

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 13 October 2016

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

#### Decision (including any steps ordered)

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1. The complainant was selected for redundancy by the Open University (the OU) and subsequently, on 10 September 2015, requested information concerning its redundancy selection criteria, the process followed and guidance documents. The OU responded that it would treat her request as a basis for her appeal against the decision. The OU considered the complainant's appeal but did not provide all the information requested. The complainant has argued that the OU should have handled her information request as an FOIA request and that its response to a further FOIA request was late. The complainant has also argued that she has still not received all the information requested.
2. The Commissioner considers that the OU's approach to the request was reasonable in the circumstances and that many of the questions asked by the complainant could have been effectively addressed as part of the appeals process. However the Commissioner also considers that any information request should be treated as a request under the FOIA and that as a matter of good practice the OU should have checked with the complainant whether she required this. Therefore in failing to respond to that part of the request of 10 September 2015 which fell under the FOIA, the Commissioner finds the OU to be in breach of section 1(a) and (b) and section 10 of the FOIA. In failing to provide a response to a further FOIA request within 20 working days, the Commissioner finds the OU to be in breach of section 10 of the FOIA.

3. The Commissioner requires the OU to provide a formal response under the FOIA to the information requests made on 10 September 2015 which the complainant considers to be outstanding (requests numbered 2, 5 and 17).
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

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5. In September 2015 the complainant was selected for redundancy by the OU. She was provided with some information concerning the selection criteria and on 10 September 2015, the complainant wrote to the OU and asked it to review its decision. The complainant explained she disagreed with her selection as the Associate Lecturer ("AL") to lose work and she did not accept that the reasoning which had been provided was correct.
6. The complainant then requested information about the redundancy selection criteria and a copy of guidance documents. She asked 17 questions (detailed in appendix 1).
7. On 16 September 2015 the OU informed the complainant it was treating her email as the basis for her appeal against the decision.
8. The complainant sent a follow-up email on the same date. She also requested a copy of the procedure that was being followed in carrying out the appeal:

*'There should also be an email that I sent to [name 1 redacted] and [name 2 redacted] dated 2 September where I disagree with my selection for loss of work. Can you please confirm you also have that? There is also an email of 13 September 2015 where I reiterated the position and made the university aware of UCUs support of my position and asked that the university consider borrowing students from another region or running 3 smaller classes. Can you confirm you also have that?'*

*I went through exactly the same process ie. appealing against loss of work with the same people in the same region in January of this year and it was found that I had been incorrectly chosen. As there was no involvement from yourself or anyone senior in AL services at that time it*

*appears that the protocol has changed. I would be grateful in the interests of transparency for confirmation of this change in protocol and when it came into place. Also in the interests of transparency, could you provide me with a copy of the procedure that you are now following to carry out the appeal?'*

9. On 23 September 2015 the OU confirmed it had received all the complainant's emails and informed her it was following the ACAS guidance regarding an appeals process for redundancy.
10. On 29 September 2015 the OU informed the complainant that her appeal had been reviewed and it considered that the redundancy points had been applied correctly. The OU provided a response to the 17 questions the complainant had asked on 10 September 2015.
11. On 15 October 2015 the complainant asked the OU a further set of 15 questions about the redundancy selection and the scoring criteria.

#### **Freedom of information request of 18 October 2015**

12. On 18 October 2015 the complainant submitted a freedom of information request with a further 18 questions (numbered a-r). The OU responded to this request on 19 November 2015.
13. The complainant has argued that the guidance notes were provided at this point but should have been provided earlier in September. She has also complained that this response was outside the 20 working day deadline.
14. On 30 November 2015 the complainant requested an internal review.
15. The internal review was provided on 27 January 2016.

#### **Further complaint**

16. On 1 January 2016 the complainant complained about the handling of her request of 10 September 2015. In particular she argued that question 12 had not been addressed.
17. This question asked about the statement '*workload loss is the net score*' and the complainant asked for further information about this criterion. She also asked for guidance documents which refer to this.
18. In addition the complainant argued that the request of 10 September 2015 was a freedom of information request and should not have been ignored by the OU. She explained that because she had not received a response she had submitted a clearly marked FOIA request on 18 October 2015.

## **Response from the OU**

19. The complainant received a grievance response from the OU in January 2016 but this did not address her complaint about how her request for information had been handled. She therefore escalated the grievance to stage 2.
20. The complainant received a response from the OU's information rights office on 29 January 2016.
21. In this letter, the OU explained that it considered the email of 10 September 2015 was not a formal request for information under the FOIA and that due to the circumstances, it considered it was correct to assume that it was made under 'normal course of business'.

## **Scope of the case**

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22. The complainant contacted the Commissioner on 5 June 2016 to complain about the way her request for information had been handled. Specifically she argued that:
  - the OU did not consider her request of 10 September 2015 under the FOIA. It therefore did not provide her with the redundancy guidance notes and criteria she requested on 10 September 2015 until November 2015, following another information request; and
  - the OU did not respond to her FOIA request of 18 October 2015 within 20 working days.
23. In addition the complainant has now also argued that:
  - there is still outstanding information from the request of 10 September 2015 which has not been provided.
24. The Commissioner considers this case is concerned with the complainant's initial complaint concerning the question of whether the information request of 10 September 2015 should have been handled under the FOIA. The Commissioner will also consider whether the OU's response to the request of 18 October 2015 was late.
25. With respect to the information the complainant has now identified as outstanding, the Commissioner considers that the OU should issue a formal FOIA response to the complainant. This will therefore not be considered within the scope of this case.

## Reasons for decision

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26. Under section 1 of the FOIA, a public authority is required to inform an applicant whether the requested information is held, and if so to provide it, subject to any exemptions which apply. Under section 10 a public authority must provide this response within 20 working days.
27. The OU has explained that it considered that the complainant's email of 10 September 2015 was not a formal request for information under the FOIA and that due to the circumstances it considered it was correct to assume that it was made under 'normal course of business'.
28. The OU has acknowledged that any request for information can be viewed as a request under the FOIA (and therefore that it does not have to mention the FOIA itself). However it has explained that it considers the complainant's correspondence with the OU was part of an on-going engagement about a personal employment-related issue.
29. The OU also argued that the staff who were copied into the email would also have assumed the request was to be handled as a normal course of business matter.
30. Furthermore the OU argued that the complainant did not send a follow-up email stating she wished the request to be handled under the FOIA. She also did not reference the FOIA or send the request to the information rights team as she has done with other requests.
31. The complainant has argued that the OU did not treat her request of 10 September 2015 as a 'normal course of business request' because it did not respond to it within 10 working days.
32. She also does not consider that she was obliged to reiterate the request made on 10 September 2015 in her follow-up email of 16 September 2015. She does not consider this she was obliged to point out that the request of 10 September 2015 was an FOIA request. She has argued that the OU should have progressed her information request under the FOIA.

### The Commissioner's position

33. The Commissioner's guidance to recognising a freedom of information request states that there are some circumstances where, despite the validity of a request, it may be more appropriate to deal with it outside of the FOIA. For example, if the requested information can be quickly and easily sent to the requester then it may be better dealt with in 'the normal course of business'; for example, a request for a current leaflet.

34. This guidance can be found on the ICO website at:

<https://ico.org.uk/media/for-organisations/documents/1164/recognising-a-request-made-under-the-foia.pdf>

35. The Commissioner considers that any information request falls under the FOIA whether or not it explicitly references the Act itself. However in accordance with the guidance, the Commissioner understands that many requests will be handled in the normal course of business and that in many circumstances there will be no need to reference the FOIA if the requested information is provided.
36. The Commissioner understands why the OU considered it was appropriate to handle the request of 10 September 2015 as part of the redundancy appeals process.
37. The Commissioner accepts the OU's argument that the request was part of on-going correspondence about the redundancy selection. The Commissioner considers that many of the questions asked by the complainant could have been effectively addressed as part of the appeals process.
38. The Commissioner also considers that the complainant's follow-up email of 16 September 2015 could be interpreted as an acceptance of the proposal to review her case. The Commissioner therefore understands why the OU took the position that the questions the complainant had raised in her email of 10 September 2015 would be answered as part of that review.
39. However the complainant has clarified that she remained dissatisfied with the review process and this is demonstrated by her further emails. She has argued that she was not obliged to point out to the OU that her request was an FOIA request.
40. The Commissioner agrees with the complainant that there was no obligation upon her to repeat her request or to refer to the FOIA in her follow-up email of 16 September 2015. However the Commissioner considers that this email was a missed opportunity for the complainant to clarify that in addition to the proposed review, she wished her request to be handled under the FOIA.
41. Having reviewed the circumstances of this case, the Commissioner considers that as a matter of good practice the OU should have clarified with the complainant whether she also wished to pursue the information requested on 10 September 2015 under the FOIA (in addition to having the issues raised considered under the appeals process).

42. To avoid such a situation occurring again, the Commissioner has recommended to the OU that as a matter of good practice, in circumstances where it wishes to respond under 'normal course of business' (and particularly where information is being disputed), it should also consider if it is more appropriate to either respond under the FOIA, or to clarify whether a requester wishes to pursue the requested information via the FOIA.
43. However, although the Commissioner does not wish to discourage the OU from answering information requests as 'normal course of business', she considers that any information request effectively falls under the FOIA. Therefore in this instance, the Commissioner considers that the requests for information contained within the email of 10 September 2015 should have been responded to under the FOIA.
44. The complainant remained dissatisfied with the response she received on 29 September 2015 and this led her to submit a clearly marked FOIA request on 18 October 2015. The OU provided a FOIA response to this request on 19 November 2015. However this was outside of the deadline of 20 working days.
45. In failing to respond to the request of 10 September 2015 under the FOIA, the Commissioner finds the OU to be in breach of section 1(a) and (b) and section 10 of the FOIA.
46. In failing to provide a response to the FOIA request of 18 October 2015, within 20 working days, the Commissioner finds the OU to be in breach of section 10 of the FOIA.

#### **Information not provided**

47. The complainant has also argued that the following three requests have still not been fully responded to and that this information is still outstanding from her request of 10 September 2015:
48. *'2. In the interest of transparency as this is a loss of work situation, can you please provide the names, job titles and regions of 'AL colleagues outside of the Yorkshire Region' who have checked your work 'for completeness and accuracy'?''*

The complainant has explained she still does not have this information.

49. *'5. There is an undated document in the 5 you have sent, please confirm the date this was used in the redundancy criteria and who compiled this document and from what sources. Criterion 2 called 'workload loss' on this document states points '04' ie. 'no loss of work'. Where is this figure derived from.'*

The complainant has explained she still wishes to know who compiled the document and from what sources. She also considers she has not been informed where the figure of 4 points (given at criterion 2) is derived from.

50. *'17. You have stated that 'the scoring has additionally been re-checked by AL services colleagues outside of the Yorkshire Region, for completeness and accuracy, and found to comply with current guidance'....I would be grateful for further details about how these checks comply with the current guidance.'*

The complainant considers she has not been provided with the further details about how the checks comply with current guidance.

51. The Commissioner notes that since September 2015 the OU has provided the complainant with detailed responses to her subsequent requests. However the Commissioner considers the OU should now review the information identified above and issue an FOIA response to these outstanding points of the request of 10 September 2015 (or a data protection response if applicable).



## Right of appeal

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52. 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](mailto:GRC@hmcts.gsi.gov.uk)

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

53. 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.
54. 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** .....

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**

## **Appendix 1: Request of 10 September 2015**

*1) Can you please provide the name of the databases these documents came from?*

*2) In the interest of transparency as this is a loss of work situation, can you please provide the names, job titles and regions of 'AL colleagues outside of the Yorkshire Region' who have checked your work 'for completeness and accuracy'?*

*3) You refer to 'current guidance'. Please state what this 'current guidance' is, the date of it and where it is available to ALs. Please provide a copy if possible.*

*4) Please confirm if proper procedures have been followed and if volunteers have been sought by sending a 'Seeking Volunteers (SV2) letter' to all DD208 ALs in Region 7? I do not appear to have received one of these letters. If you have sent them out, it would be useful to know why one has not been sent to me. If none have been sent out, it would be useful to know why you are not seeking volunteers at this stage. None were sent out during the DD102 Feb saga earlier this year. Guidelines do not appear to be followed which could result in the invalidation of the whole redundancy criteria process.*

*5) There is an undated document in the 5 you have sent, please confirm the date this was used in the redundancy criteria and who compiled this document and from what sources. Criterion 2 called 'workload loss' on this document states points '04' ie. 'no loss of work'. Where is this figure derived from? This is factually incorrect data and I would like it corrected by 5pm on Monday September 14th 2015 and a copy provided to show the corrections.*

*6) The other documents have a date of 26 August 2015. Please confirm this is the date they were used in the redundancy criteria.*

*7) You refer to 'Criterion 2 - Workload Loss'. There is not a 'Criterion 2 - Workload Loss' in the redundancy criteria available to ALs on the OU website. Please state what this criteria is and why it does not conform to published versions of the redundancy criteria.*

*8) You have stated I have 3 points at 'Criterion 4' - Continuing Appointments, ie 'Two or more continuing appointments'. Please state which modules you regard as 'continuing appointments' at the date the criteria was applied and on what basis.*

*9) The document you have provided in relation to loss of work states: 'Category 1 Lost Work Greater Protection' there is then a '1' beside my*

*name. Can you please confirm what this means? Does it mean I have been confirmed as having lost work in the previous 12 months?*

*10) According to the way you have arrived at loss of work, it appears that if I had not been active and gained a new appointment, which I have not yet started, which could be withdrawn by the OU before it starts and is not a 'continuing appointment', then I would not have been selected for loss of work in the manner you describe in your email. Please confirm if I had not gained a new appointment, would this have had any impact on your decision to select me for loss of work? Please also explain the grounds for your reasoning and provide details and quotations of the relevant sections of the guidance, including paragraph and page numbers to support your reasoning.*

*11) In my email of 2 September 2015 I stated:*

*"I would also like to remind you of Criterion 2 Loss of Work on the Redundancy Criteria for Associate Lecturers which states: 'Loss of any Every Presentation (EP) or Alternate Year (AP) module appointment during previous 12 months as at the date the criterion is applied which includes appointments at risk for a forthcoming presentation'. It then goes on to state: 'Loss of one or more EP or AP appointment (any module - planned and unplanned) within the previous 12 months'. I have lost my February presentation of DD208, therefore, this is a loss of 60 credits which has a point rating of 2. The criterion then states: 'The ALs with the highest points at criterion 2 will cease to be employed on the module at risk'. There are 3 ALs on the October presentation of DD208: me, [name redacted] and [name redacted]. I think you will find that one of those ALs has not lost an appointment in the previous 12 months, therefore, would have a point rating of 4. The current DD208 numbers indicate there are sufficient students for 2 ALs at 80% class size, therefore, I suggest you review your application of the redundancy criteria to my situation again as I disagree that my position is at risk".*

*Criterion 2 is based upon factual information which is also my personal data. That is whether I have suffered 'Loss of any Every Presentation (EP) or Alternate Year (AP) module appointment during previous 12 months as at the date the criterion is applied which includes appointments at risk for a forthcoming presentation'.*

*Please confirm ie. give a yes or no answer to the following questions: a) Have I experienced a 'Loss of one or more EP or AP appointment (any module - planned and unplanned) within the previous 12 months'.*

*b) If 'Yes' please also confirm the total credit points of the loss.*

*12) In relation to 11 above you appear to have arrived at a decision to ignore my personal data ie. the facts and instead you prefer to process incorrect*

*personal data to arrive at an incorrect decision which will result in my incorrect loss of an appointment. This is not the first time this has happened and I have no trust or confidence in how you have arrived at this decision. This is causing distress and will cause further damage and distress if you continue to apply the criteria in this incorrect way to incorrect data and I lose my appointment. This contravenes my rights in the Data Protection Act 1998 to have personal data processed fairly and lawfully. I will be making a complaint to the Information Commissioners Office if this data is not processed in accordance with my rights and a correct application of the redundancy criteria to my correct personal data is not provided by 5pm on Monday 14th September 2015.*

*The facts are clear that I have lost an appointment within the previous 12 months. There is documentary evidence to support this, (an email from [name redacted] dated 18 June 2015; a letter from [name redacted] dated 23 June 2015) not to mention all of the documentary evidence from the saga which commenced in January 2015 about the loss of appointment which had not been communicated to ALs at that time. There has clearly been loss of work which you are choosing to ignore. Why? This loss of work cannot be wiped off the face of history as you state it can because I am appointed to another post. The loss of work protection is there, according to the OU criteria for 12 months.*

*You have stated "Criterion 2 'Workload Loss' is the net score as you have gained recent appointment(s)". As I have stated above, there is not a 'criterion 2' called 'Workload loss' so you seem to be working to a different redundancy criteria. Please confirm if this is the case. Where does it state in the redundancy criteria at 'criterion 2' that as you state: "'Workload Loss' is the net score". It does not state this at all. It does not even state this in the Adjudicating Criterion. Where have you got 'Workload Loss' from and where have you got 'net score' from?*

*In the interests of transparency you will be able to provide me with full quoted extracts from any guidance documents which support your claims that 'net loss' is to be part of the criteria at 'Loss of Work'. Whether I have gained a recent appointment is irrelevant. You appear to be confusing the redundancy criteria with MOLD. MOLD should not be used in the redundancy criteria to penalise or punish ALs if they use it, but MOLD now appears to be being used as a stick to whip me with which has no place in the criteria or in the work of AL Services. Please confirm if I had done nothing to replace my lost Feb DD208 appointment what position I would have been in as regards the redundancy criteria for the loss of appointment for DD208 Oct.*

*13) It was clear in emails between [name redacted] and [name redacted] during the January DD102 saga that there are problems with the way data is*

*recorded and used in the redundancy criteria. [name redacted] states to [name redacted]: 'I have been assured that this was the first time such a situation has arisen. We have discussed the pros and cons of why it was done that way, and it will be done differently in future...Of course, we still need to find a way forward for those involved and we're working on this'. Could you please provide confirmation of what steps were taken to a) do things differently this time during the redundancy criteria period for October presentations to prevent problems I experienced in January 2015? b) what steps were taken to find a way forward for those involved to address the issues that were being raised to prevent the same issues re-occurring this time during the redundancy criteria period for October presentations?*

*14) [name redacted] states to [name redacted] in an email 'my main concern is that the way we have recorded the appointment end on CIRCE led to the generating of a redundancy scoring report which contained incorrect data. We work on the data provided in these reports'. Can you please state what steps have been taken since January 2015 to ensure that all incorrect data has been removed from ALs CIRCE reports so that the scoring reports for October 2015 presentations do not contain any incorrect data which could lead to an AL being wrongly selected for loss of work?*

*15) Please confirm why the document called 'Continuous Appointments' still states that the 'Module Last Pres' for DD208 Feb is 2017J when this is not the case as the last presentation was 2015. Please confirm how this has affected my selection and if this has been counted as a 'continuing appointment'.*

*16) Earlier this year [name redacted] confirmed to me in writing: 'Sick leave absence is not taken into consideration when applying the redundancy criteria. If an Associate Lecturer is on sick leave absence then the period is counted as having been taught under the experience criterion'. If that is the case where is my 2011J DD208 presentation? This does not appear in the list under 'experience', so why hasn't it been counted? Please explain. Please confirm which data base the 'experience' data is derived from. Please correct this with immediate effect and provide me with a copy of the corrected 'experience' data by Monday 14 September 2015 ie. showing 2011J as counting towards 'experience'. I will be reporting this matter to the ICO if this matter is not corrected in a timely fashion.*

*17) You have stated that 'the scoring has additionally been re-checked by AL services colleagues outside of the Yorkshire Region, for completeness and accuracy, and found to comply with current guidance'. It appears that this check for 'completeness and accuracy' has not been carried out very well for factual accuracy by either AL services in Region 7 or anyone else involved, nor has it been carried out to check for the compliance of the data with the Data Protection Act 1998. I would be grateful for further details about how these checks comply with the current guidance. The fact that any incorrect*

*data is being used at any point in the application of the redundancy criteria is deeply disturbing bearing in mind the OU has been on notice since at least January 2015 of the problems.*