

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

### **Decision notice**

**Date:** 11 May 2023

**Public Authority:** Queen's University, Belfast  
**Address:** University Road  
Belfast  
BT7 1NN

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

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1. The complainant has requested information from Queen's University Belfast (the University) regarding the employment process of a new Customer Experience Manager.
2. The Commissioner's decision is that the University was entitled to rely on section 40(2) when refusing this request.
3. The Commissioner does not require the public authority to take any further action.

#### **Request and response**

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4. On 10 February 2023, the complainant wrote to the public authority and requested information in the following terms:

"This is a Freedom of Information request regarding position of Customer Experience Manager (McClay Library) - Ref: 22/110486. Please tell me the following information:

1. The total number of applicants for the above position; broken down by external candidates (non QUB employees) and internal candidates (QUB employees).
2. The total number of candidates shortlisted for interview.
3. The total number of candidates interviewed who met full essential criteria with no desirable criteria."

5. The public authority responded on 16 February 2023. It answered parts 1 and 2 of the request, but advised it was withholding the remaining information under section 40(2).
6. Following an internal review, the public authority wrote to the complainant on 29 March 2023. It stated that it was upholding its original position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 30 March 2023 to complain about the way their request for information had been handled.
8. The Commissioner considers the scope of his investigation to be to establish whether the public authority is entitled to withhold the requested information under section 40(2) of the FOIA.

### **Reasons for decision**

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#### **Section 40 personal information**

9. 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.
10. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. 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').
11. 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.

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA

12. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

**Is the information personal data?**

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

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

14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. 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.
16. 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.
17. The withheld information in this case relates to the total number of candidates interviewed for a new role, who met full essential criteria with no desirable criteria.
18. The University advised providing statistical information, in this case, the number of interviewees who met the full essential criteria with no desirable criteria would not qualify as anonymised data, as the requested information can be directly linked to one or more interviewees. This University explained why the any information could be linked back to one or more third parties and the Commissioner is satisfied with the reasoning provided.
19. In the circumstances of this case, having considered the withheld information and reasoning provided by the University, the Commissioner is satisfied that the withheld information relates to the data subjects. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.
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 DP principles.
21. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

22. 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”.

23. 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.

24. 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**

25. 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”<sup>2</sup>.

26. 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;

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<sup>2</sup> 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”.

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

27. 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 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 accountability and transparency for their own sakes, 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. The University acknowledged that there would be a legitimate interest in it being open and transparent, especially in regards to a fair and equitable recruitment process.

31. The complainant explained that they wanted to find out the number of candidates who were shortlisted and did not meet desirable criteria. This would demonstrate the process was fair and equitable, which is legal requirement and is advocated publicly by the University itself.

32. The Commissioner is therefore satisfied that there is a legitimate interest in the requested information and will now go on to consider whether disclosure is necessary.

#### Is disclosure necessary?

33. '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.

34. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

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

35. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, 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.
36. In considering this balancing test, the Commissioner has taken into account the following factors:
  - the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
37. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
38. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
39. The University explained that if the requested information were released, it could be connected to the successful candidate and unsuccessful candidates by people who already had other knowledge. The University advised that releasing the information would be considered unfair and a breach of confidentiality.
40. The University explained that the identity of the successful candidate and internal candidates who attended the interview is already known within the University. If the requested information were released under FOIA, those with knowledge of candidates, could determine the level work experience an individual has.
41. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.

42. 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.

## Right of appeal

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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: 0203 936 8963

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)

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 .....**

**Catherine Fletcher**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**