

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 12 July 2019

**Public Authority:** The University Council  
**Address:** Birkbeck, University of London  
Malet Street  
Bloomsbury  
London  
WC1E 7HX

#### **Decision (including any steps ordered)**

---

1. In two requests, the complainant has requested the number of graduates achieving particular grades in three MSc courses, and ethnicity information about those graduates, across two years. Birkbeck, University of London ('Birkbeck') released relevant information having anonymised some of it under section 40(2) of the FOIA (personal data). The complainant said he has not received all the information he requested and disputes Birkbeck's reliance on section 40(2).
2. The Commissioner's decision is as follows:
  - Birkbeck is entitled to rely on section 40(2) of the FOIA to withhold information within the scope of request 1 and request 2 as the information constitutes the personal data of third persons.
  - Birkbeck breached section 10(1) as it did not communicate to the complainant all the information it holds that is relevant to request 1 within the required timescale.
3. The Commissioner does not require Birkbeck to take any remedial steps.

## Request and response

---

### Request 1

4. On 21 September 2018 the complainant wrote to Birkbeck and requested information in the following terms:
  - "1. What was the number of MSc graduates that achieved a Merit in Management, Management with International Business, and Management with International Business and Development in the last and penultimate academic sessions?"*
  - 2. What was the number of MSc graduates that achieved a Distinction in Management, Management with International Business, and Management with International Business and Development in the last and penultimate academic sessions?"*
  - 3. What was the number of MSc graduates that achieved a Pass in Management, Management with International Business, and Management with International Business and Development in the last and penultimate academic sessions?"*
5. On 8 October 2018 Birkbeck responded. It released some information with regard to two of the courses, having anonymised it through the use of '<5' (ie less than 5) in the majority of instances. It said that where the total number is less than 5, the data had been redacted under section 40(2) as it could potentially identify individuals.
6. The complainant requested an internal review on 8 October 2018. He asked why Birkbeck had provided no information about the 'MSc Management' course. He asked that if it could not provide the numbers, could Birkbeck provide the percentages [of students achieving particular grades]? The complainant said that all the names of the graduates are published and in the public domain and he disputed Birkbeck's reliance on section 40(2).
7. Following an internal review Birkbeck wrote to the complainant on 6 November 2018. With regard to no information having been provided about the MSc Management course, Birkbeck said it had stated in its response that there are less than five students. It confirmed it holds this information and was withholding it under section 40(2).
8. Birkbeck said its position with regard to providing percentages is the same as providing numbers ie releasing this information could potentially lead to individuals being identified.

9. With regard to the complainant's third point, Birkbeck said it does not publish lists of all graduates. It said that lists of graduates who attend graduation ceremonies appear in the graduation ceremony booklets but these are only circulated to the people attending the graduation. It confirmed that it does not publish this information more widely.

### **Request 2**

10. Within his request for an internal review of 8 October 2018, the complainant submitted the following request for new information:

*"Do you hold ethnicity data for the graduates in question that fall into each grade category?"*

11. In its review response of 6 November 2018 Birkbeck confirmed it holds this information and that it is also exempt under section 40(2) for the same reason as the original request. In addition, it noted that this information is special category personal data.
12. In correspondence to the Commissioner on 13 June 2019 Birkbeck confirmed its position with regard to the request of 8 October 2018 for ethnicity data; namely that it considered this information is also exempt under section 40(2). Through this correspondence Birkbeck can be considered to have effectively carried out an internal review of its response to this request.
13. From a subsequent submission that the Commissioner received from Birkbeck on 27 June 2019 she understands that its position is that section 40(2) applies to the ethnicity information in its entirety.

### **Scope of the case**

---

14. The complainant contacted the Commissioner on 9 November 2018 to complain about the way his requests for information had been handled.
15. He maintained that Birkbeck had misunderstood that his requests concerned three MSc courses; its response (to request 1) had only referenced two of the courses. He also disputed that Birkbeck could rely on section 40(2) to withhold the specific information he has requested.
16. The Commissioner has considered whether Birkbeck can rely on section 40(2) to withhold specific information with regard to both requests. She has also considered whether Birkbeck fully complied with section 10(1) with regard to request 1.

## Reasons for decision

---

### Section 40 – personal data

17. Section 40(2) of the FOIA says that information is exempt from disclosure if it is the personal data of third persons, ie someone other than the applicant, and a condition under either section 40(3A), 40(3B) or 40(4A) is also satisfied.
18. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA').

#### *Is the information personal data?*

19. Section 3(2) of the DPA defines personal data as: 'any information relating to an identified or identifiable living individual'.
20. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
21. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
22. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
23. With regard to both requests, the Commissioner has considered the information associated with the three MSc courses that Birkbeck has anonymised.

#### Request 1

24. With regard to request 1, Birkbeck has provided the Commissioner with the figures for the three courses over the two years. With regard to Management with International Business and Management with International Business and Development courses, save for one figure – '6', which was released – the remainder are less than '5'. Birkbeck released information relevant to the Management course on 14 June 2019; the Commissioner understands that five of the figures for this course that are over '10' were released and that the one figure that is less than '5' was anonymised.

25. Even though the requested information is numbers (the numbers graduating from particular courses), if the number is small enough it may be possible to identify a specific individual or individuals from this number.
26. Birkbeck has confirmed that releasing the withheld information – that is, disclosing the actual numbers involved – could potentially lead to individuals being identified. Disclosure would therefore release into the public domain what course these individuals took and what grade they achieved in this course.
27. Birkbeck says that due to the low numbers of individuals obtaining each grade for each subject in each year, a motivated intruder (especially a student within the parameters of the request) could easily identify the individuals of each category through a process of elimination. Birkbeck has noted that the complainant is a former student who graduated in one of these courses.
28. The term 'mosaic effect' is often used to refer to the argument that whilst it may not be prejudicial to disclose requested information in isolation, it would be prejudicial where the requested information can be combined with other information already in the public domain or already known to the requester, or indeed to others. In this case Birkbeck has referred to other publically available data such as graduation publications (which students can opt-out of) and online material. By 'online material' Birkbeck has explained that this refers to graduation articles or social media.
29. Birkbeck has confirmed that its position with regard to withholding the specific numbers is steered by the Higher Education Statistics Agency (HESA) to whom universities must provide their statistical data on an annual basis. HESA's guidance on this matter is a sector standard used by all education institutions for requests of this nature.
30. The complainant has also advised that they are a graduate of one of the courses in question. But even if they were not, if the information were to be disclosed to the public it would be available to, for example, other graduates of these courses and members of Birkbeck staff. In the Commissioner's view the complainant and/or other graduates or individuals would be likely to have access to other information about those cohorts to be able to identify specific individuals from the withheld information, if the pieces of information were put together and an individual had sufficient motivation to do so.
31. As such, the Commissioner considers, first, that the disputed information does relate to the individuals because it concerns courses they took and grades they achieved. Second, the Commissioner is

persuaded that, because of the wider circumstances and because of the low numbers involved, at least some of the individuals could be identified from the information by someone – for example, a member of one of the cohorts – who was motivated to do so. The Commissioner therefore considers that the withheld information falls within the definition of 'personal data' in section 3(2) of the DPA.

32. The fact that information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether any of the conditions under sections 40(3A), 40(3B) or 40(4A) have been met.

*Is a condition under section 40(3A) satisfied?*

33. The condition under section 40(3A)(a) of the FOIA is that disclosure would contravene any of the data protection principles. Birkbeck considers that disclosure would contravene principle (a) under Article 5(1) of the General Data Protection Regulation (GDPR).

34. 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*".

35. In the case of a FOIA request, 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. 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.

36. The University has confirmed that the lawful basis most applicable is GDPR basis 6(1)(f) – legitimate interests. Article 6(1)(f) states that processing shall be lawful only if:

*"...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".*

37. In considering the application of Article 6(1)(f) 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

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

**The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.**

*Is a legitimate interest being pursued?*

38. In considering any legitimate interest(s) in disclosing 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.
39. 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.
40. The complainant has suggested that Birkbeck may have an ulterior motive for withholding the information they have requested. They have alluded to maladministration, corruption and incompetence and have said that Birkbeck has deliberately disadvantaged them and diminished their academic achievement. They have not, however, provided evidence to support this claim or to support a position that it is only by having access to the specific numbers in question that they would be able to evidence the above allegations.
41. However, the Commissioner accepts that the complainant's interest in the three courses in question: the number graduating, achieving particular grades and of particular ethnicities is a legitimate interest for the complainant. Disclosure would not, however, appear to have any wider societal legitimate interest other than a public authority being seen to be open and transparent.

*Is disclosure necessary to meet the legitimate interests?*

42. '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.
43. The Commissioner considers that the complainant's legitimate interests, and any wider societal legitimate interests, have, to a large extent,

been satisfied through the information Birkbeck has released in response to the request. The complainant has not provided a persuasive argument to support a position that any of their own interests can only be satisfied through release of the specific and un-anonymised data.

44. Because part (ii) – the necessity test – has not been met, the Commissioner is satisfied that processing the personal data in this case would not be lawful under article 6(1)(f). It is therefore not necessary to consider part (iii) of the test – the balancing test, which considers matters of fairness. And since a condition under section 40(3A) has been satisfied it has not been necessary to consider the conditions under section 40(3B) or 40(4A). The Commissioner has decided that Birkbeck can rely on section 40(2) to withhold the specific information that the complainant has requested in request 1.

### Request 2

45. Request 2 is for award classification information by ethnicity for the MSc graduates for the three courses for the two academic years: 2016/7 and 2017/8. Birkbeck has withheld all the relevant information it holds under section 40(2) but has provided it to the Commissioner.
46. Birkbeck has noted particular figures in this information do not correlate with those relevant to request 1. That is the 'Total' number of students of all ethnicities achieving a 'Pass', 'Merit' or 'Distinction' in the three courses in both years. In the 'ethnicity' information these figures are in some cases greater than the 'Total' figures for the information requested in request 1, and in some cases, less than the 'Total' figures for the information requested in request 1. One would expect them to be the same. Birkbeck has explained that its Registry department routinely updates figures as results and grades are awarded. Sometimes grades are changed following appeals or retaken modules or moved from one academic year to the next – this is why some data has reduced or increased over time.
47. The Commissioner notes that Birkbeck has released some of this particular 'Total' information in response to request 1 and that she has found that the remainder can be withheld under section 40(2).
48. With regard to request 2, of the remaining figures in the ethnicity information, the numbers of students identifying as a particular ethnicity who achieved a 'Pass', 'Merit' or 'Distinction' in 2016/7 and 2017/8, are all five or less, bar two. Of the 'Total' number of those students identifying as that ethnicity for each year ie the 'Pass', 'Merit' and 'Distinction' figures added up by ethnicity, the majority - but not all - of the figures are five or less.



*Is the information personal data?*

49. The Commissioner has again considered this point with regard to request 2. Since she has found figures of five or less can be considered to be personal data with regard to request 1, she finds that this is the case here.
50. But as discussed above, with regards to request 2 Birkbeck is also withholding figures that are greater than five. For the MSc Management course there are two such figures within the award breakdown information (ie 'Pass', 'Merit' or 'Distinction') and five of the 'Total' figures by ethnicity for the three awards are greater than five. The Commissioner has considered whether these higher figures can also be categorised as personal data.
51. The Commissioner finds that, if these higher figures for both 2016/7 and 2017/8 were released it would be possible to deduce that the associated withheld figures were five or less. As above, the Commissioner has found that figures of five or less comprise personal data. The Commissioner is therefore satisfied that all the information that Birkbeck holds that is relevant to request 2 – save for that it has released in response to request 1 – can be categorised as the personal data of third persons.
52. In addition, if the requested data is special category data in order for disclosure to be lawful and compliant with principle (a) of Article 5 of the GDPR, it also requires an Article 9 condition for processing.

*Is the information special category data?*

53. Information relating to special category data is given special status in the GDPR.
54. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
55. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include special category data. She has reached this conclusion on the basis that it concerns individuals' ethnicity.
56. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.

57. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
58. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
59. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) of Article 5. The Commissioner therefore finds that the information within the scope of request 2 that Birkbeck is withholding is exempt information under section 40(2) of the FOIA.

## **Section 10 – time for compliance**

### Request 1

60. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled (a) to be told whether the authority holds the information and (b) to have the information communicated to him or her if it is held, and is not exempt information.
61. Under section 10(1) of the FOIA an authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.
62. The complainant's request of 21 September 2018 concerned three MSc Courses: Management, Management with International Business, and Management with International Business and Development. In its response Birkbeck released information with regard to the final two of these courses; it did not include the MSc Management course. It appears to the Commissioner that in its internal review response Birkbeck suggests that it had referred to the MSc Management course in its response and stated that there were less than five students. In fact, it had not – it had referred to the MSc Management with International Business, and the MSc Management with International Business and Development courses only.
63. In its submission to the Commissioner Birkbeck has acknowledged that, with regard to the request of 21 September 2018 it had overlooked the MSc Management course and told the Commissioner that it was prepared to release the particular information associated with this course to the complainant. The Commissioner understands that Birkbeck sent this information to the complainant on 14 June 2019.

64. The Commissioner finds that Birkbeck has now complied with section 1(1)(b) with regards to the information it holds that is relevant to request 1 but has breached section 10(1) as it did not fully comply with section 1(1) within 20 working days.

## Right of appeal

---

65. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals  
PO Box 9300  
LEICESTER  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

66. 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.
67. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**