

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 November 2022

Public Authority: The Governing body of
Birmingham City University

Address: University House
15 Bartholomew Row
Birmingham
B5 5JU

Complainant:
Address:

Decision (including any steps ordered)

1. The complainant has requested information from Birmingham City University ('BCU') about the number of staff in their employment who have been suspended since 2010 and have returned, the reasons for the suspension and whether they went through the disciplinary processes in place at BCU.
2. The Commissioner's decision is that BCU has correctly withheld the information under section 40(2) of FOIA.
3. The Commissioner requires no further steps to be taken.

Request and response

4. On 21 February 2022, the complainant wrote to the public authority and requested information in the following terms:
"Can you please provide how many staff have been suspended since 2010 and have returned ?

Please also provide the reason why they have been suspended?
What was the necessary process to suspend staff ? Did they go through the disciplinary process?"

5. On the 11 March 2022, the complainant additionally requested the following information:

"Please outline the reasons for each person why they have suspended ?

Also why are Birmingham City University not following their own processes ?

Why was I sent straight into disciplinary action with no evidence ?"

6. BCU responded on 11 March 2022. It provided some information within the scope of the request, related to the numbers of staff suspended and general information on the disciplinary and decision-making processes involved.

7. Following an internal review, BCU wrote to the complainant on 16 March 2022. It refused to provide any information related to reasons for any disciplinary action which may have been connected to the complainant as this was not considered a valid request for information under FOIA and cited the following as its reason for withholding the remaining information requested

"Although we do hold this information, we are unable to provide the reasons for the suspensions as the specific circumstances of each suspension would likely identify the individual who it relates to and therefore this is exempt information under s40(2) Freedom of Information Act 2000."

Reasons for decision

Section 40 personal information

8. 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.

9. 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').
10. 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'). If it is not personal data, then section 40 of the FOIA cannot apply.
11. 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 DP principles.

Is the information personal data?

12. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information, regardless of whether names are redacted, amounts to disclosure of profiles of the individuals concerned; which along with details of the circumstances associated to these procedures, would enable someone with a knowledge of BCU and the staff employed by them at that time to identify the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
13. 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 DP principles.
14. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

15. 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".

16. 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.

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

17. 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.

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

18. 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.

19. 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;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
20. 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

21. 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

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”.

accountability and transparency for their own sakes, as well as case specific interests.

22. 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.
23. In this case, It is clear that the complainant has a personal interest in the withheld information.
24. The Commissioner is satisfied that there would be a legitimate interest from disclosure of the information as it would show whether BCU followed its own policies and procedures in this regard. He has therefore gone on to consider the necessity test.

Is disclosure necessary?

25. '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.
26. The Commissioner is satisfied in this case that there are less intrusive means of achieving the legitimate aims identified such as contact with BCU internal complaints teams or seeking employment and dismissal advice from ACAS as to whether any actions taken by BCU were lawful.
27. Additionally, disclosure under FOIA is disclosure to the world at large and not just the requestor and is equivalent to BCU publishing personal disciplinary data on the complainant and others on all media platforms and websites.
28. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent and that BCU were correct in applying the exemptions of section 40(2) of FOIA.

Section 40(1) - Personal data of the applicant (or complainant)

29. Section 40(1) FOIA states that:

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

30. The Commissioner considers that the complainant requesting details of why BCU undertook disciplinary measures against him would specifically be the complainant's own personal data.
31. The complainant obviously knows whether they were subject to any suspensions or disciplinary actions and the BUC will know what evidence was available to justify their actions, however, the world at large does not know, and responses provided under the FOIA are provided to the world at large – not just to the individual who made the request.
32. Individuals should make requests for their own personal information under the remit of the Data Protection Act 2018 using a subject access request or SAR.
33. It follows that the Commissioner considers that the complainant is the data subject within the meaning of the exemption at section 40(1) of FOIA and therefore BCU could not disclose personal information relating to the complainant, should it have been considered a valid request under the FOIA. The information would be exempt from disclosure under section 40(1).

Right of appeal

34. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

35. 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.
36. 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

Catherine Fletcher
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