

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 March 2018

Public Authority: The Open University
Address: Walton Hall
Milton Keynes
Buckinghamshire
MK7 6AA

Decision (including any steps ordered)

1. The complainant has requested the names of all external examiners and funding bodies for the PhDs of two members of the science faculty at the Open University.
2. The Commissioner's decision is that the Open University has correctly applied section 40(2) of the FOIA.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 17 May 2017, the complainant wrote to the Open University and requested information in the following terms:

"(1) The names of all external examiners for the PhDs of [name redacted] and [name redacted] (science faculty).

(2) The names of all funding bodies for the PhDs of [name redacted] and [name redacted].

(3) The agreements between the OU, the OAM and Hamburg University signed at a ceremony in Palma de Mallorca on 10 July 2010. [Name redacted] was the IU representative at this signing".

5. The Open University responded on 14 June 2017. The first part of the complainant's request was withheld under section 40(2) of the FOIA.

The Open University argued that it would be in breach of the Data Protection Act 1998 (DPA) if the information were to be released.

6. The Open University elaborated that the external examiners do not have an expectation that their names will be in the public domain in their roles as PhD examiners to specific students. However, the Open University did inform the complainant of the roles of the external examiners namely: (a) is a Professor of Physics Education from a UK University and (b) a Doctor in the Department of Physics (Astronomy and Astrophysics) from a UK University.
7. The Open University decided that the second part of the complainant's request was in the interests of the public and decided to release the information to the complainant.
8. The final part of the request was initially refused by the Open University under section 14 of the FOIA. The Open University believed this request was a continuation of the complainant's grievances towards the University. The Open University cited several FOI requests that the complainant had sent to the Faculty of Science over the previous six years.
9. Following an internal review the Open University wrote to the complainant on 11 August 2017. It upheld its original position.
10. After consultation with the Commissioner, the Open University decided to release the requested information for the third part of the complainant's request on 22 February 2018.

Scope of the case

11. The complainant contacted the Commissioner on 30 August 2017 to complain about the way his request for information had been handled.
12. The Commissioner considers that the scope of the case has been to decide whether the Open University dealt with request (1) correctly in accordance with section 40(2) of the FOIA.

Reasons for decision

Section 40- Personal Information

13. Section 40 of the FOIA states that:

“(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if-

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.

14. This is an absolute exemption which means that if it is engaged there is no additional public interest test to consider.

Is the requested information personal data?

15. In order to rely on the exemption provided by section 40, the information being requested must constitute personal data as defined by section 1 of the DPA. It defines personal information as data which relates to a living individual who can be identified:

- From that data,
- Or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

16. In considering whether the information is “personal data”, the Commissioner has taken into account her own guidance on the issue. The two main elements of personal data are that the information must “relate to” a living person, and that person must be identifiable. Information will “relate to” a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts them in any way.

17. The Commissioner is satisfied that the information falls within the definition of third party personal data as set out in the DPA because it relates to identifiable living individuals.

Would disclosure be fair?

18. Section 40(2), together with the conditions in section 40(3)(a)(i), provides an absolute exemption if disclosure of the personal data would breach any of the data protection principles. For the purpose of disclosure under FOIA, it is only the first principle- data should be processed fairly and lawfully- that is likely to be relevant.

19. In considering whether disclosure of the information requested would comply with the first data protection principle, the Commissioner has first considered whether disclosure would be fair. In assessing fairness, the Commissioner has considered the reasonable expectations and the consequences of disclosure to the individuals. She has then balanced these against the general principles of accountability and transparency as well as any legitimate interests which arise from the specific circumstances of the case.
20. Whether an individual might reasonably expect to have their personal data released depends on a number of factors. These include whether the information relates to an employee in their professional role or to them as individuals, the individual's seniority or whether they are in a public facing role.
21. In their submissions to the Commissioner, the Open University stated that they had not informed the external examiners that they would release their details to a third party at any time; their details were shared with the Open University for the specific purpose of carrying out the PhD examination.
22. The Open University stated that the individuals in question hold the reasonable expectation that their personal data will not be put in to the public domain and will not be available to any third party not necessarily involved in the PhD examination process. This is a sector wide approach.
23. The individuals named have not been asked whether they are willing to consent to the disclosure. The Open University has nevertheless concluded that disclosure would open the third parties up to potential vexatious contact and could damage their relationship with those individuals and other external examiners.

Balancing the rights and freedoms of the data subjects with the legitimate interests in disclosure

24. The Commissioner considers it can be difficult to quantify what damage and distress may be caused but in any event it is only necessary to show that there is a possibility of this happening. For much the same reasons as above, the Commissioner acknowledges there is a possibility of the individuals concerned being distressed by their names being disclosed in to the public domain.
25. Given the importance of protecting an individual's personal data, the Commissioner's default position in cases where section 40(2) has been cited is in favour of protecting the privacy of the individuals. Therefore, in order to find in favour of disclosure, it would need to be shown that

there is a more compelling interest in disclosure which would make it fair to do so.

26. The Open University acknowledge there is a legitimate interest in the public knowing the examiners are suitably qualified and so informed the complainant of their roles. The Open University do not consider, however, that there is sufficient public interest in releasing the names of the external examiners.
27. In this case, the Commissioner accepts the University's arguments and considers that the legitimate interest in disclosure is not sufficient to warrant overriding the protection of the third party personal data of those concerned.
28. The Commissioner is therefore satisfied that on balance, the legitimate public interest would not outweigh the privacy interests of the external examiners and that it would not be fair to disclose the requested information in this case. Accordingly, disclosure would not comply with the first data protection principle.

Conclusion

29. In conclusion, the Commissioner's decision is that section 40(2) of the FOIA is engaged in this case and has therefore been correctly applied by the Open University to the requested information.

Right of appeal

30. 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

31. 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.
32. 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

Alun Johnson
Team Manager
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Wycliffe House
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