that non-recorded personal knowledge, in combination with anonymised data, can lead to identification."
23. The Commissioner considers that other individuals will have different levels of knowledge of NU, the members of staff, those that attend the University and the general area. If the information were to be released by NU, using the other information, individuals, specifically those in question, could be identified.
24. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
25. The most relevant DP principle in this case is principle (a).

#### Legitimate interests

26. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
27. The Commissioner accepts that the complainant has a legitimate interest in the information, but considers that this is a purely private concern, unrelated to any broader public interest.

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<sup>1</sup> [Anonymisation: managing data protection risk code of practice \(ico.org.uk\)](https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/legitimate-interests/)

### **Is disclosure necessary?**

28. 'Necessary' means more than desirable but less than indispensable or absolute 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.
29. The Commissioner is cognisant that disclosure under FOIA is disclosure to the world at large. It is the equivalent of NU publishing the information on its website. When considering the necessity test, he is not therefore considering whether providing the information to the requestor is necessary to achieve the legitimate interest, but whether it is necessary to publish the information.
30. The Commissioner notes that, whilst NU has not stated the specific numbers involved, it has implied that there are less than five that the request relates to. He is therefore satisfied that disclosure of the withheld information is necessary to meet the legitimate interest.

### Balance between legitimate interest and the data subject's interests or fundamental rights and freedoms

31. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject 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 legitimate interests in disclosure.
32. 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(s) expressed concern to the disclosure; and
  - the reasonable expectations of the individual(s).
33. In the Commissioner's view, a key issue is whether the individual(s) 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.

34. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that/those individual(s).
35. The Commissioner considers that the individuals involved (both the students and their parents), have a strong and reasonable expectation that personal information about them will remain confidential.
36. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the fundamental rights and freedoms of the individuals involved. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.

**Is any of the information special category data?**

37. Information relating to special category data is given special status in the UK GDPR.
38. Article 9 of the UK GDPR defines 'special category' as being personal data which reveals racial, political, religious, or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
39. Having considered the wording of the request, the Commissioner finds that the requested information does include special category data. He has reached this conclusion on the basis that the information includes data regarding applicants with 'disabilities' and specifically, applicants with 'Asperger's Syndrome.'
40. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
41. The Commissioner considers that the only conditions that could be relevant to a disclosure under FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
42. The Commissioner is aware that there is clearly a recognised and strong expectation that the personal information of each student held by NU, will remain private. The Commissioner has seen no indication that the data has been made manifestly public by the data subjects. He has a

well established position on these matters and sees no reason to deviate from it on this occasion<sup>2</sup>.

43. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of FOIA.

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<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notice/2024/4028235/ico-253319-y7v8.pdf>

## Right of appeal

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44. 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](mailto:grc@justice.gov.uk)

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

45. 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.
46. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Susan Duffy**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
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