

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 June 2017

Public Authority: Newcastle University
Address: Claremont Tower
Claremont Road
Newcastle upon Tyne
NE1 7RU

Decision (including any steps ordered)

1. The complainant has requested information regarding a former student of Newcastle University (the University).
2. The Commissioner's decision is that the University is correct to neither confirm nor deny that it holds information relevant to the request, by virtue of section 40(5)(b)(i) of the FOIA.
3. The Commissioner does not require the University to take any steps.

Request and response

4. On 25 October 2016, the complainant made the following request for information:

"Has the Law Department been contacted by Northumbria Police between March 2016 and the present in an attempt to trace a former student of the department?"

I do not need to give any other details, except that there is good reason to be concerned about the welfare and possibly even the safety of the former student".

5. On 14 November 2016 the University responded and stated that it was unable to confirm or deny that it held any relevant information.
6. The University provided an internal review on 6 December and upheld the decision to apply section 40(5)(b)(i) of the FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 19 December 2016 to complain about the way his request for information had been handled.
8. The Commissioner has focused her investigation on whether the University is correct to neither confirm nor deny whether it holds the information that has been requested, under section 40(5)(b)(i) of the FOIA.

Reasons for decision

9. When a public authority receives a request for information under FOIA, it normally has a duty under section 1(1)(a) of the FOIA to tell the requester whether it holds the information. This is called “the duty to confirm or deny”. However, in certain circumstances, this duty does not apply and the public authority is not obliged to say whether or not it holds the information; instead, it can give a “neither confirm nor deny” response.
10. Section 40(5) of FOIA sets out the conditions under which a public authority can give a “neither confirm nor deny” response where the information requested is, or would be, personal data. It includes provisions relating to both personal data about the requester and personal data about other people.
11. If the information would constitute personal data relating to someone other than the requester, then the public authority does not have to confirm or deny whether it holds it if one of the conditions in section 40(5)(b)(i) or (ii) applies.
12. There may be circumstances, for example requests for information about criminal investigations or disciplinary records, in which simply to confirm whether or not a public authority holds that personal data about an individual can, itself, reveal something about that individual. To either confirm or deny that the information is held could indicate that a person is or is not the subject of a criminal investigation or a disciplinary process. If to do so would contravene any of the data protection principles, for example because it would be unfair, then the public authority is not obliged to confirm or deny that it holds the information.
13. The University says that 40(5)(b)(i) applies in this case, namely that confirming or denying information is held would contravene one of the data protection principles. Specifically it would contravene the first

principle which says that personal data should be processed fairly and lawfully.

If held, would the information be personal data?

14. The Commissioner has first considered whether the requested information would be the personal data of a third party.
15. The Data Protection Act 1998 (DPA) categorises personal data as data that relates to a living individual from which that individual can be identified.
16. The University has explained that although the complainant has not named the former student in his request, to confirm or deny whether any information is held would indicate that the police contacted it about the student and therefore, if held, the requested information 'relates' to the student and is their personal data.
17. The complainant has argued that he has not requested any personal data and that the information is required in order to prove or otherwise that the police have made the enquiries they purport to have done. He has further argued that in the event the University had not been contacted then this would indicate misconduct on behalf of the police.
18. The Commissioner has carefully considered the complainant's arguments, however she is satisfied that the requested information is personal data.
19. Although the former student has not been named in the request and the complainant has asked for a 'yes/no' answer, the answer sought still relates to a living individual, and would tell the public something about the individual, namely that the police contacted the University about them.
20. If held, the former student could also be identified from the information as it is unlikely that the University receives a large number of similar requests of this nature from the police, and anyone with knowledge of a missing student may know that the police have been involved and would therefore be able to establish who the information relates to.

Would confirming or denying the information is held breach any of the data protection principles?

21. In assessing fairness, the Commissioner considers the reasonable expectations of individuals concerned and what the likely consequences might be as a result of disclosure.

22. The University says that confirming or denying whether the information is held would communicate whether or not it was contacted by the police about a former student, who would have a reasonable expectation of privacy.
- If held, the information would relate to the individual's private life, not their public or professional life. The University explained that it would not have given any individuals assurances that such information would be held confidentially, however it considered that the nature of such information and how it would have been obtained implies very strongly that it would not be disclosed in response to an FOI request. The University therefore feels that any individual would be very likely to have a reasonable expectation of privacy with regards to this type of information.
 - The University considered that it would be very unlikely that a data subject would consent to the public disclosure of this type of information and it would therefore, seek an individual's consent. However, in the case of former students this would not always be possible as the University cannot guarantee it holds up-to-date contact details.
 - If held, the University considered that disclosure of this information would cause an individual unwarranted distress, and it does not consider that there is an overriding legitimate interest in disclosure. There is no general public interest in disclosure of this information. The complainant does identify private interests in the disclosure of this information, and the University has taken these into account in its decision.
 - The University does not consider that public disclosure of this information is necessary to meet the complainant's private interests as he has indicated that another process is underway. If this is the case, then the University considered that it would be fair to expect that this will ascertain all of the relevant facts
23. Based on the above the University maintained that its response citing section 40(5)(b)(i) was correct.
24. The ICO's guidance states that there is no need to consider whether or not a Schedule 2 condition might apply once the decision has been made that the processing will not be fair. However, for completeness, the University's position is that no Schedule 2 condition would allow for the information to be disclosed. For the reasons given above, the sixth condition does not apply, as there is no overriding legitimate interest in disclosure of the information, when balanced against the rights and freedoms of the data subject.

25. Releasing information under the FOIA is effectively releasing it to the world at large. In other cases decisions the Commissioner accepted that information containing the personal data of other persons should not be disclosed in response to a request under the FOIA, therefore the Commissioner accepts that if the requested information is held, the former student would have a reasonable expectation that their personal data would not be placed into the public domain.
26. The Commissioner notes here that there may be situations in which it could be argued that giving the confirmation or denial to a requester would not necessarily contravene data protection principles because the requester already knows or suspects that the public authority holds the information.
27. 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 the requester. Therefore an authority can only disclose or confirm or deny it holds information under the FOIA if it could disclose it, or confirm or deny it holds the information, to any member of the public who requested it.
28. The Commissioner accepts the University's argument that if the requested information is held, the former student would expect their personal data to be treated fairly. It would be reasonable for them to have an expectation of confidentiality that would extend to the University refusing to confirm or deny if information was held about any police contact.
29. The Commissioner also accepts that an individual would be likely to feel a degree of distress if the University confirmed whether or not it held information of the type requested. In conclusion, the Commissioner finds that confirming or denying that the requested information is held would be unfair and thus contravene the first data protection principle. If held, the Commissioner does not consider the complainant's private interest in the information to outweigh the student's rights. Also, the Commissioner does not consider there to be any wider value in the University's disclosure of the information, and therefore she does not consider there to be an overriding legitimate interest in its disclosure.
30. The Commissioner finds that the University was entitled to refuse the request on the basis of section 40(5)(i)(b) of the FOIA. This is an absolute exemption and therefore is not subject to the public interest test.
31. As the Commissioner has determined that it would be unfair to confirm or deny if the information is held, it has not been necessary to go on to

consider whether this is lawful or whether one of the schedule 2 conditions is met.

Right of appeal

32. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

27. 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.
28. 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
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