

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

### **Decision notice**

**Date:** 28 March 2022

**Public Authority:** Board of Governors  
**Address:** University of Chichester  
College Lane  
Chichester  
West Sussex  
PO19 6PE

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

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1. The complainant has requested information from the University of Chichester (the university) relating to sexual abuse/assaults at the university within a particular timeframe. The university provided information in relation to the first part of the request but refused to provide any information regarding parts two and three of the request, citing section 40(2) – personal information.
2. The Commissioner's decision is that the university has appropriately cited section 40(2) and that the requested information should not be disclosed.
3. The Commissioner does not require the university to take any further steps.

#### **Request and response**

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4. On 1 April 2021, the complainant wrote to the university and requested information in the following terms:

"I would like to know the number of reports of sexual abuse / assaults at The University of Chichester across the years 2018, 2019, 2020, 2021

Included in this information I would like the age of the victims and whether any were known to be vulnerable.

I would also like to know the level of seriousness of each assault and the result of investigations."

5. On 4 May 2021, the university responded (in a letter dated 30 April 2021). It disclosed figures in response to the first part of the request. The university has told the Commissioner that these figures were correct at the time of the request, based on the date of the alleged incident, but have subsequently been modified after further reporting took place.
6. The university refused to provide the requested information regarding the second and third part of the request, citing section 40(2) of the FOIA (personal data of a third party) as its basis for doing so.
7. The complainant replied to the university on the same day and asked it to carry out a review of its handling of the request. They stated that the requested information did not have to be linked to an individual but the complainant wanted to know ages and vulnerability.
8. On 18 May 2021, the university completed an internal review and wrote to the complainant maintaining its original decision.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 18 May 2021 to complain about the way their request for information had been handled. Their view is that both they and the public are concerned that the vulnerable are not being protected at the university and other such establishments.
10. The Commissioner considers the scope of this case to be the university's citing of section 40(2) FOIA to the withheld information.

### **Background**

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11. Before analysing the exemption cited, it might be helpful to detail how the university determined the scope of the request and subsequently located that information.
12. Firstly, the university stated that the first part of the request is relatively simple, only requiring numbers of reports within the timeframe specified. It categorised a "report" to be an instance in which information was provided to the university. The university then narrowed this to cover only formal reports of sexual assault and/or abuse. It made a distinction between disclosures and reports. For example, a disclosure could be an instance of sexual abuse disclosed during a counselling session. This may have taken place outside the timeframe, outside the context of the university, have taken place years before, and being fully investigated at the time by other authorities. Notes may be recorded in a counselling session but would not be taken forward as a formal "report" unless there was some remaining 'live' issue. Similarly, the university considered the request to cover reports received from third parties such as the police and would cover duplicate reports of the same incident, for example, the alleged victim and an eyewitness of the same incident.
13. The university interpreted "at the university of Chichester" to mean incidents that took place on campus or under the auspices of the university, for example, field trips. The university interpreted the request requiring information about incidents alleged to have taken place within the specified timeframe. It used academic years as that is how the records are kept. The university explained that a judgement can be made as to whether sexual assault or abuse has taken place but that its view was that the request does not seek this determination but rather whether an abuse/assault had been reported. The age data sought was interpreted as the ages of those who identified as alleged victims within the report at the time of the alleged abuse/assault.
14. As regards "whether any were known to be vulnerable" This was taken to mean in the context of safeguarding. The university applies the current definition which is 'adult at risk' and not "vulnerable" in the words of the complainant or 'vulnerable adult'. This definition covers those who have a particular care or support need, are at risk of experiencing abuse or neglect, and are, by reason of their support or care needs, unable to protect themselves from that abuse or neglect. The university notes that being 'at risk' is context-dependent and may vary over time, therefore it is subjective. The request refers to a person known to be vulnerable, the university interpreted this as it having positively recorded that a person had 'at risk' status. The university also considered that the request is seeking to understand whether it held information that discloses that a person is, or believes themselves to be,

at risk. For example, there may be a record held that a person has a severe mental health condition or could be 'known to be vulnerable', even if not specifically recorded as 'at risk'. The university did not apply a narrow interpretation.

15. The complainant requested to know "the level of seriousness of each assault" which was interpreted as referring to each of the alleged incidents of abuse and/or assault identified within the first part of his request. The university stated that the severity of an alleged incident is a complex judgement and will vary depending on context or the information available to the person undertaking the assessment. The university does not classify these alleged incidents by severity but addresses each report in its own terms. The university interpreted "result of investigations" as referring to the outcomes of investigations undertaken by the university or by third parties (like the police) where the outcomes were recorded by the university. A "result" in this context would cover findings of fact and application of policy law, details of legal or disciplinary action against perpetrators, action taken to support victims and wider actions such as preventative measures to manage future risk. The university considered relevant reports, letters to those involved and other records to be in scope in a broad sense.
16. In locating the information requested, the university reviewed the records held by its Student Support Service which is the department responsible for student wellbeing and to which all reports of sexual misconduct are directed for review and investigation. The university also reviewed the records held by its Academic Quality and Standards Service which oversees all student complaints that are received.

## **Reasons for decision**

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### **Section 40 - personal information**

17. 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.
18. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

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').

19. 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.
20. 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?**

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

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

22. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
23. 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.
24. 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.
25. The university considers the information it identified as within scope to be personal data within the meaning of the GDPR. The age data is recorded in individual student records which constitute the personal data of those individuals. It contends that such cases inevitably become 'public knowledge' within the local community. The university provided the Commissioner with an example, the age of an alleged victim or perpetrator, combined with the location of an incident, for example, in a student house could easily narrow the number of possible individuals to one. The university argues that this is exacerbated by the fact that there are outliers. Those individuals are particularly likely to be identified.

26. The university categorised the information sought as -

The ages of the alleged victims ('Age data');

Care records that describe the sexual abuse and/or assault alleged to have been suffered by the individuals ('Care Records');

Records that describe the outcomes of investigations undertaken into such alleged abuse and/or assault ('Investigation Records').

27. Some of the personal data is special category data and some of it is criminal offence data.

28. The complainant did not ask for names but the Commissioner is satisfied that the information could lead to the identification of individuals when combined with other information. The Commissioner has considered the withheld information which was provided to him as pseudonymised samples of the information held, with names replaced by reference numbers and specific dates by year only. He is satisfied that this information both relates to and has the potential to lead to the identification of the data subjects concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

29. 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.

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

**Would disclosure contravene principle (a)?**

31. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

32. 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.

33. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

34. The Commissioner intends to consider the age data provided to the Commissioner separately from the remaining requested third party

personal data as it does not fall within the category of criminal offence data or special category data. Criminal offence data does not, as matters stand, cover information about alleged victims/victims of crime unless it also identifies an offender or suspected offender. In this case the age data that has been requested solely applies to the alleged victims, it does not relate to or identify any alleged perpetrator. Therefore a Schedule 1 condition under the DPA 2018 is not required to process this particular personal data.

35. Nor does the Commissioner intend to consider the age data within his analysis of special category data even though it was only processed because of the alleged sexual abuse/assault instances. Age, in itself, does not fall within the definition of special category data.

**Lawful processing: Article 6(1)(f) of the GDPR**

36. 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”<sup>2</sup>.*

37. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

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<sup>2</sup> 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 GDPR would be contravened by the disclosure of information, Article 6(1) of the 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”.*

- 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.

38. 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

39. 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.
40. The complainant considers that they are acting for the public and in the public interest regarding their concern that the vulnerable are not being protected appropriately at establishments like the university.

#### Is disclosure necessary?

41. '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.
42. Despite the information being considered necessary to the complainant to further their aim of apparently holding the university to account for failing to protect the vulnerable, in itself it does not provide any furtherance of the complainant's stated aim. However, the Commissioner accepts that the complainant did not request this information in isolation and as part of a wider request which will be



considered later in this decision notice, it might aid his stated purpose and therefore be necessary.

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

43. 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 the 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.
44. 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.
45. The university confirmed that it had considered the lawful bases in Schedule 6(1) GDPR and had concluded that there was no lawful basis to disclose this information.
46. 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.
47. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
48. The Commissioner considers the disclosure of this information to be beyond the reasonable expectation of the individuals concerned that any personal data that could be linked to them would be disclosed within the context of an FOI request. His view is that the risk of identification in such a context would be likely to result in unwarranted damage or distress. The Commissioner's opinion is that there is a more appropriate

route to address such concerns. It is for the university authorities and the police and other support services to ensure that alleged sexual abuse/assault victims are protected.

49. 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.
50. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately to consider whether disclosure would be fair or transparent.
51. 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).

**Is the information special category data and criminal offence data?**

52. Information relating to special category data is given special status in the GDPR.
53. Information relating to criminal convictions and offences is also given special status in the GDPR.
54. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
55. This special category data is the Care Records held by the university regarding care and support requests, decisions on outcomes recorded about an individual in order that the university may act on that information in providing its services. The information recorded is the personal data of the individual who is the subject of the records in each case. There are notes of interviews, correspondence regarding a person's health, and records of action taken in support of individuals who require special care or support. The university contends that the individual is easily identifiable by name (the Commissioner notes that the complainant has not asked for names), by the descriptions of their experiences, conditions and care and in some cases by other elements such as the home address, contact details etc. It is the university's position that the entirety of these records is personal data within the meaning of the DPA 2018. It argues that the entire purpose of these

records is to hold personal data and that there is no reason for them to exist to the extent that they do not contain personal data.

56. Having considered the wording of the request, and viewed the pseudonymised withheld information, the Commissioner finds that the requested information does include special category data. He has reached this conclusion on the basis that the information is about individuals' sex lives and sexual orientation which, in fact, is the focus of the information and is highly sensitive. He considers that it is not possible to anonymise this information and that, given the content, it would be possible to link an individual/s to the sensitive personal data recorded and that to disclose this information cannot be warranted.
57. Article 10 of the GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to:
  - (a) *The alleged commission of offences by the data subject; or*
  - (b) *Proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.*
58. The university explains that the Allegation Records and the Investigation Records include criminal offence data in that they record allegations that, if proven, would constitute criminal offences. They necessarily include frequent and extensive references to complainants, alleged perpetrators and witnesses. They may also identify university staff and third parties such as the police who are responding to or investigating the allegation. These individuals' personal data appear throughout the records. They are identifiable by name (the Commissioner notes that the complainant has not asked for names), by description, and by the details recorded of events. The records include statements made by individuals, witnesses, other evidence and consideration and determinations made by investigators. Some of the information does not constitute personal data alone, such as dates and times of incidents or descriptions of locations or actions but in combination with other elements it can be used to identify the alleged victim or alleged perpetrator. The university's view is that the entirety of these records constitute personal data.
59. The university explains that the Care Records occasionally contain criminal offence data in that they record similar allegations in that context.

60. Having considered the wording of the request, and viewed the withheld information in a pseudonymised form, the Commissioner finds that the requested information does include criminal offence data. He has reached this conclusion on the basis that this information contains the alleged commission of sexual offences and police report information. He considers that it is not possible to anonymise this information and that, given the content, it would be possible to link an individual/s to the sensitive personal data and potentially criminal offence information recorded and that to disclose this information cannot be warranted.
61. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
62. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
63. The University has confirmed to the Commissioner that it considered the conditions for processing set out in Article 9 of the UK GDPR but was unable to satisfy any of them in order to disclose this personal data.
64. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
65. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.
66. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met.
67. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under the FOIA are the conditions at Part 3 paragraph 29 (consent from the data subject) or Part 3 paragraph 32 (data made manifestly public by the data subject).
68. The University has confirmed that it has considered the conditions for processing as set out in Schedule 1, Parts 1-3 of the DPA but it was

unable to satisfy any of them in order to disclose this personal data. The university does not have explicit consent to disclose this information and, to the best of its knowledge, the information has not been made public by the individuals concerned.

69. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to the criminal offence data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
70. As none of the conditions required for processing criminal offence data are satisfied there is no legal basis for its disclosure. Processing this criminal offence data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.

**Right of appeal**

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71. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

72. 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.
73. 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 .....**

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