

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 August 2024

Public Authority: The Governing Body of Royal Holloway
University of London

Address: Egham
Surrey
TW20 0EX

Decision (including any steps ordered)

1. The complainant has requested the meta-data relating to emails sent about the effect of Emergency Regulations 2022/23 on students' degree classification, from the Royal Holloway University of London ('the University'). The University relied on sections 38 and 40(2) to withhold the information. These exemptions concern health and safety, and personal data, respectively.
2. The Commissioner's decision is that the University incorrectly relied on section 38. It was entitled to rely on 40(2) for some of the withheld information, but not all of the information.
3. The Commissioner requires the University to take the following step to ensure compliance with the legislation:
 - Disclose the withheld information in line with the Commissioner's confidential annex.
4. The University must take this step within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 18 October 2023, the complainant wrote to the University and requested information in the following terms:

"meta-data relating to correspondence (email/instant messages) involving holders of the following offices:

- the Vice-Chancellor and Principal
- the Pro-Vice-Chancellor (Education & Student Experience)
- Associate Pro-Vice-Chancellor (Quality & Standards)
- the Head of Academic Quality and Policy Office

- the Principal External Examiner
- any individuals holding these posts on an interim basis

received between the 20th April 2023 and the 10th July 2023, concerning the effect of the Emergency Regulations 2022/23 on students' degree classification, or other closely related outcomes.

"Related outcomes" includes but is not limited to "good honours", "grade inflation", "degree attainment", and "student attainment".

I would like this request to be formatted as a register of information with each item of correspondence marked with the:

- I. Time
- II. Date
- III. Sender
- IV. Recipient(s)
- V. Subject header
- VI. Name of any attachment."

6. The University responded on 14 November 2023. It provided some of the requested information but advised that it was withholding the remaining information under section 40(2).
7. The complainant requested an internal review on 13 December 2023 and clarified their request in an attempt to prevent section 40(2) being used. They provided the following clarification:

"Although you may have a policy of withholding staff names and/or email addresses of staff below Executive Board level, this does not prevent you releasing information on the role held by the individuals involved in the communication.

Disclosing the roles of the persons involved in the communication would not involve disclosure of personal data, but would allow questions of public interest (when was any external examiner consulted on mitigations) to be answered.

I would therefore like you to review my request bearing in mind the possibility of disclosure of information other than names and email addresses."

8. The University requested further clarification from the complainant on 16 January 2024 in the following terms:

"You have referred to the "roles" of individuals in your email of 15 December, below. Please could I ask you to clarify what is to be understood by "roles" in the context of your internal review request? For example, should this be understood as job titles, or as a category of membership of the University community - if the latter, I would be grateful if you could provide examples of the types of category you are seeking."

9. The complainant responded on 21 January 2024 with the following clarification:

"For the purpose of this request, "role" can be interpreted under "job title"

10. Following an internal review the University wrote to the complainant on 1 March 2024. It stated that it was now disclosing the job titles for the members of staff on the Executive Board but maintaining section 40(2) for the remaining information.

Scope of the case

11. The complainant contacted the Commissioner on 1 March 2024 to complain about the way their request for information had been handled.
12. In their complaint to the Commissioner, the complainant asked the Commissioner to also consider whether disclosing the contents of the emails would be proportionate.
13. The Commissioner refuses to consider this part of the complaint, as it relates to a different request for information and he has already advised the complainant on that matter.

14. During the Commissioner's investigation into the current request the University advised that it now also sought to rely on section 38 to withhold the requested information.
15. Based on the above, the Commissioner considers that the scope of his investigation is to establish whether the University is entitled to withhold the requested information under sections 38 and 40(2) of FOIA.

Background

16. The request relates to the effect that the Emergency Regulation 2022/23 had on students' degree outcomes. Due to an industrial dispute regarding pay and work conditions, University unions started industrial action on pensions and on conditions of employment issues.
17. Due to the dispute, a marking and assessment boycott ('the boycott') took place which saw staff refuse to do work which related to marking or assessing students' work. This meant that essays, dissertations, practical and artistic work didn't get marked.
18. This boycott led to students being unable to get their final degree classification and even being unable to graduate.
19. The University explained to the Commissioner that the boycott of summer 2023 was a highly charged and heated situation, which resulted in some employees dividing themselves into 'camps' – those who went on strike and/or supported the boycott, and those who did not.

Reasons for decision

Section 38 – health and Safety

20. Under section 38(1) information is exempt information if its disclosure would or would be likely to a) endanger the physical or mental health of any individual or b) endanger the safety of any individual.
21. The Commissioner's guidance 'Health and Safety- section 38'¹ states 'In section 38 the word "endanger" is used rather than the word "prejudice"' and 'The use of the phrase "any individual" in section 38

¹ [Section 38 – Health and safety | ICO](#)

includes any specific individuals, any member of the public, or groups within society'.

22. In the Commissioner's view, three criteria must be met in order to engage section 38:

- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the endangerment which the exemption is designed to protect. Furthermore, the resultant endangerment which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of endangerment being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in endangerment or disclosure 'would' result in endangerment.

23. Consideration of the exemption at section 38 is a two-stage process: even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

The applicable interests

24. The University explained to the Commissioner that releasing the job titles in question would likely endanger the safety, physical or mental health of the individuals in those roles. In this particular case, the University considers that those individuals would be subject to potential endangerment due to the information relating to the boycott.

The nature of the endangerment

25. The Commissioner's guidance states, "Endangering mental health means it must have a greater impact than causing upset and distress."

26. The Commissioner must now consider if there is a causal link between the requested information and the endangerment that section 38(1)(a) is designed to protect.

27. The University explained that the boycott was a highly charged and heated situation and because of this, the University anticipates the harm the individuals may face is reprisals from other individuals who held a

different opinion on the matter to them. The University advised that it is not alone in having concerns in this regard, the University and College Employers Association has advised all higher education institutes to use caution, where applicable, with respect to this boycott and requests for information.

28. The University stated that it considered it to be appropriate to release the job titles of only the most senior staff. In this case, it considered this to be members of staff at Executive Board level, as they had the responsibility for decision-making with respect of the University's response to the boycott.

Likelihood of endangerment

29. The University is relying upon the lower threshold of endangerment 'would be likely to'. The Commissioner's guidance states, 'this means that even if there is below a 50% chance, there must be a real and significant likelihood of the endangerment occurring.'
30. Whilst the Commissioner acknowledges that the University is seeking to rely on the lower threshold of endangerment, he is not swayed by the arguments that the harm being described is sufficient enough to invoke the exemption. The Commissioner notes that the request does not ask for the contents of the emails, it instead focuses on any emails which were about the effect the boycott on students' degree classification.
31. The Commissioner finds it likely, regardless of what position any individual had on the matter, that the proposal to boycott grading and marking would have led to many generic queries and concerns, especially regarding the effect this would have on students' grades.
32. The Commissioner does not agree that revealing the job titles of the individuals who sent any email regarding the boycott, would reveal whether they hold a specific opinion on the matter. He considers it is likely that the disclosure would only show that the staff member made enquiries regarding the boycott. The nature of these enquiries could not be determined unless the full contents of the emails were being disclosed, which is not the case here.
33. Due to the above, the Commissioner is satisfied that the harm described by the University is not likely and the University was therefore not entitled to rely on section 38 to withhold the requested information.
34. As the Commissioner is not satisfied that the exemption has been applied correctly, he will not be going be considering the public interest test, but rather the University's application of section 40(2).

Section 40 - personal information

35. 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.
36. 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').
37. 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 FOIA cannot apply.
38. 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?

39. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".
40. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
41. 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.
42. 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.
43. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information does relate to certain individuals, the data subject(s). This is because the request asks for the job titles of individuals who sent emails regarding the boycott and the effects this would have on grades. The job titles of the data subjects is information that relates to and could identify those concerned.

44. The Commissioner also recognises that some of the requested information carries a greater risk of identification due to the small number of staff that hold a specific role. Whether individuals can be identified will depend on the particular facts, such as the size of the overall dataset, the number of data points that have been requested and the information, already in the public domain, that could potentially be cross-referenced with the disclosed information. It is not sufficient for there to be only a hypothetical risk of identification. If there is no realistic route to identification, the information is not personal data, regardless of its sensitivity.
45. When considering the possibility of identification, the Commissioner applies the "Motivated Intruder Test." This test starts with a hypothesis that there exists a person who wishes to identify the individuals covered by the disputed information. The person is willing to devote a considerable amount of time and resources to the process of identification. They may have some inside knowledge (ie information not already in the public domain) but will not resort to illegality – they are determined but not reckless. The Commissioner looks to see how such a person would go about identifying the individuals involved.
46. In this case, the Commissioner considers that a motivated intruder could be a fellow member of staff or student within the University who has knowledge of individuals within a specific role. In this instance, where there are only five or fewer individuals that hold the same role, if the University was to disclose the job roles of the individuals who had sent emails regarding the boycott, it is highly likely that motivated intruders could identify the individuals from the disclosed information. As the individuals can be identified, the information is personal data.
47. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
48. 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 DP principles.
49. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

50. 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".

51. In the case of an FOIA 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.
52. 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 UK GDPR

53. 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”².

54. In considering the application of Article 6(1)(f) of the UK 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.
55. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

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

Legitimate interests

56. 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.
57. 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.
58. The complainant advised the Commissioner that they were interested in the requested information because it provides an understanding into the integrity of university degrees and the effectiveness of the governance system.
59. The complainant also explained that the requested information would show whether correspondence between senior figures, Royal Holloway and the principal external examiner had taken place regarding the decision to adopt regulations which would have the effect of altering degree classifications. If no correspondence had occurred, the complainant stated that this would demonstrate that no effective external checks had taken place, which would contradict public assurances given by the University that the changes had been signed off by the Principal External Examiner.
60. Having reviewed the complainant's position, the Commissioner is satisfied that there is a legitimate interest in the requested information.

Is disclosure necessary?

61. '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.
62. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

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

63. 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.

64. 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.

65. 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.

66. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

67. The University informed the Commissioner that in each instance, the postholder is either the only member of staff with that job title, or there is a very small pool of staff with that job title. It confirmed that due to this, disclosing the job titles would either directly lead to, or very likely lead to the individuals being identified. The University advised that as the emails relate to the boycott, disclosure of the job roles could cause either physical or mental harm to the individuals in question.

68. Similar to its section 38 position, the University considers if it were to disclose the job titles of individuals who sent an email regarding the boycott, it would also be revealing the opinion of these individuals regarding the boycott. It stated that once these opinions had been revealed, other members of staff may then take issue with the opinions, and this could lead to reprisals against the individuals who sent the initial email.

69. The University explained that in an attempt to be open and transparent, it had disclosed the most senior members of staff roles in its response. It considered that any members of staff who were not a part of the

Executive Board and were not a part of the decision making of the response to the boycott, should therefore be considered as junior members of staff in the context of this request.

70. The University concluded that some of the withheld information related to students and third parties who did not work for the University. The University advised that as these individuals did not work for the University, it would be unable to disclose their job title or role as a student within the University.

The Commissioner's Decision

71. The Commissioner has considered the University's position and the balance between legitimate interests and the data subjects' interests or fundamental rights and freedoms. Regarding seniority of employees and what might be expected to be disclosed, his published section 40 guidance advises:

"It is reasonable to expect that [a public authority] disclose more information about senior public authority employees than more junior ones. Senior employees should expect their posts to carry a greater level of accountability, since they are likely to be responsible for major policy decisions and the expenditure of public funds."

72. His guidance also goes on to explain:

"It may also be fair to release more information about employees who are not senior managers but who represent your organisation to the outside world, as a spokesperson or at meetings with other bodies. This implies that the employee has some responsibility for explaining the policies or actions of your organisation."

73. The Commissioner is not satisfied with the University's position that the only senior members of staff in this matter are those who responded to the boycott at an Executive Board level. It is clear from the withheld information that some of the individuals are of a senior position, this is reflected in their job titles and job description.
74. The Commissioner also notes that disclosing the majority of the withheld information would not reveal anything new about the individuals in question. Having reviewed the University's website and the withheld information, the Commissioner was able to locate a number of the individual's roles and names on the University's website. As the roles of the individuals are already in the public domain, the Commissioner does not consider there would be any greater risk in re-disclosing this information.

75. Having considered the remainder of the University's arguments, the Commissioner must again state that while the requested information may relate to the boycott, the Commissioner finds it highly unlikely that disclosure of the requested information would reveal a specific stance held by a data subject on the boycott.
76. The Commissioner notes that the complainant did clarify that they were now only seeking "job titles" rather than the names of the individuals who had emailed, but at no point did the complainant advise they specifically wanted information that pertained to University employees only. The Commissioner therefore considers that in the instance where the individual was a student, this can be considered as a role and the word "student" can be disclosed to the complainant where applicable.
77. Finally, the Commissioner does acknowledge that a limited amount of the withheld information contains the roles of individual(s) who do not appear on the University's website and have been confirmed to be one of fewer than five members to hold that specific role. The Commissioner is satisfied that in these circumstances it would be more likely for a motivated intruder to identify these individuals from the withheld information.
78. As these individual(s) are not named on the University's website and do not have a senior role within the organisation, the Commissioner is satisfied that they would have a reasonable expectation that their personal data would not be disclosed, particularly where there is an increased risk of their identification.
79. Therefore, where the information relates to the two individuals who could be identified due to the small numbers, the Commissioner does not consider the legitimate interests outweigh the rights and freedoms of these individuals and section 40(2) applies to that information.
80. However, the Commissioner considers that for the majority of the requested information, the legitimate interest in disclosure outweighs the data subjects' interests or fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing and so the disclosure of the information would be lawful.

Is disclosure fair and transparent?

81. Even though disclosing certain of the job titles of individuals under FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons. The

requirement for transparency is met because as a public authority, the University is subject to FOIA.

82. The Commissioner has therefore decided that the University has failed to demonstrate that the exemption at section 40(2) is engaged for the majority of the withheld information. Based on this, the Commissioner requires the University to disclose the requested information in line with his confidential annex, attached separately.

Right of appeal

83. 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

84. 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.
85. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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