

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 January 2019

Public Authority: The University of Manchester
Address: Oxford Road
Manchester
M13 9PL

Decision (including any steps ordered)

1. The complainant has requested the names of those shortlisted in three recruitment exercises. The University refused to provide the requested information citing section 40(2) – personal information, as its basis for doing so.
2. The Commissioner's decision is that the University is entitled to rely on section 40(2) to withhold the information.
3. The Commissioner does not require the public authority to take any further action in this matter.

Request and response

4. On, or around, the 20 July 2018 the complainant made the following request through the University's website using an online form:
"Provide the names of applicants shortlisted for interview for the following posts:

(Recruiting Manager [named individual deleted]) S&E-009998

(Recruiting Manager [named individual deleted]) S&E-10702

(Recruiting Manager [named individual deleted]) S&E-09999"

5. The request was received by the University on 20 July 2018 and on 25 July 2018 the University responded. It refused to provide the requested information. It cited the exemption provided by section 40(2) – third party personal information as its basis for doing so.
6. The complainant requested an internal review on 26 July 2018. The University provided the outcome of its internal review on the same day, 26 July 2018. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 30 July 2018 to complain about the way their request for information had been handled.
8. The Commissioner considers the matter to be decided is whether the requested information can be withheld under section 40(2).

Reasons for decision

Section 40(2) – personal information

9. Section 40(2) has to be read in conjunction with the relevant Data Protection Act. As the request was received and dealt with after 25 May 2018, the date the new Data Protection Act 2018 (DPA 2018) and General Data Protection Regulation (GDPR) legislation came into force, the Commissioner considers that the DPA 2018/GDPR applies.
10. Section 40(2) provides that information is exempt from disclosure if it is the personal data of someone other than the applicant and at least one of the conditions listed in section 40(3) or 40(4) is satisfied.
11. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to a member of the public would contravene any of the principles relating to the processing of personal data as set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') ('the DP principles').
12. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA 2018. If it is not personal data then section 40 FOIA cannot apply.

¹ As amended by Schedule 19 Paragraph 58(3) of the Data Protection Act 2018

13. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA 2018.

Is the information personal data?

14. Section 3(2) of the DPA defines personal data as:-

“any information relating to an identified or identifiable living individual”.

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.
17. 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.
18. The information captured by the request identifies individuals who applied for particular posts within the University and were subsequently shortlisted and invited to an interview.
19. In the circumstances of this case the Commissioner is satisfied that the information both relates to and identifies the individuals concerned. This information therefore falls within the definition of ‘personal data’ in section 3(2) DPA 2018.
20. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the data protection principles.
21. When refusing the request the University argued that disclosing the information would contravene the first data protection principle and the Commissioner agrees that principle (a) is the most relevant in this case.

Would disclosure contravene the principle (a)?

22. Article 5(1)(a) GDPR states that:-

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”

23. In the case of a 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 (i.e. would meet one of the bases of lawful processing listed in Article 6(1) GDPR), fair, and transparent.

Lawful processing: Article 6(1)(f) GDPR

24. 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 bases for processing listed in the Article applies. One of the bases in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
25. The University considers that the only condition that could apply would be if the data subjects had consented to the disclosure, which they have not. Nor does the University consider it likely that they would consent.
26. However the Commissioner considers that the basis most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:-

“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.

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

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”.

ii) Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;

iii) Balancing test: Whether the above interest overrides the legitimate interests, 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.

Legitimate interests

28. In considering any legitimate interests in the disclosure of the requested information to the public under the FOIA, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sake as well as case specific interests.
29. 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.
30. In this particular case the complainant has not presented any arguments for considering there is a legitimate interest in disclosing the information. However the Commissioner considers that there is a legitimate interest in having access to information that would allow the recruitment process for the three posts to be examined. The Commissioner has absolutely no grounds for believing the process was flawed in any way, it is simply that there is an argument that identifying those that were shortlisted may serve to aid independent scrutiny of the process.

Is disclosure necessary?

31. 'Necessary' means more than desirable, but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so disclosure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
32. It is entirely possible that the University has its own procedures that would allow a candidate to challenge the fairness of any recruitment process that they had been involved in. In the case of internal candidates who were unsuccessful there is often a procedure for providing feedback on the reasons why they were not considered the most appointable applicant. It may also be that the University makes figures available to the public on the diversity of staff at different levels

of seniority, which would enable some external scrutiny of its procedures. Unfortunately the University has not provided the details of any such procedures.

33. The University has however directed the Commissioner to a previous complaint that she dealt with which resulted in a decision notice being issued under the reference number FS50700473. The requests which were the subject of that notice related to the recruitment process for one of the jobs listed in the current request. Amongst other things, the requests sought information on the number of redeployees interviewed for that post, the number of candidates shortlisted, how many redeployees were shortlisted and how many females were shortlisted, as well as requesting information on to how the advertising of that post complied with the University's redeployment policy. It is apparent from that notice, and the University's submission in this case, that the University ultimately disclosed these statistics and the Commissioner is satisfied this would allow some scrutiny of the recruitment process and whether it conformed to the University's policies, for example on diversity issues or redeploying staff. The University has stated that it would be prepared to disclose similar information in respect of the other two positions listed in the current request.
34. Therefore there are less intrusive ways of providing reassurance to candidates and the wider public on the fairness of the University's recruitment processes, albeit they are dependent on a further request being made.
35. Even if disclosing the names of those shortlisted was necessary in order to pursue the legitimate interests of the requestor or society as a whole, the Commissioner would still have to weigh these legitimate interests against the interests or fundamental rights and freedoms of the data subjects.

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

36. In balancing the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms, 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.
37. The requested information identifies individuals who applied for and were shortlisted for the particular posts. The Commissioner considers that an individual's application for a job and the details of how far they progressed in any particular recruitment exercise is a private matter

between that individual and the potential employer. It is not a matter any candidate would expect to be revealed to the world at large, which is in effect what a disclosure under the FOIA would be. It is the established practice that job applications are treated as confidential within human resource departments and this is well understood by those who apply for jobs.

38. It is understandable that some candidates may not wish their colleagues to know they had been seeking a new role. Furthermore, it is possible that revealing someone had applied for a new job would not be viewed favourably by their current line manager, or, in the case of an external candidate, their current employer. It is also conceivable that a candidate may wish to keep the details of their application private from family and friends. In light of this the Commissioner considers it would be very intrusive to disclose the requested information and could potentially be detrimental to the professional lives of some candidates.
39. Taking account of the limited value in disclosing the information and the fact that a significant and meaningful level of scrutiny of these recruitment exercises could be achieved by less intrusive means, the Commissioner finds any legitimate interests in having access to the information do not override the rights and freedoms of the data subjects.
40. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms, and that the disclosure of the information would not be lawful. Given the conclusion the Commissioner has reached above on lawfulness, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair.
41. The Commissioner's view
42. The Commissioner has therefore decided that the University was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

44. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
45. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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