

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

### **Decision notice**

**Date:** 26 February 2025

**Public Authority:** Council of the University of Surrey  
**Address:** Stag Hill  
University Campus  
Guildford  
GU2 7XH

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

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1. The complainant has requested information about an alleged misconduct investigation. The above public authority ("the public authority") relied on section 31 of FOIA (law enforcement) in order to withhold the requested information
2. The Commissioner's decision is that:
  - the public authority should have relied upon section 40(5B) of FOIA to refuse to confirm or deny whether it held information within the scope of part [1] of the request. He now applies this exemption himself, proactively, to prevent any further disclosure of personal information; and
  - on the balance of probabilities, the public authority holds more information within the scope of part [2] of the request than it has identified to the Commissioner; and
  - of the information that the public authority has identified as falling within the scope of part [2] of the request, the public authority is not entitled to rely on section 31 of FOIA to withhold it; and
  - the Commissioner considers that some of that information is the personal information of either the complainant or of third parties. He has therefore applied sections 40(1) and 40(2) himself, proactively, to prevent further disclosure of personal information.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information identified in the confidential annex. And
  - Provide a fresh response to part [2] of the request, based on the interpretation set out in paragraph 25 of this decision.
4. The public authority must take these steps 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**

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5. On 14 August 2024 the complainant requested information of the following description:

"I would like to request the following information:

"[1] Surrey university is currently cooperating with [University B] in terms of a scientific misconduct investigation at [University B]. The individual involved from Surrey is [Academic A]. I am requesting all information held by the university regarding this matter:

- Emails Meetings/notes
- Decision making strategy
- Communications from [University B]
- Communications from Surrey to [University B]

"[2] I will also be requesting all communications between [Academic A] and [Academic B] from 2023 to current date."

6. On 2 September 2024, the public authority responded. It relied on section 30 (criminal investigations) of FOIA to withhold the information.
7. The complainant requested an internal review on the same day. The public authority sent the outcome of its internal review on 6 September 2024. It revised its position. It now relied on section 31 of FOIA to withhold the information.

## Reasons for decision

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### Section 40(5B) – personal information

8. Section 40(5B) of FOIA allows a public authority to refuse to confirm or deny that it holds information if the mere act of confirming or denying that the information was held would, in itself, reveal someone's personal information – unless there is a lawful basis in data protection law.
9. The Commissioner notes that part [1] of the request rests on an allegation that Academic A is, or has been, involved in an investigation for scientific misconduct. As far as the Commissioner is aware, there is nothing in the public domain to support an allegation that Academic A is, or has been, involved in any such investigation.
10. When deciding whether to confirm or deny that it holds this information, the public authority is entitled to consider what is currently in the public domain and what new information would be revealed to the world as a result of confirming or denying. It doesn't just have to consider what specific individuals may or may not be aware of.
11. In this instance, confirming that information was or wasn't held would confirm whether Academic A was or wasn't involved in a misconduct investigation. Whether or not Academic A is, or has been, involved in an investigation is their own personal information, as it relates to their performance at work, as well as their professional integrity. Academic A is identified by name in the request and therefore if the public authority were to confirm or deny that it held information, it would be revealing something that could only relate to Academic A. Providing a confirmation or a denial that the information was held would therefore reveal Academic A's personal information.
12. Revealing Academic A's personal information to the world would require a lawful basis under data protection legislation. As Academic A doesn't seem to have consented to their personal information being made public, the Commissioner considers that providing a confirmation or a denial would only be lawful if it were necessary to satisfy a legitimate interest.
13. The Commissioner recognises that the complainant has his own private interest in any information that might be held. There is also a wider legitimate interest in understanding how the public authority and University B handle allegations of research misconduct.
14. The Commissioner is not satisfied, on the basis of the available evidence, that confirmation or denial is necessary to achieve either legitimate interest.

15. In terms of the complainant's private interest, the Commissioner considers that this matter can be pursued via other, less intrusive, means, such as via the appropriate grievance procedure it does not require Academic A to have their personal information revealed to the wider world.
16. In relation to the wider legitimate interest, the Commissioner is not convinced that revealing Academic A's personal information is a proportionate means of achieving a legitimate aim. University B and the public authority already publish details of their processes showing the steps they would take if an allegation of research misconduct were made.
17. Even if (hypothetically) Academic A were involved in an investigation, that does not mean that they have done anything wrong or even that any allegations had merit. If the public authority were (hypothetically) to confirm that it held information, it would only be confirming that an allegation of unknown merit had been made and that it involved Academic A – however tenuous that involvement was.
18. Had an allegation of serious misconduct been found proved against Academic A, revealing this fact might have represented a proportionate intrusion into their privacy. However, to the Commissioner's knowledge, no such finding had been made at the time of the request (or since).
19. Clearly Academic A is likely to be less concerned if the public authority were to deny holding information (if, hypothetically, that were the case). However, it would defeat the purpose of refusing to confirm or deny if the public authority were only to refuse where it did hold information – the pattern would quickly become obvious.
20. The Commissioner is therefore of the view that providing confirmation is not necessary and so providing a confirmation or denial would not be lawful.
21. Consequently the Commissioner, as the regulator of data protection legislation, has applied section 40(5B) of FOIA himself, proactively, to part [1] of the request to prevent any further revelation of personal information.
22. In respect of part [2], the Commissioner does not consider that the same arguments apply. Academic A co-authored a paper with Academic B in late 2023 therefore it would be expected that the two individuals would have exchanged some correspondence during the period in question. Merely revealing the **existence** of correspondence does not, in the Commissioner's view, reveal the **substance** of that correspondence.

23. The public authority was therefore correct to confirm that it held some information within the scope of part [2].

### **Part [2] of the request**

24. In respect of part [2], the Commissioner considers that the public authority has not correctly interpreted this part.
25. The original wording of the request is quoted above. When the public authority issued its original refusal notice, the wording of part [2] had changed to "from **January** 2023." It is not clear whether this additional word was inserted by the complainant, or by the public authority, but the complainant has confirmed to the Commissioner that he intended his request to capture correspondence generated throughout 2023.
26. The Commissioner also notes that the request would capture **any** correspondence between the two academics. It is not restricted to correspondence on any particular topics.
27. The public authority has provided the Commissioner with a batch of emails. The earliest of these emails is dated March 2024.
28. As noted above, Academic A and Academic B co-authored a paper that was submitted for publication (and subsequently published) in an academic journal, in late 2023.
29. It is not clear to the Commissioner what state the research supporting the paper was at in January 2023. However, even if the underlying research was complete, it seems extremely unlikely to him that Academic A and Academic B would not have exchanged a single email in either the eight months prior to the paper being submitted and published, or the six months or so immediately afterwards. It seems likely that drafts of the paper would have needed to be circulated for review. Obviously if the research remained ongoing in January, it seems likely that the academics would have needed to communicate about that as well. Once the paper had been published, the two academics may have shared any feedback they had received or they may have discussed the possibility of further research collaboration.
30. No such correspondence has been provided to the Commissioner and the public authority's submission does not demonstrate that any such material has been considered.
31. On the balance of probabilities, the Commissioner is therefore of the view that the public authority holds more information within the scope of part [2] than it has identified to him.

32. The public authority must now issue a fresh response to this part of the request, based on the correct interpretation. It must identify all the information it holds within the scope of the request and then either provide that information to the complainant or issue an appropriate refusal notice.
33. If, having carried out further searches, the public authority is satisfied that it holds no information beyond that already identified, the Commissioner will, in the event of a further complaint, expect the public authority to be able to provide details of those searches and any other evidence indicating that no further information is held.
34. Although the public authority has not identified all correspondence within the scope of part [2] of the request, it has identified some.
35. Given that the correspondence it has identified would fall within the scope of the request and given the issues discussed below, the Commissioner considers that he should make a decision on disclosure of that information now, rather than defer a decision until a fresh response has been issued. This will allow the public authority consider the following matters in that response.

### **Section 31 – law enforcement**

36. Section 31 of FOIA allows a public authority to withhold information that could harm the ability of a public authority to exercise its function of ascertaining whether any person is responsible for any conduct that is improper.
37. The public authority argued that disclosing the information would affect an investigation into research misconduct that University B was carrying out (or intended to carry out).
38. The public authority pointed to Part 3 of the Higher Education Act 2017 and the [Concordat for Research Integrity](#). It argued that the concordat set out a definition of misconduct (or, at least, defined what good conduct was), University B had an obligation to investigate allegations of research misconduct, as defined by its own adaptation of the concordat and to determine whether specific individuals had been responsible for misconduct.
39. The Commissioner notes the public authority's (and University B's) concerns that the information is sensitive. However, he does not consider that the investigation University B is carrying out (or intends to carry out) meets the requirement of the exemption.
40. In order to qualify, the investigation University B is carrying out must be part of a function that arises by or under statute, from common law or

from the Royal Prerogative. In [DVLA v Information Commissioner and Williams](#), the Upper Tribunal drew a clear distinction between the **functions** entrusted to a public authority and the **powers** that it might be entitled to exercise.

41. The Commissioner accepts that ensuring the integrity of research is a valuable activity. However, he has not seen any evidence that the concordat has any statutory footing, nor that suggests that University B has been entrusted with any **function** that requires it to assess misconduct – even though it may have the **power** to do so.
42. University B can write into its contracts of employment a requirement that staff must comply with various codes of conduct – including those produced by external bodies. It would follow from that that University B has an ancillary power to investigate allegations that individuals have failed to comply with those codes of conduct. However, these are **powers** that arise out of the terms of employment, they are not **functions** entrusted in law.
43. This is further emphasised by the limited nature of sanction that University B can impose. Unlike a regulator, such as the General Medical Council, which can prevent a person from practising medicine anywhere in the UK if their conduct is found to be improper, the limit of University B's powers is to terminate the person's contract of employment. Furthermore, if its investigations concluded that someone it didn't employ might have committed misconduct, it is limited to referring the matter to that individual's employer.
44. University B would have the ability in some circumstances to refer the matter to a regulator (such as the GMC) which would have a statutory function of ascertaining improper conduct. However, such arguments do not arise here as, neither the public authority nor University B has claimed the work of any regulator would be harmed by disclosure and the Commissioner is not persuaded that a referral to a regulator is likely in such circumstances.
45. For completeness, the Commissioner would note that, even if he were persuaded that University B was exercising a statutory function via its investigation, he is not persuaded that disclosure would harm its ability to perform that function. The correspondence does not form part of what the Commissioner understands to be the subject matter of the investigation, nor is it correspondence that has been generated for the purposes of gathering evidence for that investigation.
46. During the course of his investigation, the Commissioner made clear to the public authority that he was sceptical that this exemption applied. It



was open to the public authority to either change to a different exemption, or to rely on a second exemption “in the alternative.”

47. The public authority chose not to cite any other exemption and, given that he has found section 31 does not apply, the Commissioner would normally proceed to order disclosure. However, as the regulator of data protection legislation, he notes that the withheld information contains a significant amount of personal information – both belonging to the complainant and to others. He therefore considers it appropriate to deal with such matters before deciding what he should direct the public authority to disclose.

## **Section 40 – personal information**

48. Section 40 of FOIA allows a public authority to withhold information that is someone’s personal information. It covers both the requester’s own personal information and the personal information of third parties.
49. The withheld information contains several references to the complainant, actions he took and decisions made about him. Even if the complainant’s name was redacted, the Commissioner considers that others familiar with the circumstances would still be able to identify him. This information is therefore the complainant’s own personal information.
50. The personal information of the requester is absolutely exempt from disclosure under FOIA (because it can be accessed via a Subject Access Request). The Commissioner is not required to consider public interest or the complainant’s wishes.
51. This information is therefore exempt under section 40(1) of FOIA.
52. The withheld information also contains the personal information of Academic A and Academic B. Both are named in the request and so every email within scope must have been sent by one or the other. The information cannot be anonymised.
53. Some of the information discusses academic research that the two academics had, were, or would be collaborating on. Whilst some of this information might loosely be termed an “opinion”, it would be a professional opinion on the research, not a personal opinion. The Commissioner is therefore satisfied that such information is not the personal information of either academic.
54. However, there is also some information within the correspondence that does relate to personal matters. The Commissioner will not elaborate further in case it undermines the use of exemptions.



55. The Commissioner is satisfied that this information would relate to or be of biographical significance for either Academic A or Academic B (or both). It is therefore their personal information.
56. Personal information can only be disclosed under FOIA if there would be a lawful basis, in data protection legislation, that would allow the information to be published.
57. The Commissioner is not aware that either Academic A or Academic B has consented to their personal information being published. Therefore publication will only be lawful if it is necessary to satisfy a legitimate interest.
58. As referred to in respect of part [1], the complainant has his own private interest in receiving the information. There is also a general interest in public authorities being accountable and transparent.
59. Once again, the Commissioner is satisfied that the complainant is able to pursue his private interest via other means. Publishing the information is not the least-intrusive means of achieving that interest.
60. In respect of the wider interests in accountability and transparency, once again the Commissioner is not persuaded that publication of the information is a proportionate means of achieving a legitimate aim.
61. Publishing the information in question would intrude considerably into the privacy of the individuals involved. Conversely, given the limited nature of the request, it would reveal very little about either university's wider processes. Both organisations already publish a wide variety of information about their internal processes and their spending. The Commissioner is not persuaded that publication of this personal information would add anything further of significance.
62. The Commissioner is therefore satisfied that disclosure of this information is not necessary to satisfy a legitimate interest and so would be unlawful.
63. Section 40(2) of FOIA is therefore engaged and the Commissioner applies this exemption himself, proactively, to prevent further disclosure.
64. The Commissioner has set out, in the confidential annex, details of the information to which he has applied sections 40(1) and 40(2) of FOIA respectively.

## **Confidential Annex**

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65. This decision comes with a confidential annex that will only be provided to the public authority. This is so as to avoid undermining the exemptions that the Commissioner has applied and to preserve a meaningful right of appeal for the public authority – should it wish to exercise that right.
66. The confidential annex identifies precisely which information the public authority must withhold and that which it must disclose. Necessarily this involves references to information the public authority wishes to withhold.
67. The confidential annex only identifies information that is exempt and information that is not. It does not contain any additional analysis.

## **Other matters**

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68. Whilst he cannot compel the public authority to do so in a FOIA decision notice, given that he has found that some of the withheld information is the complainant's own personal information, the Commissioner strongly recommends that the public authority reconsider the request under SAR.
69. During the course of the investigation, the public authority raised a query around the lawful basis for processing personal information in respect of an investigation. A FOIA decision notice is not the appropriate place for the Commissioner to determine such matters.

## Right of appeal

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70. 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)

71. 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.
72. 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

**Roger Cawthorne**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**