

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 May 2022

Public Authority: London School of Economics
Address: Houghton Street
London
WC2A 2AE

Decision (including any steps ordered)

1. The complainant made a request for information relating to President Tsai Ing-wen's Thesis. The LSE provided some information, it withheld some information under section 40(2) FOIA and confirmed that no further information was held.
2. The Commissioner considers that section 40(2) FOIA was applied correctly to the withheld information and that the LSE was correct to confirm that no further information was held under section 1(1)(a) FOIA other than that which had been provided or withheld under section 40(2) FOIA. The LSE breached section 10 in the handling of this request as it did not provide a response within the statutory time for compliance.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 14 September 2020 the complainant made a multi-part request to the LSE in combination with an internal review request relating to a previous request for information. The following three parts of the new requests made in this correspondence have been considered as part of this Decision Notice:
 - " 1. LSE's response: "there are no records about the appointment of the supervisor held by LSE but two reports indicating who the supervisor was." **Please provide a copy of those two reports.**

2. Please send me copies of all records showing the laws/regulations/rules/policies/common practices/ethical standards under which the LSE/the LSE Library were authorized to accept and store Ms. Tsai's 2019 photocopy in the way it was accepted and is stored.
3. All emails between the LSE and [name redacted] at Cornell Law School."
5. As the new requests were made within a request for internal review on a previous request, there was some confusion as to whether or not the LSE had responded to the new requests made on 14 September 2020. As a result an internal review was requested on 7 September 2021 as the complainant did not consider that the new requests made on 14 September 2020 had been addressed by the LSE in its correspondence on this matter or in relation to the previous request she had made.
6. On 22 November 2021 the LSE responded to one of the new requests made on 14 September 2020. It refused to disclose two reports in response to the request under section 40(2) FOIA (see the request numbered '1' above).
7. Due to the time that it had taken the LSE to respond to the new requests made on 14 September 2020 and the complainant having already asked for an internal review, the Commissioner exercised his discretion to accept the section 50 complaint without an internal review having been carried out.
8. During the course of the Commissioner's investigation, information was disclosed to the complainant on 21 January 2022 covering 'all' requests including parts '2' and '3' of the request set out above.
9. The complainant remains dissatisfied with the LSE's application of section 40(2) FOIA to withhold the two requested reports and she also considers that LSE has failed to provide all information held in relation to parts 2 and 3 of her request set out above.

Scope of the case

10. The Commissioner has considered whether the LSE was correct to refuse to provide the two withheld reports under section 40(2) FOIA and whether the LSE was correct to confirm it holds no further information other than that which had been provided in relation to parts 2 and 3 of the request under section 1(1)(a) FOIA.

Reasons for decision

Section 40 - personal information

11. 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.
12. 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 General Data Protection Regulation ('GDPR').
13. 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.
14. 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.

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

Is the information personal data?

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

“any information relating to an identified or identifiable living individual”.

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

17. 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 LSE explained that the two withheld reports are at MPhil level, which is the first stage in a PhD programme as set out in University of London regulations at the time. A student must still pass MPhil stage to progress to PhD level. As such the withheld information relates to President Tsai Ing-wen’s program of study.

20. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to President Tsai Ing-wen. He is satisfied that this information both relates to and identifies President Tsai Ing-wen. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.

21. 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.

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

Would disclosure contravene principle (a)?

23. 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”.

24. 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.
25. 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.

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

26. Article 6(1) of the 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.
27. 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.
28. 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:-
 - i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

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) 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".

- 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.
29. 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

30. 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.
31. The University considers that there is a legitimate interest in confirming that a degree has been awarded and it's level. It will also confirm if no record of a degree award claimed by an individual is made for the same reason of legitimate interest.
32. The Commissioner considers that there is a legitimate interest in demonstrating that a PhD or other qualification has been correctly awarded.

Is disclosure necessary?

33. '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.
34. In this case the LSE has argued that as the withheld reports relate to the MPhil level, they do not add much to the debate as to whether President Tsai Ing-wen was rightly awarded a PhD or not.

35. In *Dr Yungtai Hsu v IC EA/2020/0286*³, the First-tier Tribunal decided that as the University of London had confirmed that President Tsai had been awarded a PhD degree, it was not necessary to disclose the further detail requested relating to the awarding of the PhD.

“. Having considered the above arguments, we find that disclosure of the requested information is not necessary. In particular, the University has confirmed publicly that a PhD degree was awarded to President Tsai. In its original response to the Request, the University stated, “The University of London confirms that Ms Ing-Wen Tsai was awarded a PhD by the University of London in 1984 and she was registered as an LSE student”, and this statement was repeated in the internal review response. The internal review also repeats information from other FOIA requests that, “The University can confirm its records state that the examiners reviewed the thesis and examined the candidate orally on the subject of the thesis...Dr Tsai was recorded on the University’s 1984 pass list”. The University’s submissions for this appeal also confirm that it holds records of the viva and pass list, and can confirm award of the degree. These clear statements from the University satisfy the legitimate interests in confirming that President Tsai was awarded a PhD degree.” [24]

36. For similar reasons the Commissioner considers that it would not be necessary to disclose the information requested in this case.

37. For completeness the Commissioner has considered the final stage of the test, had the test of necessity been deemed to have been met in this case.

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

38. 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.

39. 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.
40. 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.
41. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
42. The LSE explained that it is very careful about provision of student records to third parties. The imbalance in power between the LSE and students means that it takes into consideration their expectation of privacy of their student records in any request for records relating to them.
43. In this case the Commissioner is mindful that the withheld information does not relate directly to the awarding of the PhD and quite rightly students have an expectation of privacy that their student record will not be published into the public domain.
44. 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.
45. 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.

The Commissioner's view

46. The Commissioner has therefore decided that the LSE was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Section 1 – Parts 2 and 3 of the request

47. Section 1 of the FOIA states that:

“Any person making a request for information to a public authority is entitled – (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him.”

48. The complainant considers that the LSE has not provided all information it holds falling within the scope of parts 2 and 3 of the request.
49. In cases where a dispute arises over the extent of the recorded information held by a public authority at the time of a request, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority held information relevant to the complainant's request.
50. The Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.
51. In this case the LSE has explained that, in relation to part 2, there were no potential records other than emails as that is how all correspondence was conducted. So other than the emails which have already been provided as a result of the LSE searches, it holds no other information relating to this request. In relation to part 3, it similarly confirmed that all information held relevant to the request was provided on 21 January 2022 and if no information has been provided in relation to the requests it is because the information does not exist.
52. The complainant's position remains that parts 2 and 3 have not been responded to but no further explanation has been provided as to why it is considered more information is held.

53. On the basis that the LSE has confirmed that it has conducted searches and provided all information located (other than the information withheld under section 40(2) FOIA) the Commissioner can only determine that on the balance of probabilities no further information is held by the LSE under section 1(1)(a) FOIA.

Section 10

54. Section 10(1) provides that:

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

55. Section 1(1) provides that:

"Any person making a request for information to a public authority is entitled –

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
(b) if that is the case, to have that information communicated to him."*

56. The requests was made on 14 September 2020 and responses were not provided until 22 November 2021 and 21 January 2022. The Commissioner therefore finds that the LSE breached section 10(1) in failing to provide a response within 20 working days.

Right of appeal

57. 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

58. 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.
59. 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.....

Gemma Garvey
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