

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 November 2022

Public Authority: The Governing Body of the University of Bristol
Address: Beacon House
Queen's Road
Clifton
Bristol
BS8 1QU

Decision (including any steps ordered)

1. The complainant has requested the University of Bristol (the university) to disclose the two QC reports commissioned by the university in the [named redacted] case. The university confirmed that some of the requested information has been published. With regards to the remainder, the university refused to disclose it citing sections 22, 32(2), 30 and 40 of FOIA.
2. The Commissioner's decision is that the remaining withheld information is exempt from disclosure under section 40 of FOIA. He therefore does not require any further action to be taken.

Request and response

3. On 8 December 2021, the complainant wrote to the university and requested information in the following terms:

"Please send the two QC Reports commissioned by the University in the [name redacted] case".

4. The university responded on 9 August 2021. It refused to disclose the requested information citing sections 22, 32, 36 and 40 of FOIA.
5. The complainant requested an internal review on 9 December 2021. They stated that the public interest rested in the disclosure of both reports.
6. The university carried out an internal review and notified the complainant of its findings. It withdrew its application of section 22 but confirmed that it could now rely on section 21 because the second report and parts of the first had been published. For the remaining withheld information, the university confirmed that it upheld its previous application of sections 32, 36 and 40 of FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 7 February 2022 to complain about the way his request for information had been handled. They believe the remaining information should be published.
8. The Commissioner has reviewed the withheld information and obtained additional submissions from the university. He is satisfied that all remaining withheld information is exempt from disclosure under section 40 of FOIA. The following section of this notice will explain why.

Reasons for decision

Section 40 personal information

9. 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.
10. In this case the relevant condition is contained in section 40(3A)(a)¹. 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').

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

11. 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.
12. 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?

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

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

14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. 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.
16. 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.
17. The withheld information is part of one report commissioned by the university and conducted by a King's Counsel in relation to a complaint made about a previous university employee dated December 2020. It consists entirely of the personal data of the ex-employee in relation to their conduct and behaviour and contains information concerning the individual who made the original complaint. It also contains the personal data of third party individuals who produced documentation that was analysed as part of the investigation. The withheld information is so intrinsically linked to the personal data of those third parties that redaction in any form is not possible.
18. The Commissioner is satisfied that the remaining withheld information both relates to and identifies the third parties concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
19. 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.

20. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

21. 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”.

22. 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.

23. 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

24. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that “processing shall be lawful only if and to the extent that at least one of the” lawful bases for processing listed in the Article applies.

25. 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.

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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) 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

26. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the 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.
27. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

28. 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.
29. The university appreciates that there are potential wider social and political interest in the disclosure of the remaining withheld information. Also, that disclosure would ensure that the university is acting with transparency and in accordance with its decision-making procedures.
30. The complainant clearly believes there are legitimate interests in disclosure. They said in their opinion there is an 'enormous interest' in the case and not just from the Jewish Community.

sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

31. The Commissioner is in agreement with both the university and the complainant that there are clear legitimate interests in disclosure.

Is disclosure necessary?

32. '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 the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

33. The Commissioner considers the information already in the public domain goes some way to meeting the legitimate interests identified. But he considers the fullness of first report would be required in order to offer complete transparency and accountability and enable members of the public to see exactly what was taken into account and how such information then led to the decisions that were taken. The Commissioner does not consider there is a less intrusive means available for achieving that.

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

34. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects 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.

35. 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.

36. 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.

37. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
38. With regards to the third parties who contributed to the remaining information, from the submissions received from the university, it is clear that they would hold no reasonable expectation that disclosure to the world at large could take place. The student who complained was only entitled to the outcome of the investigation in general terms; not the entire report. They would not expect the wider public to be granted full access. They would expect the information they supplied to be used for the purposes of the enquiries undertaken and would hold no expectation that detailed information relating to their complaint and the conduct of the ex- employee could be disclosed to the world at large. Disclosure would cause the student distress and upset and would be an unwarranted intrusion into their private life.
39. The third parties that contributed to the investigation, whose evidence is detailed in the remaining withheld information, would similarly hold no reasonable expectation of public disclosure. Those third parties were placed under strict conditions of confidentiality in accordance with Ordinance 10.1 of the university's Charter of Incorporation, which requires that:

"all parties involved in the operation of Ordinance 10 must ensure that they maintain, as appropriate, confidentiality within and outside the University."
40. Those individuals would similarly have no expectation that the University could disclose their input. Given the sensitivities the investigation addressed, it is reasonable to say that disclosure would cause those individuals considerable distress and upset.
41. Turning now to the ex-employee themselves, it is accepted that they held a senior public role in the university and should expect accountability, especially if there are concerns around their behaviour and professional conduct. However, that being said the ex-employee is still entitled to some privacy and right of confidentiality especially in terms of more detailed information that was analysed and put forward against them. They may expect some public accountability in terms of the general outcome of the matter but not the full details of what was accused, the detailed evidence the university gathered and the King's Counsel considerations of that in order to reach the finding that they did.
42. The Commissioner accepts that disclosure of the remaining withheld information would cause the ex-employee considerable distress and

upset, when they have already be held publicly accountable. It would be a step too far and constitute an unjustified level of intrusion.

43. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
44. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
45. The Commissioner has therefore decided that the university was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Right of appeal

46. 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

47. 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.
48. 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

Samantha Coward
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