

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 February 2023

Public Authority: The Council of the University of Exeter

Address: Stocker Road

Exeter

EX4 4PY

Decision (including any steps ordered)

1. The complainant requested information from the University of Exeter ("the University") in several parts, the majority of which were answered. The University refused to provide the number of students admitted to the law school for two academic years on the basis of section 21 of FOIA.
2. The Commissioner's decision is that the University has incorrectly applied section 21 to the request.
3. The Commissioner requires the University to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the request which does not cite section 21 of FOIA.
4. The University 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 31 May 2022 the complainant made a multi-part request to the University. The University responded to all parts of the request but refused to provide the information at part 3 on the basis of section 21 of FOIA. This part of the request was for:

 “How many students were admitted into the Law School in each of the academic years 2019/20 and 2021/22?”
6. The University refused this part of the request under section 21 of FOIA as it stated the data was reasonably accessible to the complainant via other means; a position the University upheld at internal review.

Reasons for decision

7. Section 21 of FOIA provides that information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
8. The University provided its arguments as to why it believes section 21 is engaged in its refusal notice and internal review. The Commissioner invited the University to add further comments and any additional submissions but received no further arguments from the University.
9. The University's arguments included the fact that the information may be reasonably accessible to the complainant though only on payment (section 21(2)(a)) and could be accessed through either the [Higher Education Statistics Agency](#) (HESA) or the [Joint Information Systems Committee](#) (JISC) custom data request schemes.
10. The University further stated that data which is disseminated by HESA/JISC for a fee is considered to be commercially sensitive and therefore would be exempt from disclosure under Section 43(2) of FOIA. It also argued that it may engage section 40(2) of FOIA if it was small enough numbers and could identify individuals.
11. The purpose of section 21 is to ensure that there is no right of access to information via FOIA if it is available to an individual by another established route.
12. The first consideration is the University's citing of section 43 and 40 of FOIA. The Commissioner's guidance on section 21 states the following:

 “If the information is held but is covered by another exemption in Part II of FOIA, section 21 cannot apply because, for that very reason, the information is not, in fact, reasonably accessible to the requester.”

13. The Commissioner must therefore consider if either of the exemptions cited by the University may have been correctly applied as, if this is the case, the information cannot be reasonably accessible as it will be exempt from disclosure.

Section 43

14. Section 43 of FOIA states that information is exempt from disclosure if its disclosure would or would be likely to damage the commercial interests of the public authority and/or a third party. It is also subject to the public interest test.
15. The University's central argument for applying section 43 is that data which is disseminated by HESA/JISC for a fee is commercially sensitive and, if the University were to disclose this information, then it would impact on the commercial interests of HESA/JISC as the organisation responsible for disseminating such statistics. It argued that HESA/JISC is the body nominated to provide statistics on the higher education sector in the UK and disclosure of data available from HESA/JISC would prejudice their ability to sell such data to third parties via their paid services.
16. The University has not, in the Commissioner's view, explained in sufficient detail how disclosure of the specific information in this case (the number of students admitted into the law school) would prejudice the ability of HESA/JISC to sell data to third parties. Nor has the University provided any evidence that such arguments have originated from HESA/JISC. The Commissioner does not consider that this information would be prejudicial to HESA or JISC if it were disclosed by the University as this is highly unlikely to affect other individuals requesting custom data sets from them.
17. As such the Commissioner cannot accept that section 43(2) has been correctly cited in this case as there is no clear link between the information requested and any potential prejudice to the commercial interests of HESA/JISC.

Section 40(2)

18. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester
19. 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 FOIA cannot apply.

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

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

21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

22. In this case the University has argued that:

“section 40(2) could [also] be applied if the data set you have requested is low enough to identify individuals. Please be aware that section 40(2) would also be applied by HESA if this was the case. This is only relevant where there are less than 5 individuals involved in the breakdown and would risk the disclosure of the personal data of the individuals involved.”

23. If the numbers involved were less than five this would not directly identify individuals by name but this does not mean that an individual cannot be identified in some circumstances by numbers alone.

24. The Commissioner refers to a first tier tribunal decision which considered the suppression of small numbers and the Upper Tribunal decision which upheld the decision that individuals would not be identified if the small numbers were disclosed. (Information Commissioner v Miller – [GIA/2444/2017](#) (EA/2016/0265). In this decision there is an emphasis placed on public authorities to explain how a ‘motivated intruder’ would be able to identify an individual from small numbers.

25. In this case, the University has simply asserted that identification of individuals where the numbers are lower than five could occur but has not explained in any detail why this might be the case or why anyone may be motivated to try and identify a particular student admitted to a law school.

26. The Commissioner cannot see any logical argument as to how identification could occur and has seen no evidence to suggest individuals would be motivated to attempt to identify specific students who might have been admitted to law school. Therefore the Commissioner is satisfied that the requested information in this case does not constitute personal data. As it is not personal data then section 40(2) of FOIA cannot apply and the Commissioner must now go back to consider if section 21 has been correctly applied to refuse the request.

Section 21

27. Having determined that neither section 43(2) or section 40(2) FOIA have been correctly applied the Commissioner notes the information can

now engage section 21 if it is still found to be reasonably accessible by other means, in this case via HESA/JISC's data set

28. Section 21(2)(a) states that information may be regarded as reasonably accessible to the applicant "even though it is accessible only on payment".
29. However, for the information to still be considered "reasonably accessible" there are only two avenues requiring payment of fee the Commissioner considers are acceptable –
 - Information available by means of other legislation which permits a charge to be made, and
 - Information made available by a public authority's publication scheme.
30. HESA was the official agency for the collection, analysis and dissemination of quantitative information about higher education in the UK. HESA became a directorate of JISC during a merger in 2022 with JISC becoming the Designated Data Body (DDB) for higher education in England following the merger. Part of the information collected by HESA/JISC in its annual data collection streams would have included data about students, including courses and qualifications.
31. The [Higher Education and Research Act 2017](#) (HERA) sections 64-67 sets out the duties of the DDB to compile, make available and publish higher education information and the power of the DDB to charge fees.
32. The DDB duties require it to compile information about higher education providers and courses and make this available to the Office for Statistics, UK Research & Innovation and the Secretary of State for Education. The DDB is also required to publish appropriate information about higher education providers and courses with consideration for what would be helpful to students. The HERA also sets out that the DDB can charge fees not exceeding the costs incurred in performing these duties – when HESA was the DDB it charged a subscription to cover the costs of compiling and publishing information.
33. The complainant argues that getting this information from HESA/JISC would involve requesting a custom data set and they acknowledge the fee that might be charged is not the issue in this case.
34. Section 21(2)(b) states that:

"information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by

making the information available for inspection) to members of the public on request, whether free of charge or on payment”

35. In this case the issue is whether HESA/JISC (or whomever the DDB is at the time) is under any obligation to communicate the information to members of the public on request. The DDB has duties to provide information to various bodies but not to the public. Whilst the Commissioner notes anyone can request a custom dataset from the DDB this is not the same as the DDB being under a legislative obligation to publish the specific information, report on it or provide it on request.
36. As such the Commissioner does not accept that this information is reasonably accessible to the complainant by other means and does not find section 21 to be engaged. As the information appears to be relatively straightforward statistical information on admissions to a course the Commissioner cannot see that this would be particularly onerous or difficult to provide. The Commissioner now requires the University to issue a fresh response to the request that does not rely on section 21.

Right of appeal

37. 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

38. 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.
39. 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

Jill Hulley
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF