

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 May 2021

Public Authority: The Council of the University of Leicester
Address: University Road
Leicester
LE1 7RH

Decision (including any steps ordered)

1. The complainant requested statistical information about the classification of masters degrees that had been awarded. The University of Leicester ("the University") provided some information, but withheld all numbers fewer than five and relied on section 40(2) of the FOIA (third party personal data) to do so.
2. The Commissioner's decision is that the University is not entitled to rely on section 40(2) of the FOIA to withhold the information.
3. The Commissioner requires the University to take the following steps to ensure compliance with the legislation.
 - Disclose the remaining withheld data.
4. The University must take these steps within 35 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 21 May 2021, the complainant wrote to the University and requested information in the following terms:

"I would like to request access to the following information:

"The breakdown of grades achieved for each classification (Fail; Pass; Merit; Distinction) for the following years at Leicester University:

2015; 2016; 2017; 2018; 2019

"In the following courses:

- MSc in Occupational Psychology (Distance Learning)*
- MSc in Psychology (Distance Learning)*
- MRes in Research Methods in Psychology (Campus-based)*
- MSc in Management (Campus-based)*
- MSc in Finance (Campus-based)*
- MSc in Finance (Distance Learning)*
- MSc in Human Resource Management and Training (Campus-based)*
- MSc in Human Resource Management and Training (Distance Learning)"*

6. On 29 June 2020, the University responded. It provided some data for the first four academic years, but used "<5" to withhold small numbers. It later clarified that it had relied on section 40(2) of the FOIA to withhold this information. It also claimed that it had not "finalised" the data for the most recent academic year.
7. The complainant requested an internal review on 17 July 2020. The University sent the outcome of its internal review on 31 July 2020. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 26 August 2020 to complain about the way her request for information had been handled.
9. On 23 April 2021, the Commissioner commenced her formal investigation with a letter to the University. She asked the University to explain why it believed that individuals could be identified from the withheld information. She also asked the University to either provide the data from the 2019 academic year – or explain why it could not – within 20 working days.
10. The University issued a further response to the complainant on 19 May 2021. It disclosed most of the data but again relied on section 40(2) of the FOIA to withhold numbers smaller than five.

11. The Commissioner considers that the scope of her investigation is to determine whether the University is entitled to rely on section 40(2) of the FOIA to do so.

Reasons for decision

Section 40 – Personal Information

12. Section 40(2) of the 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.
13. 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 General Data Protection Regulation ('GDPR').
14. 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.
15. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

"any information relating to an identified or identifiable living individual."

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable. 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.
18. 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.

19. The Commissioner recognises that small numbers carry a greater risk of identification than larger ones – but that does not mean that every small number identifies any individual. 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. This is consistent with the binding Upper Tribunal ruling in *Information Commissioner v Miller* [2018] UKUT 229 (AAC).

The University's position

20. In its submission, the University noted that the complainant had previously been enrolled as one of its students. Whilst it noted that this fact would not affect its response, it also considered that this meant that any information it disclosed would be available to those with inside knowledge – and that this was a matter of fact, not just a hypothetical possibility.
21. The University commented that:

"[The complainant] is likely be able to use their own knowledge of the University's courses in question for which some information has been reported, in conjunction with the very small numbers of students with a particular degree classification, in order to identify the individual students. For example, where there is a small number of degree classifications for a particular course ie: between 1 and 4, the requestor would only need to know the course name and the year of graduation in order to put the two together and identify the individual student. [The complainant] also has more accessibility to other students of the University by virtue of being part of the student community themselves, which increases the likelihood of them being able to identify other students if the withheld information is released into the public domain...

"...In this particular case, there is good reason to believe that the requestor of the information in question does have access to other information that would allow the identification of individuals, if combined with the information currently being withheld. For example, [the complainant] is likely to know or be familiar with other students on her course and other similar courses, meaning they would be more likely to be able to identify individuals awarded particular degree classifications if they knew the specific numbers that were fewer than 5."

22. When asked to explain specifically how individuals could be identified from the withheld information – either alone or in combination with other available data sources:

"The University publishes graduation information as well as alumni information about students, but does not publish degree classifications awarded to individual students. An individual could use that published information in combination with the withheld information were it to be disclosed into the public domain. This could result in identification of individuals who are identified by virtue of there being a very small number of degree classifications awarded for their degree for that particular year. In addition, anyone could submit separate, and indeed multiple, FOI requests on the same or similar subject matter, and using the combined information with information already in the public domain, to identify the individuals from the results...

"...In addition, the suppressed numbers, if disclosed, could be used by any member of the public in combination with knowledge of a student's year of graduation and course, or in conjunction with information in the Graduation Prospectus, to easily identify specific individual students. In particular the above information could be used by [the complainant] who has a specific interest in and knowledge of students at the University by virtue of having themselves been a student of the University."

The Commissioner's view

23. The Commissioner does not consider that the University has explained how individuals could be identified from the withheld information.
24. 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.
25. The University has argued that the withheld information could be cross-referenced with the graduation list to identify individual students. Even if the Commissioner were to accept that individuals could be identified via that route, she does not accept that those individuals could be linked with the classification of their degree.

26. When determining whether or not a small number would identify individuals, the Commissioner considers not just the size of the number itself, but the size of the overall dataset from which it has been drawn. It is much easier, for instance, to identify one person from a group of three than it is to identify one from a group of thirty.
27. For example, the University has withheld the number of people who graduated its Finance (Distance Learning) course with a distinction in the 2015/16 academic year. The data it has already disclosed shows that 21 students graduated with merit that year and a further 14 students achieved a bare pass. That means that there must have been a minimum of 36 students who graduated that course in that particular year.
28. Even if only one student had passed with distinction and even if a person wishing to identify that student knew every single one of the students on that course, it is not clear how a person could reliably identify which of the 36 students had passed with distinction. It is not sufficient for someone to simply "make an educated guess" as to who an individual might be.
29. Some of the datasets were admittedly smaller. For example, the University used "<5" to withhold the number of students who passed in each category of the "Psychological Research Methods" course in 2017/18. That means the overall number of students graduating the course that year could be as high as 12 or as low as 3 – although the data from the same course for other years suggests the number will be at the upper end of that range.
30. However, even if the overall dataset is relatively small, the Commissioner still does not see how individuals could be linked with their degree classification.
31. The University provided a fictional example of a student "student X" who had gained a degree in Occupational Psychology in 2016/17:

"for the course Occupational Psychology MSc, there is only one award of 'Masters with Distinction' in 2017 and Student X is the only student in the Prospectus who has completed that course in 2017, this combination of information could then be used to identify which student was awarded which degree classification ie: Student X was awarded a Masters with Distinction in Occupational Psychology MSc in 2017.
32. The difficulty with this hypothetical scenario is that it does not relate to any of the data already disclosed. For example, the data for Occupational Psychology in 2016/17 shows that five students passed

with merit, fewer than five students passed with distinction and fewer than five achieved a bare pass. That means that Student X would have been one of between 7 and 14 students (and data from other years suggests a number closer to 14) who had graduated from that course, in that year. Even a person who knew that Student X had graduated from that course, in that year, would have no way of knowing whether it was Student X who had received the distinction or any of the other 6-13 students with same degree.

33. The Commissioner also notes that the way that the request has been structured does not allow a person to compare the various breakdowns to deduce information. For example, if the complainant had asked for a breakdown of students by degree classification and then asked for that data to be further broken down by age and gender, a person who knew the age of some of the students would be able to use that data to deduce their degree classification (or vice versa), However, because the request only asks for the dataset to be broken down by course and then by classification, it isn't possible to use one breakdown to identify the individuals from another.
34. The Commissioner therefore considers that the University has not demonstrated how the withheld information can be used to link individuals with their degree classification. It thus follows that the withheld information is not personal data and therefore the University is not entitled to rely on section 40(2) of the FOIA to refuse it.

Right of appeal

35. 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 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

36. 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.
37. 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

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