

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 19 January 2015

Public Authority: University of Ulster
Address: Cromore Road
Coleraine
BT52 1SA

Decision (including any steps ordered)

1. The complainant has requested information relating to an internal investigation he believes may have been conducted by the University of Ulster. The University refused to confirm or deny that it holds the requested information. The Commissioner's decision is that the University is entitled to rely on section 40(5)(b)(i) of the FOIA and he does not require any steps to be taken.

Request and response

2. The complainant in this case represents an individual who had previously brought civil legal proceedings against the University. This litigation was settled in or around February 2013.
3. On 9 December 2013 the complainant requested the following information from the University:

"The file on any investigation into the conduct of the University and its servants and agents in defending the civil legal proceedings for negligence, breach of confidentiality and breach of statutory duty brought [personal information redacted] against the University and its servants and agents."
4. The University responded on 6 January 2014, advising that the request was being refused under sections 40 and 41 of the FOIA.
5. The complainant requested an internal review on 13 February 2014. At this stage the complainant also asked whether the information could be disclosed under section 35 of the Data Protection Act 1998 (the DPA).

6. Following the internal review the University wrote to the complainant on 13 March 2014. The University upheld its refusal in reliance on sections 40 and 41, although it now cited section 40(2). The University also declined to disclose any information under section 35 of the DPA.

Scope of the case

7. The complainant contacted the Commissioner on 1 July 2014 to complain about the way the request for information had been handled. The complainant was of the view that their client was entitled to be provided with the requested information.
8. The Commissioner's investigation in this case considered the University's application of section 40 of the FOIA. The Commissioner gave the complainant advice on section 35 of the DPA but it does not form part of this decision notice because it falls outside of the FOIA.

Reasons for decision

Section 40(5)(b)(i): refusal to confirm or deny that personal information is held

9. The University originally cited section 40(2) in its internal review letter. However the University did not at any stage confirm or deny to the complainant that it held the requested information. The University subsequently advised the Commissioner that it sought to maintain a position of neither confirming nor denying that the requested information was held under section 40(5) of the FOIA.
10. Section 40(5)(b)(i) provides that

"The duty to confirm or deny-

(b) does not arise in relation to other information if or to the extent that either-

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles..."

11. It is necessary first to consider whether confirming or denying that the requested information is held would involve the disclosure of personal data. If this test is met then the Commissioner will go on to consider whether this would contravene any of the data protection principles.¹

Would confirming or denying that information is held involve the disclosure of personal data?

12. Section 1(1) of the Data Protection Act 1998 (DPA) defines personal data as:

“...data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”

13. The Commissioner has taken particular account of the wording of the request itself:

“The file on any investigation into the conduct of the University and its servants and agents in defending the civil legal proceedings...”

14. The “civil legal proceedings” were brought by the complainant against the University. The University has not published details of the civil case, and the Commissioner is limited as to the detail he can include in this decision notice.
15. The complainant’s client believes that an investigation may have taken place, and that disciplinary proceedings may have resulted from such an investigation. The complainant argued that their client was entitled to find out about any alleged impropriety that occurred in relation to how the University handled his civil claim. The complainant said that their client had the right to know whether he had been the victim of (alleged) improper conduct or an (alleged) imperfect representation in the course of his litigation, if that was the case.
16. The complainant also argued that it was in the public interest that any complainant in a civil case learned about any such impropriety. The

¹ As set out at Schedule 1 to the DPA.

complainant pointed out that public authorities must conduct their affairs with probity and integrity.

17. The Commissioner understands that the complainant's client had a personal interest in the request. However the FOIA does not allow the Commissioner to take this into account as a substantive factor when considering whether information should be disclosed. The Commissioner has published guidance² on section 40(5) which acknowledges that there may be situations in which it could be argued that giving the confirmation or denial to the requester would not necessarily contravene data protection principles because the requester already knows or suspects that the public authority holds the information. The FOIA is motive and applicant "blind", and the test is whether the information can be disclosed to the public at large, not just to an individual. Therefore information can only be disclosed under the FOIA if it could be disclosed to any member of the public who requested it.
18. The Commissioner must be careful to avoid any inadvertent confirmation or denial that the requested information is held. However, in citing section 40 as a basis for refusing the request the University indicated that, if the requested information were held, it would comprise the personal data of one or more individuals. The Commissioner understands that the civil case was settled around February 2013, therefore any investigation as described in the request would have to have taken place between then and the complainant's request of 9 December 2013.
19. The Commissioner considers it reasonable to assume that, if the University did hold information relating to an investigation of the type described in the request, it would be likely to comprise personal data of the individual(s) who would have been the subject of the investigation, as well as any individual who may have provided information, such as witnesses. The request describes any investigation into "the conduct of the University and its servants or agents".
20. The Commissioner must also consider whether any individual could be identified by virtue of the University confirming or denying that it holds the requested information. The complainant's client, as the individual who brought the civil case, would be likely to know the identity of the University staff involved in handling that case. Therefore the

² https://ico.org.uk/media/for-organisations/documents/1206/neither_confirm_nor_deny_in_relation_to_personal_data_and_regulation_foi_eir.pdf

Commissioner accepts that confirmation as to whether the requested information is held or not would be likely to tell the public something about those staff, namely whether they were subject to any investigation.

The first data protection principle

21. The University has argued that confirming or denying that the requested information is held would breach the first data protection principle, which requires that personal data be processed fairly and lawfully. When considering the first principle the Commissioner will generally look to balance the reasonable expectation of the data subject(s) with the consequences of compliance with the request, and general principles of accountability and transparency. The Commissioner has been mindful of his published guidance³ on handling requests for personal data, and information that is (or would be if it were held) the personal data of public authority employees.

Reasonable expectation of the data subject(s)

22. The Commissioner is of the view that public authority employees should expect to have some personal information disclosed (for example, salary bands) as they are paid from the public purse. However the Commissioner considers that information relating to an internal investigation or disciplinary hearing will carry a strong general expectation of privacy. This has been supported by the Information Tribunal's finding in the case of *Waugh v Information Commissioner and Doncaster College*:⁴

"...there is a recognised expectation that the internal disciplinary matters of an individual will be private. Even among senior members of staff there would still be a high expectation of privacy between an employee and his employer in respect of disciplinary matters."

23. The Commissioner considers that individuals who are subject to internal investigation, or who provide information as witnesses, are generally entitled to expect that their personal information would not be disclosed into the public domain. Otherwise, public authorities as employers would find it more difficult to encourage staff to engage with disciplinary

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https://ico.org.uk/for_organisations/guidance_index/freedom_of_information_and_environmental_information#exemptions

⁴ Appeal no EA/2008/0038

procedures, whether as the subject of an investigation or as a witness. The Commissioner recognises that individuals have a reasonable expectation that a public authority, in its role as a responsible data controller, will respect confidentiality in this regard. The University has confirmed that, if an investigation did take place, any relevant information would have been treated confidentially.

24. In light of the above the Commissioner accepts the University's argument that any individual involved in an investigation of the description set out in the request, would have an expectation of confidentiality which would extend to refusing to confirm or deny that such an investigation took place.

Consequences of disclosure to the individuals

25. The Commissioner has set out above his reasons for accepting that the individual(s) in question have a reasonable expectation of confidentiality in this case. The Commissioner further accepts that any individual involved in internal investigations would be likely to feel distressed if the University confirmed whether or not an investigation had taken place. The Commissioner is mindful that the University has not put any relevant information into the public domain that would suggest that such an investigation had taken place in this case.

General principles of accountability, transparency and legitimate public interest in disclosure

26. The Commissioner appreciates that there is a general public interest in accountability and transparency, and the public is entitled to be informed as to how the University operates. On the other hand the Commissioner recognises that this legitimate interest must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of any individual who would be affected by confirming or denying that the requested information is held.
27. The Commissioner's guidance on requests for personal data of public authority employees suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private life. However the Commissioner recognises that information relating to personnel matters such as discipline will often be inherently "private" in nature. Issues may be relatively innocuous but will still be personal to the individuals involved, whether they are under investigation or providing information as witnesses. In the Commissioner's opinion there is a much weaker public interest in confirming or denying that this kind of information is held.

28. Despite the arguments set out above, the Commissioner recognises that in some circumstances it will still be fair to disclose information of the type withheld, ie where there is an overriding public interest in disclosure. The Commissioner notes the complainant's argument that compliance with the request would assist their client in considering further legal action against the University. However this is a private, rather than public, interest, and does not assist the Commissioner's considerations.
29. As indicated above the Commissioner must be careful not to confirm or deny that the requested information is held, but he can confirm that he is satisfied that there is no overriding public interest in this case that outweighs the fact that confirming or denying that the requested information is held would be likely to cause unwarranted distress to the individual(s) concerned.
30. In conclusion then, the Commissioner finds that confirming or denying that the requested information is held would be unfair and thus contravene the first data protection principle. Therefore the Commissioner finds that the University was entitled to refuse the request on the basis of section 40(5)(i)(b) of the FOIA.

Procedural requirements

Section 17: refusal notice

31. Section 17(1) of the FOIA states that if a public authority wishes to rely on any exemption it must issue a refusal notice. The refusal notice must state which exemption applies and why, if that would not otherwise be apparent.
32. In this case the University's refusal notice dated 6 January 2014 cited section 40 but did not cite any subsection. The internal review letter dated 13 March 2014 cited section 40(2). The University did not advise the complainant that it was refusing to confirm or deny that it held the requested information, and it did not cite the appropriate subsection of section 40. Therefore the Commissioner considers that the University failed to comply with section 17(1)(b) in respect of its refusal notice.

Right of appeal

33. 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 123 4504
Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

34. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Tribunal website.
35. 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

Alexander Ganotis
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF