

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 May 2019

Public Authority: **Governing Body of the University of Essex**

Address: **Wivenhoe Park**

Colchester

CO4 3SQ

Decision (including any steps ordered)

1. The complainant has requested correspondence between the University of Essex (the University) and eight named individuals and organisations. The University denied holding correspondence with all but three of the named organisations. In respect of these three organisations the University provided a limited amount of its correspondence with one, from which personal data had been redacted under section 40 of the FOIA but withheld the remaining information under section 34 – parliamentary privilege. The complainant has not contested the application of section 40. In respect of the second body, it withheld the information in its entirety under section 30 – investigations and section 31 – law enforcement. It advised the complainant that it was still considering whether to disclose the information it held in respect of the third body, the Information Commissioner's Office (ICO).
2. The Commissioner's decision is that whilst the University denied holding correspondence with five individuals/organisations, it is highly likely, that at the time of the request, there was at least some information held on its behalf by an academic. However, during the course of the Commissioner's investigation it became clear that the University was unable to access or recover this information and consequently the Commissioner is unable to order any meaningful steps. The Commissioner also finds that the University is entitled to withhold the information to which it applied section 34. However it is not entitled to withhold the information to which it has applied section 30 and section 31. Some of the information to which it has applied those exemptions can though be withheld under section 40. The University cannot withhold the correspondence with the ICO, apart from a limited amount of information which is exempt under section 40.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information withheld under sections 30 and 31 and the correspondence with the ICO apart from that which is exempt under section 40. The Commissioner has produced a confidential annex to identify the personal data in question. This annex will be provided exclusively to the University.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 13 June 2018 the complainant requested information of the following description:

“In accordance with the freedom of Information Act 2000, please provide copies of all correspondence on or after 1 March 2018 between the University of Essex or any of its staff or representatives (including but not limited to [a named academic] and any of the following or their representatives:

 - i. Named individual A;
 - ii. Let’s Take Back Control Ltd aka The Fair Vote Project;
 - iii. Digital, Culture Media & Sport Committee;
 - iv. Information Commissioner’s Office;
 - v. Electoral Commission;
 - vi. Named individual B;
 - vii. Byline Media; and/or
 - viii. Named individual C.”
6. On 19 July 2018 the University responded. It denied holding any correspondence between the University and the individuals/organisations requested at parts (i),(ii), (vi), (vii) or (viii) of the request.
7. It confirmed that the University did hold correspondence with the Electoral Commission, the Department Culture Media and Sports (DCMS) select committee and the Information Commissioner’s Office (ICO). The University went on to release a limited amount of the correspondence between itself and the DCMS select committee, from which the personal

details of the authors and recipients had been redacted under section 40(2) of the FOIA – personal information. The rest of the information relating to DCMS select committee was withheld on the basis that it was exempt under section 34 – parliamentary privilege.

8. In respect of the information relating to the Electoral Commission, the University withheld the information under section 30 – investigations and proceedings, and section 31 – law enforcement.
9. In respect of the correspondence the University held with the ICO the University explained that it was still awaiting a response to its consultations before deciding whether to release the information.
10. The University also explained that it was still searching for any additional information captured by the request and asked the complainant to provide the names of any departments or individuals who he believed may have corresponded with the parties named in the request in order to assist its searches.
11. On 8 August 2018 the complainant requested an internal review of the University's decision to withhold the correspondence with the Electoral Commission under the exemptions provided by sections 30 and 31. The request was made to University's Registrar and Secretary.
12. On the same day he also asked the University, via an email to the general FOI email address, to clarify whether the University had received a response to its consultation with the ICO and, if so, what the result was. He also provided some suggestions as to who might also hold information captured by his request; namely the colleagues of the named academic and their students in response to the University's request to do so.
13. The University concluded its internal review on 30 August 2018. The review focussed solely on the University's decision to withhold the correspondence from the Electoral Commission. It upheld the original position in respect of this information, ie that it was exempt under section 30 and 31.

Scope of the case

14. The complainant contacted the Commissioner on 18 September 2018 to complain about the way his request for information had been handled.
15. The Commissioner considers that the matters to be decided are whether the University is correct when it says it does not hold information in relation to five of the named individuals/organisations. The Commissioner will also consider whether the University is entitled to

withhold information from correspondence between itself and the DCMS select committee under section and 34, and whether it is entitled to withhold correspondence between itself and the Electoral Commission under sections 30 and 31. In respect of the correspondence between itself and the ICO, the Commissioner will consider whether it is required to disclose this information.

Background

16. In broad terms the request relates to concerns raised about the use of data analytics for political purposes. These concerns were the subject of enquiries and investigations by the DCMS select committee, the Electoral Commission and the ICO. At the time of the request the academic named in the request was a lecturer at the University and it is understood that as part of her research she had conducted interviews with a number of individuals which were potentially relevant to the investigations being conducted. As a consequence she was asked to contribute, or give evidence to these enquiries and investigations.

Reasons for decision

Section 1 – information held

17. The University denied holding any information in respect of five of the individuals/organisations named in the request. The Commissioner will start by looking at whether the University is correct to say the information is not held.
18. Section 1 of FOIA states that upon receipt of a request a public authority is obliged to confirm whether the information is held and if it is held, to communicate that information to the applicant, subject of course to the application of any of the exemptions that apply.
19. The request seeks correspondence between the University and the named parties. Although it is clear that the focus of the request is on correspondence between the named academic and those parties, it is explicitly not limited to just the correspondence that she had with them.
20. The Commissioner asked the University to explain what searches it had conducted for any information falling within the scope of the request. In response the University explained that it identified those individuals most likely to be holding relevant information to examine their files. Those individuals were its Registrar and Secretary, the Assistant Registrar, the Research Governance and Planning Manager as well as the named academic herself. The position in respect of the named

academic is dealt with in more detail later, for now it is sufficient to say that at the time of the request the academic was on secondment and that she has since left the University. Regarding the other three officials they were also asked by the University to identify any others who they believed may hold information. The Commissioner gathers that no other individuals were noted as potentially holding information. The individuals most likely to hold the requested information were asked in particular to interrogate their email accounts as any correspondence is most likely to be held in an electronic format. Given its understanding of its own working practices and the context in which correspondence with the parties named in the request would be held, the University considers that the scope of the searches were adequate and should have identified the relevant information.

21. The searches returned only a limited amount of correspondence and this is the information which was either disclosed to the complainant, withheld under the exemptions, or its disclosure was still under consideration at the time of the Commissioner's investigation. In broad terms the correspondence located is that relating to arrangements and processes by which the DCMS select committee, the Electoral Commission and ICO obtained information for the purposes of their enquiries. As the information which these bodies were interested in would have been that created or collected as part of the named academic's research, the University had concerns over the ethics of its staff sharing such information. It therefore took an active interest in the process and as a result these officials were either copied into the correspondence, or the named academic shared some of the correspondence she had received with them. However it is clear that the main contact for these organisations was the academic herself.
22. A likely explanation of the lack of information identified by these searches is that much of the requested information may well have been held by the academic named in the request herself as she considered the information extremely sensitive. It is possible that such information could have been stored on the University's own computer system. As the University does allow personal, ie information not related to an academic's work, to be stored on its computer system, it is cautious of accessing information stored by an employee without their consent. However, the University considers it most unlikely that the academic would have placed any relevant information on the University's shared drives as she would have had difficulty in accessing those drives during her secondment. The University also checked the amount of storage used in her University OneDrive account and it was found to be minimal, again leading the University to think it unlikely that any relevant information would held there. More importantly however, the University has explained that the academic was concerned that the information she held could potentially present a risk to her own safety, as evidenced by the fact that she asked that some of her discussions with the University

about access to that information to be conducted via encrypted email. The University therefore considers it highly unlikely that any information relating to her research, or requests for access to that information by the DCMS Committee etc, would be held in areas where others could access it.

23. The University therefore found itself in a position where it had to ask the named academic to clarify what information, relevant to the request, she had stored on systems other than the University's. Unfortunately the University has not been able to confirm what information she holds. There a number of reasons for this.
24. At the time the request was received on the 13 June 2018, the named academic was employed by the University as a lecturer and as part of that role she conducted research into political communications. Therefore the correspondence could very well include information generated as part of her research, for example arranging interviews with individuals and discussion of issues relating to her research. It is also possible that she would have held a fuller set of correspondence with the three bodies who later investigated issues around data analytics for political purposes.
25. The University works on the presumption that information held by its employees and which is generated as part of their employment, is held by the University for the purposes of the FOIA. This would include work related information held on non-University systems. However the University has also explained that it considers the issue of who holds information relating to an academic's research is a complex one and the Commissioner acknowledges that there are some who consider it to be a contentious area and that some argue control of such information rests with the academic.
26. Every case needs to be considered on its individual facts, but the Commissioner's general view is that research information generated and held by academics in their role as an employee of a university is information held by the university for the purposes of the FOIA. The Commissioner asked the University a series of questions about the control which the University had on the research, the funding of the research, how the research impacts on the assessment of the quality of the University's research under the Research Excellence Framework, which ultimately impacts on the funding. Whilst it is clear that the academic had great freedom in terms of what areas of research to pursue and how that research was conducted, there was nothing in the responses provided by the University which has caused the Commissioner to alter her view that the research information held by the academic is information held by the University.

27. However it is clear from the University's responses to the Commissioner's enquiries that the named academic took a different view and it is understood that she obtained her own legal advice to the effect that she holds the information on her own behalf and that she would breach the Data Protection Act if she shared it with the University. As a consequence she has not been prepared to share the information she holds with the University.
28. The University's difficulty in obtaining any information held by the academic has been compounded by the fact that during the Commissioner's investigation the academic was actually on secondment and had tendered her resignation. She is now no longer employed by the University. The University has informed the Commissioner as to the steps it took to try and secure the information. These have included face to face meetings between the Registrar and the academic together with many email and Skype conversations. Unfortunately the academic has maintained her position and the University has been unable to secure access to any information she may hold.
29. As set out in paragraph 12 above, during the initial handling of the request the complainant suggested to the University that relevant information may be held by the academic's colleagues or students. However, having discussed the matter with academic's Head of Department, the University understands that the academic's research was not being carried out in collaboration with other academics or students at the University. It therefore concluded that there was no value in widening the scope of its search.
30. In light of the above, the Commissioner recognises that although the complainant has good grounds for believing the University may well have held information relevant to his request, at the time of that request, in that information was likely to have been held by the academic. The University would appear to have taken and exhausted all reasonable steps to access and recover that information, but has not been successful. Bearing in mind the analysis and conclusions above, the Commissioner considers that it would not be appropriate for the University to continue to try and obtain the information and is unable to require it to take any further action in respect of accessing the contested information held by the academic.

Correspondence between the University and the DCMS select committee

31. The Commissioner will now look at the information which the University was able to locate, starting with the correspondence between itself and the DCMS select committee. Some of this information has been provided to the complainant with information redacted on the basis that it is the personal data of either the recipient or the author of the

correspondence. The complainant has not challenged the application of section 40 to this information. The remaining correspondence has been withheld section 34 – parliamentary privilege.

Section 34 – parliamentary privilege

32. Section 34(1) states that information is exempt from the duty to communicate information if the exemption is required for the purpose of avoiding an infringement of the privileges of either House of Parliament.
33. The correspondence consists of both emails sent to the named academic by the select committee and information from the academic to the select committee.
34. As one would expect the University has had little experience of considering the exemption for parliamentary privilege. Therefore, in line with the Freedom of Information code of practice published under section 45 of the FOIA, the University sought the views of the DCMS select committee on the sensitivity of the communications. This approach is also in line with the Commissioner's guidance on section 34. In response the University was advised by the DCMS select committee that the correspondence related to the enquiry it was undertaking into disinformation and fake news in which the named academic was a witness. The information therefore attracted parliamentary privilege and was exempt under section 34. The exceptions to this were three documents which the University then released to the complainant with names and contact details of staff redacted.
35. The advice was provided both verbally and in writing by the clerk to the DCMS committee, the House of Commons FOI team and the head of the Ministerial Support Team. The email from the clerk to the DCMS committee also noted that advice had been verified by the House authorities. In light of this advice the University considered it had good grounds for applying the exemption. During the course of the Commissioner's investigation the University consulted again with the DCMS committee and was again advised that all the information remained privileged. The Commissioner has verified that this was the content of the advice.
36. As set out in the Commissioner's guidance on section 34, parliamentary privilege is not defined in the FOIA and its origins lie in the Middle Ages. In broad terms, it provides rights which allow Parliament to work effectively and independently, without interference from the monarchy, courts or other authorities. The concept of parliamentary privilege was partly codified in The Bill of Rights 1689. Article 9 of the Bill of Rights means that no other authority including a court, can challenge or interrogate statements made in the course of parliamentary proceedings. This means that parliamentarians and any other individual

participating in parliamentary proceedings enjoy freedom of speech and cannot be sued or prosecuted as a result of something they say. Although 'parliamentary proceedings' has never been precisely defined it would cover participation as a witness to a select committee. It also protects the right of each House to manage its own affairs and to exercise sole jurisdiction over its own proceedings. This would extend to the work undertaken by officials of either House arising directly out of proceedings of the relevant House or under the authority of that House and this would cover correspondence on behalf of select committees exercising a scrutiny function.

37. Although parliamentary privilege is most likely to be used by the Houses of Parliament themselves, it can be relevant to information held by other public authorities. The test is whether the information in question relates to parliamentary proceedings. In this case the correspondence concerns the provision of evidence to a select committee. The Commissioner's guidance also recognises parliamentary privilege can be applied to correspondence from members of Parliament if it relates to current or potential parliamentary proceedings such the work of a select committee.
38. Where information attracts parliamentary privilege no one other than the Houses of Parliament have any discretion to release that information voluntarily. The privilege belongs to the relevant House and although it may choose to publish its own privileged information, other public authorities cannot, nor does any other public authority have any discretion to release privileged information.
39. It can be seen that the experts on the scope of parliamentary privilege are the Houses of Parliament. It was therefore reasonable for the University to accept the advice it received from them. Having looked at the information itself the Commissioner can see no grounds for challenging the application of section 34.
40. Section 34(3) provides that the relevant House can issue a certificate to confirm disclosure of the information would infringe its privilege. The complainant has queried whether the University obtained such a certificate. During the Commissioner's investigation the University confirmed that it had not obtained such a certificate. This does not invalidate the University's application of the exemption. Although such a certificate is conclusive proof that the information attracts privilege, a public authority is not required to have obtained one in order to apply the exemption. Given the advice that the University had received from the Clerk to the Committee, and others, the Commissioner accepts that the information that has been identified as being covered by parliamentary privilege can be withheld under section 34.

41. Section 34 is an absolute exemption; it is not subject to the public interest test.

Correspondence between the University and the Electoral Commission

42. The correspondence located by the University is limited. It relates to provision of evidence to the Electoral Commission by the named academic. As before the University consulted with the other party to the correspondence, in this case the Electoral Commission. The Electoral Commission advised the University that it considered the information would be exempt under section 30 and 31. After considering the matter the University accepted the advice and the information was withheld under those exemptions. The Commissioner will start by looking at the University's application of section 30.

Section 30 - investigations

43. The actual provision that has been applied to the information is that contained in section 30(1)(a)(i). This provides that:

30(1) - information is exempt if it has at any time been held by the public authority for the purpose of –

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained –

(i) whether a person should be charged with an offence.

44. The exemption sets out very strict tests that have to be satisfied before the public authority can rely on the exemption. Importantly, the public authority itself has to have a statutory duty to conduct a relevant investigation, as part of that investigation the public authority has to be responsible for 'ascertaining' whether someone should be charged with a criminal offence. The most obvious public authorities with this sort of statutory duty are police forces. The Commissioner accepts that the Electoral Commission is also likely to have similar duties in respect of breaches of the Political Parties, Elections and Referendums Act 2000 (PPERA). However it is clear that the University itself does not have such powers. Therefore the exemption is not available to the University.
45. The Commissioner finds that the University cannot withhold the information under section 30. However, as explained in its initial refusal notice, the University has applied section 31 to the correspondence with the Electoral Commission "to the extent that that information is not exempt under section 30." Therefore having found that none of the correspondence is exempt under section 30 the Commissioner will go on to look at whether the same information can be withheld under section 31.

Section 31 – law enforcement

46. The University applied various exemptions contained within section 31 of the FOIA. All the exemptions provided by section 31 are only available to information which the public authority cannot withhold under section 30. As the Commissioner has already concluded that section 30 cannot be applied by the University in this case, she is satisfied that this first test established by section 31 has been satisfied.
47. When initially refusing the request, two of the exemptions cited by the University were those provided by section 31(1)(a) and (b). These provide that information is exempt if its disclosure would, or would be likely to prejudice
 - (a) the prevention or detection of crime,
 - (b) the apprehension or prosecution of offenders
48. The University maintained its reliance on these exemptions at the internal review stage. Although there appears to be some typographical errors in the University's submission to the Commissioner, she understands that it is the intention of the University to continue to rely on these exemptions and the Commissioner has proceeded on this basis.
49. Although sections 31(1) (a) and (b) are two separate exemptions the reasons presented by the University for relying on them are very similar and Commissioner considers that in the circumstances of this case it is sensible to examine whether either is engaged at the same time.
50. Having viewed the withheld information and having accessed the 'Report on an investigation in respect of the Leave.EU Group Limited' produced by the Electoral Commission in May 2018, the Commissioner is satisfied that, at the time of the request, there was the possibility of a criminal investigation arising out of the Electoral Commission's investigation. In particular the investigation report states that the Electoral Commission had reasonable grounds to suspect that a false declaration had been submitted in respect of Leave.EU's referendum spending return and that it had referred the matter to the police.
51. If disclosing the requested information would, or would be likely to, prejudice a thorough investigation into that matter by the police, or any investigation by the Electoral Commission into related, or similar matters, the information would be exempt under both sections 31(1)(a) and (b).
52. The exemption provided by section 31 can be engaged on the basis that the alleged prejudice, either would occur, or that it is only 'likely' that the prejudice would occur. The University has not stated on which of these two limbs it has engaged the exemption. In such cases the

Commissioner proceeds on the basis that the public authority is relying on the lower test, ie that the prejudice is only likely to occur. This still means, however, that for the exemption to be engaged there has to be a real and significant risk of the prejudice occurring.

53. Based on its consultation with the Electoral Commission the University has argued that the requested information relates solely to the Electoral Commission's investigation into potential breaches of the reporting requirements in the PPERA. The Commissioner has visited the Electoral Commission's website in order to access the report referred to in paragraph 50. This was published in May 2018, ie before the request was received. It sets out the findings of the Electoral Commission's investigation and as noted above, the Electoral Commission referred one matter to the police. Therefore the Commissioner concludes that although the Electoral Commission's investigation had been completed by the time of the request, some of the matters arising from that investigation were still live. Nevertheless the fact that the Electoral Commission's investigation had been concluded by the time of the request does minimise the potential for the disclosure of the information to prejudice that investigation. Having viewed the information the Commissioner can detect nothing within its contents that would undermine the Electoral Commission's findings, or compromise any subsequent police investigation into matters arising from those findings.
54. However, when setting out the public interest arguments for maintaining the exemptions provided by section 31, including those provided by sections 31(1)(a) and (b), the University provided further details of the harm that the Electoral Commission was concerned would arise if the information was disclosed. It explained that although the Electoral Commission does have powers to require information, the cooperation of those it regulates, and others from whom it requires information, remains essential to its ability to conduct its statutory functions. Without that cooperation the Electoral Commission believed its ability to obtain information and therefore to make sound regulatory decisions, based on a firm facts, would be hindered.
55. The Commissioner acknowledges that the use of statutory powers to obtain information can at times be unwieldy and the efficient conduct of an investigation will often depend on the voluntary cooperation of the parties involved. The Commissioner therefore recognises the value in regulatory investigations being conducted with the cooperation of both those who are being regulated and others with contributions to make. It is certainly arguable that if the information provided during an investigation was later made public, people may be more reluctant to volunteer information, or be less candid in the responses they did provide, during future investigations.

56. However each case needs to be considered on its own merits. In this case the information captured by the request, is not the actual evidence required by the Electoral Commission, but correspondence relating to the process for obtaining that evidence. Furthermore, the Commissioner is aware from basic internet searches that the academic had, prior to the request being made, written at least one article in which she explicitly refers to her involvement in the Electoral Commission's investigation. It is clear therefore that at the time of the request the fact she had been involved was in the public domain and that she was content for this to be the case. It would be difficult for a party to a future investigation to interpret the disclosure of the requested information in these circumstances as indicating that the Electoral Commission would routinely disclose information they obtained during an investigation. Therefore the disclosure of the requested information is unlikely to undermine the ability of the Electoral Commission to undertake robust investigations and reach conclusions on firm evidence. The Commissioner therefore considers the risk of prejudice to either detection or prevention of crime, or the apprehension or prosecution of offenders is not significant. It follows that she does not accept the exemptions provided by sections 31(1)(a) or (b) are engaged.
57. The University is also relying on the exemption provided by section 31(2)(a) by virtue of section 31(1)(g) to withhold the same correspondence. Section 31(1)(g) states that information is exempt if its disclosure would, or would be likely to prejudice –
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2).
58. The purpose specified in section 31(2)(a) is –
- (a) the purpose of ascertaining whether any person has failed to comply with the law.
59. Whereas sections 31(1)(a) and (b) protect information which relates to criminal offences, section 31(2)(a) is more concerned with non-criminal investigations. As part of its response to the University's consultation the Electoral Commission explained that, where there is no evidence of criminal activity, or in other circumstances, the Commission may consider civil breaches of the PPERA. Even though it has not explicitly identified particular civil offences established by that Act, the Commissioner is satisfied that the Electoral Commission has functions relating to determining whether a body it regulates has failed to comply with the law.
60. What is less clear is whether it is likely those functions would be prejudiced if the requested information was disclosed. As with the application of sections 31(1)(a) and (b) the Commissioner has had

regard for the following factors. Firstly she has viewed the actual correspondence in question. Secondly, she has noted that the only matters still outstanding from the Electoral Commission's investigation at the time of the request appear to have been those criminal matters which were referred to the police, rather than civil breaches of PERRA. The Commissioner has also had regard for the fact that the named academic, in effect, publicised her involvement in the investigation. In light of this the Commissioner does not consider it likely that disclosure could either undermine the Electoral Commission's ability to investigate the issues arising from the EU referendum, or deter the voluntary cooperation of others in future investigations. Therefore the Commissioner finds that the exemption provided by section 31(1)(g) via 31(2)(a) is not engaged.

61. Although the Commissioner has concluded that none of the exemptions provided by section 31 can be relied on by the University to withhold its correspondence with the Electoral Commission, she also notes that the correspondence contains the personal data of a number of individuals. Therefore when deciding what information should be disclosed she also has to have regard for her role as the regulator of Data Protection Act 2018 (DPA). Information, which if disclosed, would breach the DPA is exempt under section 40.

Section 40 – personal information

62. The information to which the Commissioner will consider the application of section 40 is the names and contact details (phone numbers and email addresses) of the correspondents, together with any individuals named within the body of the correspondence, or any documents attached to that correspondence. Such information is clearly the personal data of the individuals in question as it identifies the individual and relates to them.
63. So far as is relevant, 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.
64. 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').
65. The Commissioner is satisfied that the names and contact details constitute the personal data of an identifiable living individual but this does not automatically exclude it from disclosure under the FOIA. The

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

second element of the test is to determine whether disclosure would contravene any of the DP principles. The most relevant DP principle in this case is principle (a).

66. 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”.

67. 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.

68. 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.

69. The personal data contained in the Electoral Commission correspondence can be separated into two parts. The first is simply that of the staff of the University, including the named academic, and the officers of the Electoral Commission. These individuals are involved in either conducting the investigation or in providing information as evidence to that investigation. The other personal data is that which relates to individuals who are the subject of the evidence that the Electoral Commission wished to obtain. As the investigation could have involved the consideration of criminal offences under the PPERA the Commissioner will consider whether such information should be dealt with as ‘criminal offence data’. If it is, the disclosure of that personal data must also meet the requirements of Article 10 of the GDPR in addition to one of the lawful bases listed in Article 6.

70. 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;

71. Having viewed the withheld information, the Commissioner finds that none of the information relating to those who are the subject of the evidence being gathered is criminal offence data. She has reached this conclusion on the basis that the Electoral Commission had investigated the Leave.EU Group Limited after becoming aware of reports suggesting that services had been provided to Leave.EU by two companies based in the United States for which Leave.EU had not reported any electoral expenses. The purpose of the investigation was to determine whether there had been any breaches of the PPERA including those for which either criminal proceedings or civil sanctions were available. The breaches under investigation can only be committed by officials of the body regulated by the PPERA, in this case Leave.EU. The Commissioner

is not satisfied that the data subjects named in the correspondence are those who could have committed criminal offences themselves. Therefore the information does not relate to allegations that they committed any offences.

72. Having found the information is not criminal offence data the Commissioner needs only to focus on the requirements of Article 6(1) of the GDPR when considering whether disclosing any of the personal data contained in the correspondence with the Electoral Commission would be lawful in compliance with Article 5(1).
73. 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.
74. 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.
75. 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;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;

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".

- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

76. 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

- 77. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
- 78. Further, 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
- 79. The result of the EU referendum is one with major consequences for the UK and its citizens. It is an issue which has caused great division within the country and within Parliament. The decision to leave the EU will impact on the future of the UK for many years. The referendum result was obviously influenced by the effectiveness of the strategies adopted during the referendum campaign. Therefore there is a very significant interest in how the different sides to the debate conducted their campaigns, including whether they complied with relevant legislation governing such campaigns. The requested information is part of that story since it relates to how the Electoral Commission pursued its concerns over the conduct of one of the organisations that played a role in that referendum debate.
- 80. The Commissioner also recognises that the complainant has a personal interest in the conduct of the Electoral Commission's investigation and there is a legitimate interest in better understanding the scope of that investigation and the breadth of evidence that was considered by the Electoral Commission. This would allow the complainant and the wider public to reach an informed view on the thoroughness of that investigation and its impartiality.
- 81. The Commissioner is satisfied that the first part of the three part test is met.

Is disclosure necessary?

- 82. '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.

83. The Commissioner has had regard for the report published by the Electoral Commission into its investigation. This appears comprehensive and sets out the process by which the investigation was conducted. This includes some details of those from whom evidence was gathered and in some cases the value of that information to the investigation. It could be argued that this reduces the need to disclose the requested information. However the requested information provides a more complete picture and therefore its disclosure would still assist the public in understanding the breadth of the evidence collected. Furthermore, the fact that information relevant to that captured by the request had already been published reduces the level of intrusion that would be caused by disclosing the personal data. Therefore the disclosure of the personal data relating to the names of those who were the subject of the evidence provided by the named academic meets the test of reasonable necessity established by the second part of the test.
84. The personal data of those who were the subject of the evidence only forms one part of the personal data contained in the correspondence. There is also personal data relating to officials within the Electoral Commission and the University. This includes the signature of an officer of the Electoral Commissioner, including where that official signed on behalf of someone else. The Commissioner can see no grounds for finding it necessary to disclose the personal data of these individuals in order to satisfy the legitimate interest in better understanding the nature or thoroughness of the Electoral Commission's investigation. The one exception to this is the name of a senior official within the Electoral Commission. Disclosing their involvement would demonstrate that the investigation had been conducted appropriately.

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

85. The Commissioner has found that there is both a legitimate interest and a reasonable necessity to disclose some of the personal data contained in the correspondence. That is the names of those who were the subject of the evidence sought by the Electoral Commission and the name of a senior officer within the Electoral Commission. It is now necessary to balance the legitimate interests in disclosure against the interests or fundamental rights and freedoms of these data subjects. 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.

86. 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.

87. 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.

88. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

89. As already discussed, some information relating to the Electoral Commission's investigation had already been published at the time of the request. The investigation has also been the focus of media attention and there has been an intense public debate around the issue raised by the campaigning methods adopted during the EU referendum and more generally about the use of data analytics for political purposes. As a consequence there has already been a great deal of discussion and speculation about individuals associated with this matter, including about some of those who were the subject of the evidence obtained by the Electoral Commission from the academic. The Commissioner recognises that the effect of this is to reduce the impact disclosing this information would have on the individuals who were the subject of the evidence.

90. Nevertheless the Commissioner finds that there is a degree of confidentiality around the Electoral Commission's investigatory process. The individuals whose personal data is contained in the correspondence were not themselves the subjects of its investigation. They would not necessarily have expected that the fact information was collected about them, or the method by which that information was obtained, would be made public. The Commissioner also understands that the evidence collected did not prove central to the Electoral Commission's investigation.

91. 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 names of those who were the subject of the evidence collected would not be lawful.

92. In respect of the senior official at the Electoral Commission, the Commissioner considers there would not be any adverse impact on the data subject by identifying them as having carried out a specific task that one would expect someone at their level to perform. Nor does the Commissioner consider that an individual of their seniority could have any realistic expectation that their personal data would be withheld in these circumstances.
93. Based on the above factors, the Commissioner has determined that there is sufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing and so the disclosure of the name of the senior official would be lawful.

Fairness and Transparency

94. Even though it has been demonstrated that disclosure of the requested information under the FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).
95. In relation to fairness, the Commissioner is satisfied in this case that as the disclosure passes the legitimate interest test for lawful processing, the disclosure will also be fair for the same reasons.
96. The requirement for transparency is met because as a public authority, the University is subject to the FOIA.
97. In this instance, the Commissioner is therefore satisfied that the name of the senior official within the Electoral Commission can be disclosed without breaching the principle set out in Article 5(1)(a). The University is required to include the individual's name in its disclosure of the correspondence between itself and the Electoral Commission. For avoidance of any doubt the Commissioner will provide the University with the name of the official in a confidential annex.

Correspondence between the University and the Information Commissioner's Office

98. The final set of correspondence that the University has been able to locate is a limited amount of correspondence between itself and the Information Commissioner's Office (ICO).
99. Upon receipt of the request the University contacted the ICO to seek its views on the sensitivity of the information. The consultation provided no

grounds for withholding the information. In light of this the Commissioner finds that the University is required to disclose this correspondence apart from some of the personal data contained within it.

100. That personal data are the names and contact details of the staff and officials at the University who were the recipients of the correspondence, together with that of the officials at the ICO who sent the correspondence. Included in the correspondence is the name of a senior officer within the ICO and their signature. The Commissioner is satisfied that the disclosure of this data (apart from the name of senior officer) would breach Article 5(1)(a) of the GDPR which states that personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject. This is because the processing would be unlawful as no lawful basis listed in Article 6(1) can be satisfied. As before, the Commissioner considers the lawful basis most applicable 6(1)(f) which states that:

“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”

101. The request is pursuing a legitimate interest in seeking greater transparency of the investigation conducted by the ICO into the use of data analytics for political purposes. However when considering the second element of the three part test established by basis 6(1)(f), the Commissioner can see no grounds for finding it necessary to disclose the personal data of these individuals in order to satisfy the legitimate interest in better understanding the nature or thoroughness of the ICO's investigation. As such the Commissioner has concluded there is no lawful basis for processing and that disclosing the information would breach Article 5(1)(a). It follows that the University is entitled to withhold this personal data under the exemption provided by section 40(2) of the FOIA.

102. The exception to this is the name (but not the actual signature) of the senior officer within the ICO who is the signatory of one of the pieces of correspondence. The Commissioner considers that it is reasonably necessary to disclose this information as it provides assurance that the appropriate procedures were followed by the ICO in the collection of the evidence during its investigation.

103. As was the case with the senior officer within the Electoral Commission, the Commissioner considers that there would be no grounds for arguing that the senior officer within the ICO would suffer any harm or distress if he was identified as the signatory, as this is a role and responsibility

that the public would expect him to fulfill. Furthermore, the Commissioner considers that the officer would have a reasonable expectation that he would be identified as the signatory.

104. In light of the above the Commissioner finds there is sufficient legitimate interest to outweigh the data subject's rights and freedoms and there is a lawful basis under Article 6 basis for disclosing their name.

Fairness and transparency

105. Even though it has been demonstrated that disclosure of the requested information under the FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).

106. In relation to fairness, the Commissioner is satisfied in this case that as the disclosure passes the legitimate interest test for lawful processing, the disclosure will also be fair for the same reasons.

107. The requirement for transparency is met because as a public authority, the University is subject to the FOIA.

108. In this instance, the Commissioner is therefore satisfied that the name of the signatory can be disclosed without breaching the principle set out in Article 5(1)(a). Section 40(2) of FOIA cannot be used to withhold this information.

Other matters

109. 'Other matters' does not form part of the formal decision notice. However the Commissioner uses this section to identify issues that have arisen as part of her investigation which she wishes to comment on.

110. The Commissioner has noted in paragraph 22 that when conducting searches for the requested information the University was reluctant to search those files used exclusively by an individual employee due to concern that the files may contain non-work, or personal information. To overcome this problem in the future the Commissioner considers it would appropriate for the University to review its policies for non-work related use of its systems by staff. For example, simply requiring staff to identify non-work information by including the prefix 'N/W' (for non-work) on the title of files or in the subject box of emails would help address the problem.

111. The Commissioner also recommends that the University reviews its arrangements for accessing information held by staff as part of any research they are conducting, in order to ensure that it can access the information they hold on the University's behalf.

Right of appeal

112. 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

113. 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.

114. 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

Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
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SK9 5AF