

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 February 2019

Public Authority: Cardiff University

Address: Inforequest@cardiff.ac.uk

Decision (including any steps ordered)

1. The complainant requested a copy of an investigative report referred to in a particular press release. Cardiff University ('the University') stated that the information requested was exempt under section 40(2) of the FOIA. The Commissioner's decision is that the University has correctly applied section 40(2) of the FOIA to the information held relevant to the request. The Commissioner does not require any steps to be taken.

Request and response

2. On 24 April 2018, the complainant wrote to the University and referred to a specific press release it had issued. He requested information in the following terms:

*"I refer to this press release.

.....I submit this FOIA inquiry for the relevant investigative report mentioned in the press release".*
3. The University issued a refusal notice on 22 May 2018 and stated that the information requested was exempt under section 40(2) of the FOIA.
4. On 22 May 2018 the complainant requested an internal review of the University's refusal to disclose the information requested.
5. The University provided the outcome of its internal review on 15 June 2018 and upheld its decision that section 40(2) of the FOIA applied.

Scope of the case

6. The complainant contacted the Commissioner on 19 June 2018 to complain about the way his request for information had been handled.
7. The scope of the Commissioner's investigation into this complaint is to determine whether the University should disclose the information requested or whether it correctly withheld the information under section 40(2) of the FOIA.

Reasons for decision

Section 40(2) – the exemption for third party personal data

8. The exemption under section 40(2) of the FOIA applies to information that is the personal data of an individual other than the applicant making the request, where disclosure of that information would breach any of the data protection principles contained within the Data Protection Act 1998 ('the DPA').
9. The University considers that the information requested constitutes the personal data of the individual concerned and that disclosure would breach the first data protection principle.

Is the requested information personal data?

10. 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.
11. 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.

12. The withheld information in this case comprises a formal report on the outcome of an investigation undertaken by the University to examine allegations of research misconduct relating to a number of articles originating from its School of Medicine. There was only one respondent named in the report (a specific Professor), and the allegations of misconduct relate to this individual. The details contained in the report identify the Professor by name and by reference to their work within the University. The University considers that the report constitutes the personal data of the Professor concerned.
13. The Commissioner has had sight of a copy of the investigation report. It includes information about the allegations made against the Professor concerned, their response to the allegations and the decisions reached by the investigation panel in respect of each allegation. The Professor is referred to by name throughout the report and is the focus of the report. As such, the Commissioner agrees that it constitutes the personal data of the individual named in the report within the meaning of section 1 of the DPA, as the information clearly relates to an identifiable individual.

Would disclosure breach one of the data protection principles?

14. Having accepted that the information requested constitutes the personal data of a living individual other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles. She considers the first data protection principle to be most relevant in this case. The first data protection principle has two components:
 - personal data shall be processed fairly and lawfully; and
 - personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

Would disclosure be fair?

15. 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 of the individual concerned, the nature of those expectations and the consequences of disclosure to the individual. She has then balanced against these the general principles of accountability and transparency

as well as any legitimate interests which arise from the specific circumstances of the case.

The complainant's position

16. In his complaint to the Commissioner, the complainant provided a history of the subject matter associated with his request. He explained that in September 2017 the University was notified by a "*pseudonymous whistleblower*" about data manipulations in research publications of two professors. In February 2018 the University informed the whistle blower of the outcome of its preliminary investigation and provided a copy of the report on its preliminary investigation. The preliminary investigation report indicated that there was sufficient substance to warrant further investigations into some of the allegations raised.
17. The complainant subsequently published copies of the preliminary investigation report on a science journalism website which he maintains/operates. He also stated that he later published a follow-up article about the "*shady business dealings*" between the University and a pharmaceutical company with whom one of the Professors, who was the subject of the investigation, had an involvement.
18. In April 2018 the University issued a press release confirming that it had conducted a formal investigation into the allegations of misconduct but it had not upheld the allegations. The complainant then submitted the request, which is the subject of this notice, to the University for a copy of the full report.
19. The complainant considers that the University itself has placed details of this matter into the public domain by issuing a press release about it. In addition, he advised that "*They [the University] released first investigate [sic] report, where suspicions of data manipulation were upheld, but refuse to release the second report, where those findings were overruled*"
20. The complainant has alleged that the University slandered him in a press release and accused him of spreading false allegations and considers that the full investigation report should be disclosed in light of the fact that it was used "*as the basis of their [the University's] press release*".

The University's position

21. The University explained that the report which is the subject of this request is a full formal investigatory report which was undertaken in response to the results of an initial screening report outlining the University's preliminary consideration of the allegations. The investigation was conducted in accordance with the University's procedures for dealing with allegations of misconduct in academic

research¹ ('Academic Misconduct Procedures'). The University also confirmed that the investigation was carried out in consultation with the UK Research Integrity Officer, which provides advice and guidance to the academic, scientific and medical research community and promotes integrity and high ethical standards in research.

22. The University considers the report has the same standing as an internal investigation or disciplinary hearing/investigation. It considers that there is a recognised expectation that internal disciplinary matters of an individual will be kept private, even if the matter refers to a senior member of staff. The University referred to the Commissioner's guidance on section 40² which states that :

"Information relating to an internal investigation or disciplinary hearing will carry a strong general expectation of privacy. This was recognised by the Information Tribunal in the case of Rob Waugh v Information Commissioner and Doncaster College (EA/2008/0038, 29 December 2008)".

23. In light of the above the University considers that the individual in this case would have a reasonable expectation that the information would be kept confidential and would not be disclosed in response to an FOIA request, essentially into the public domain. The University did not seek consent to disclosure from the individual concerned. The University confirmed that as such investigations are conducted on a confidential basis it does not routinely ask individuals for consent to disclosure of investigation reports.
24. The University confirmed that in this case the formal, full investigation concluded that the allegations of misconduct had not been substantiated. Under its' Academic Misconduct procedure in a case where allegations have found to be not proven the University has a duty to take all reasonable steps to preserve the reputation and position of the respondent (the Professor in this case).
25. Based on the reasonable expectations of the individual concerned in this case the University considers that disclosure of the withheld information would constitute an unnecessary intrusion into the privacy of the

¹ <https://www.cardiff.ac.uk/public-information/policies-and-procedures/academic-research-misconduct>

² <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>

individual involved. In addition, the University considers that disclosure "*could fundamentally undermine the employer/employee relationship and expectation of mutual confidentiality between both parties*". The University argues that it has a duty of care to ensure information it holds on its employees is dealt with appropriately and in accordance with its policies and procedures, such as the Academic Misconduct Procedures.

26. Although the complainant has stated that the individual who initially made the allegations was a "*pseudonymous whistleblower*", the University confirmed that, at the start of its investigation, it was unaware that the name provided by the person who made the allegations was a pseudonym.
27. The University confirmed that all stages of its Academic Misconduct Procedures are treated as confidential and it does not take steps to publish, in full, either the initial screening report or the full investigation report. The summary report of its screening panel is provided in confidence to both the complainant and respondent only.
28. In this case the University provided a copy of the report of its initial screening panel to the individual who raised the allegations of research misconduct. When the report was provided to the individual the University asked them to treat it in confidence in line with the Academic Misconduct procedure, a copy of which was also provided. The initial screening report was also clearly marked as confidential. However, the initial screening was subsequently published in full, without the consent of the University, by the complainant on a science journalism website which he maintains/operates.
29. In light of the fact that a copy of the initial screening report was shared without its consent, the University sought legal advice from its solicitors who confirmed that:
 - "*that it could constitute a breach of the implied term of trust should we disclose any further information about the formal stage of the procedure to the complainant or anyone else not involved in the procedure; and*
 - *that the respondent would have a reasonable expectation of privacy in relation to the report of the formal panel*
 - *that disclosure of documents relating to this procedure could constitute breach of contract under our employment legislative requirements*".

The University advised the Commissioner that it is in the process of reviewing its Academic Misconduct Procedures to consider limiting

information which is provided to person making complaints/raising allegations.

30. The full investigatory report contains significant detail about the discussion and evidence given by the respondent in answer to the allegations. This information is not contained within the initial screening report. However, when the investigation was completed the University took into consideration the fact that the initial screening report had been published by the complainant. The subject matter had also received social media publicity. As a result, the University, in consultation with the respondent, took the decision to issue a press release to provide the outcome of the investigation. This decision was taken as the University felt it was *"necessary to protect the reputation of the academic and in order to be as transparent as possible without unnecessary intrusion"*.
31. The University advised that the only other requirement it has in relation to disclosing information about this type of investigation is to advise the body that funded the research that an investigation is being carried out and to advise the funder of the outcome of the investigation. This information is provided to the funder in confidence and will include the outcome of the investigation but not the detailed final report of the full investigation.
32. The University acknowledges that there is a legitimate interest in terms of allegations of misconduct in connection with research projects. The University considers that the press release it issued providing the outcome of its investigation is sufficient to satisfy any legitimate interest. It considers that disclosure of the full report on the investigation (the withheld information) would be damaging to the individual who was the subject of it and could cause considerable distress, particularly as it is likely to provoke further social media posts.

The Commissioner's position

33. The Commissioner is of the opinion that disclosing personal data is generally less likely to be considered unfair in cases where the personal data relates to an individual's public or professional life rather than their private life. In this case, the Commissioner accepts that the information relates to the public life of the individual in question.
34. The Commissioner considers that the seniority of the individual acting in a public or official capacity should be taken into account when personal data about that person is being considered for disclosure under the FOIA. This is because the more senior a member of staff is, the more likely it is that they will be responsible for making influential policy decisions and/or decisions relating to the expenditure of public funds.

35. In this case the Commissioner appreciates that the withheld information relates to a senior teaching academic at the University. However, the Commissioner recognises that regardless of their seniority people have an expectation that certain information will not be disclosed and that its confidentiality will be respected. For example, the Commissioner considers that information relating to an internal investigation, a grievance or disciplinary hearing will carry a strong general expectation of privacy.
36. In this case, based on the nature of the withheld information, and the representations provided to the Commissioner by the University, the Commissioner is satisfied that the individual would have had a reasonable expectation that the withheld information would be kept confidential and not disclosed into the public domain without their explicit consent.
37. In light of the nature of the information and the reasonable expectation of the individual, as noted above, the Commissioner is satisfied that disclosure of the withheld information would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the individual.
38. Despite the reasonable expectations of an individual and the fact that damage or distress may result from disclosure, it may still be fair to disclose the information if there is an overriding legitimate interest in disclosure to the public. Under the first principle, the disclosure of information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public.
39. 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. The Commissioner accepts that in considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for its own sake along with specific interests.
40. In this case, the Commissioner accepts that there is a legitimate interest in the public being assured that any allegations of research conduct are investigated properly and thoroughly. The Commissioner notes that issues around the subject matter of the request have been put into the public domain by the complainant and through social media. She therefore accepts that disclosure of the withheld information would further enhance the public understanding of the matter and the decisions made in relation to the allegations made against individual who was the subject of the investigation.

41. Having considered the nature of the withheld information and the facts of this case, the Commissioner does not consider that any legitimate interests of the public in accessing the full investigation report are sufficient to outweigh the individual's right to privacy. The Commissioner considers that the individual had a strong expectation of privacy in relation to the withheld information and that to release it would be unfair and likely to cause damage or distress to them.
42. In conclusion, the Commissioner finds that disclosure of the withheld information would be unfair and would therefore contravene the first data protection principle. The Commissioner therefore upholds the University's application of section 40(2).

Right of appeal

43. 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

44. 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.
45. 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

David Teague
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