



Neutral Citation Number: [2024] UKFTT 213 (GRC)

Case Reference: EA/2022/0362

**First-tier Tribunal  
General Regulatory Chamber  
Information Rights**

**Heard by: determination on the papers**

**Heard on: 10 October 2023  
Decision given on: 12 March 2024**

**Before**

**TRIBUNAL JUDGE ALEKSANDER  
TRIBUNAL MEMBER GASSTON  
TRIBUNAL MEMBER MATTHEWS**

**Between**

**SHAMIR AHMED ALI**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

**Decision:** The appeal is allowed in part

**Substituted Decision Notice: IC-161403-Y8F7**

1. Birmingham City University were entitled to withheld information held that was created on or after 1 January 2019 under sections 40(1) and 40(2) FOIA.
2. As regards information held that was created before 1 January 2019, Birmingham City University must issue a fresh response to the Appellant's request for the number of staff that have been suspended since 2010 and have returned, by stating whether it holds this information in recorded form and, if it does, either:
  - a. Supplying the information; or
  - b. Serving a refusal notice under s17 FOIA, setting out the grounds on which Birmingham City University rely.
3. Birmingham City University must comply with paragraph 2 within 35 calendar days of the date of this substituted Decision Notice.

4. A failure to comply with this Substituted Decision Notice could lead to contempt proceedings.

## REASONS

1. The Tribunal apologises for the delay in promulgating this Decision.
2. This Decision concerns the Mr Ali's appeal against the Information Commissioner's Decision Notice dated 4 November 2022, in which the Information Commissioner found that the public authority (Birmingham City University - "BCU") was entitled to rely on s40(1) and (2) Freedom of Information Act 2000 ("FOIA") to withhold the the requested information.

### MODE OF HEARING

3. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("GRC Rules")
4. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 37. The Information Commissioner only submitted an Open Hearing Bundle. He did not submit an application in accordance with the May 2012 Practice Note and Rule 14(6) of the GRC Rules to file a closed material bundle comprising the disputed information. We have not therefore seen the disputed material.

### BACKGROUND

5. On 21 February 2022 Mr Ali wrote to BCU with the following request:

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?

6. On 11 March 2022 BCU responded with the following information:

#### REQUEST 1

Can you please provide how many staff have been suspended since 2010 and have returned?

#### RESPONSE

Prior to 2019, this information is not readily available in a recorded form.

Therefore, the response is based on the data held from 1st January 2019 – 2022 (current date)

- 15 suspensions in total
- 7 of which returned to work following the suspension

#### REQUEST 2

Please also provide the reason why they have been suspended?

#### RESPONSE

The reason for suspension would be in relation to a serious allegation/s that may constitute Misconduct or Gross Misconduct.

Suspending an employee from work pending an investigation into a serious allegation of misconduct is not a disciplinary sanction, is done without prejudice and does not pre-judge the outcome of any investigation. It should last for the shortest possible time and be reviewed regularly. It is a decision that can only be taken by a member of the University Executive Group.

### REQUEST 3

What was the necessary process to suspend staff? Did they go through the disciplinary process?

### RESPONSE

Initially, a risk assessment would be completed to determine the level of risk and to consider if there are any control measures that can be implemented to mitigate the risk; we would also ensure that other alternatives to suspension have been considered.

The suspension would be considered based on the following circumstances:

Suspension from work on full pay should only be considered in all of the following circumstances:

a) There is an allegation of serious misconduct which needs to be investigated and which, if proven, could amount to gross misconduct and initial fact finding suggests sufficient evidence of alleged misconduct;

b) Other alternatives to suspension have been considered but are not appropriate, for example

- Allocating the employee alternative duties
- Transferring the employee to another University campus
- Allowing the employee to work from home

d) it would be impossible to properly investigate the allegations because the presence of the employee on University Premises during part or all of the investigation poses a potential

- Threat to the University – health and safety, security, evidence compromised
- Threat to other employees – risk of intimidation
- Risk to the person suspected of misconduct - i.e. someone making further allegations or
- Relationships at work have broken down to such an extent that suspension is the most appropriate course of action.

7. On 11 March 2022, Mr Ali wrote to BCU as follows:

I am writing to request an internal review of Birmingham City University's handling of my FOI request 'How many staff which have suspension have returned'.

My second question has not been answered specifically and I am requesting further details.

"Please also provide the reason why they have been suspended?"

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?

8. On 16 March 2022, BCU responded to Mr Ali. the relevant part of BCU's response is as follows:

Your request for an internal review of the response that we provided was received by BCU on 11th March 2022.

Outcome

With regards to the further details that you have requested for request 2;

"Please also provide the reason why they have been suspended?" Please outline the reasons for each person why they have suspended?

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.

In relation to the second part of your internal review request;

Also why are Birmingham City University not following their own processes? Why was I sent straight into disciplinary action with no evidence?

We do not consider this to be a valid request for recorded information held by Birmingham City University and therefore it cannot be processed as a Freedom of Information Request under the Freedom of Information Act 2000.

9. On 16 March 2022, Mr Ali complained to the Information Commissioner. The Information Commissioner's decision dated 4 November 2022 was that BCU were correct to withhold information under s40(2) FOIA.

10. Mr Shamir now appeals against that decision on the grounds that BCU have not answered the questions he has raised. He alleges that the Information Commissioner is biased against him because of his racial, religious, and sexual characteristics. He alleges that BCU are covering up incompetence, failings, and malicious practises.

11. In his response, the Information Commissioner submits that Mr Ali does not state why the Information Commissioner's Decision Notice is not in accordance with the law nor how the Commissioner should have exercised his discretion differently. The Information Commissioner also strongly refutes the allegations of bias.

12. In his reply, Mr Ali says:

Why must it be refused? I'm confused. Why are my personal characteristics being denied?

How is this in any way impartial? Jesus Christ. Not very informative considering that this is meant to be an information commissioner.

#### **DECISION NOTICE**

13. In his 4 November 2022 Decision Notice, the Information Commissioner decided that BCU were entitled to withhold information relating to staff suspensions from Mr Ali under s40(2) FOIA. This was on the basis that the information was (i) personal data, and (ii) that disclosure would contravene principle (a) of the data protection principles.

14. The Decision Notice went on to decide that Mr Ali's request about details of why BCU undertook disciplinary measures against Mr Ali himself, was a request for personal data, which is exempt from disclosure under s40(1) FOIA.

15. The Decision Notice does not address BCU's refusal to answer the requests in relation to the period 2010 to 2018 on the grounds that the information "is not readily available in recorded form".

## Section 40(2) FOIA

16. “Principle (a)” of the data protection principles is set out in Article 5(1)(a) UK GDPR (“GDPR”) as follows:

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

17. Article 4 GDPR defines personal data as follows:

“personal data” means any information relating to an identified or identifiable natural person (“data subject”); an identifiable natural person 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 that natural person.

18. Further amplification of this definition is found in Recital 26 GDPR:

The principles of data protection should apply to any information concerning an identified or identifiable natural person. [...] To determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly.

19. The guiding principle to Recital 26 is “data should be such as not to allow the data subject to be identified via ‘all’ ‘likely’ and ‘reasonable’ means”, and “clearly sets a very high standard”.

20. Personal data is a relational concept: data in the hands of one individual may not be personal data, where in the hands of another individual holding additional relevant data, it would be personal data: per Cranston J. in *Department of Health v Information Commissioner* [2011] EWHC 1430 (Admin).

21. When considering identifiability in the context of FOIA it must be borne in mind that FOIA disclosure is disclosure into the public domain (“the world at large”).

22. Thus the “identifier” presumed by the GDPR may be any other person in the public domain, not just the requester. This could plainly include complete strangers to the data subject but also friends, family, colleagues, and enemies to the data subject.

23. In regards this latter category, the Upper Tribunal has previously utilised the concept of the “motivated intruder” to assist in consideration of means likely to be used by a third party to seek to identify data subjects, who would have a number of routes and tools to do so (per *Information Commissioner v Magherafelt District Council* [2012] UKUT 263 and *Miller v Information Commissioner* [2018] UKUT 229).

24. The correct question formulated by Judge Markus in *Miller* (adopted and approved in *NHS Business Services Authority v. Information Commissioner & Spivack* [2021] UKUT 192) was: “Whether a person can be identified taking account of ‘all means reasonably likely to be used’?”.

25. In *Miller* the key issue was whether public authority was permitted to redact “small numbers” data concerning a few individuals from within a larger data set. Paragraph [28] of *Miller* holds that the threshold for the likelihood of indirect identification was “greater than remote.”

26. It is apparent from the responses given by BCU to Mr Ali that there were 15 suspensions since 1 January 2019, seven of which involved individuals who subsequently returned to work. We find that it is more likely than not, given the small number of individuals that have been

suspended by BCU since 1 January 2019, that BCU were correct to state that if they provided the reasons for those individuals' suspensions, those individuals would be capable of being identified.

27. However, the fact that the individuals in question are capable of being identified does not of itself mean that the information is exempt from disclosure under s40(2) FOIA. For the information to be exempt, BCU (and the Information Commissioner when making his decision) must go on to consider the three gateway questions: (i) whether there is a legitimate interest in disclosing the information, (ii) whether disclosure of the information is necessary, and (iii) whether these interests override the rights of the individuals whose personal information it is. They must then weigh the answers to those questions against the fundamental rights and freedoms of the individuals.

28. In this case, the Information Commissioner went on to ask himself these gateway questions. Whilst the Information Commissioner was satisfied that Mr Ali had a legitimate interest in the disclosure of the information, namely to show whether BCU had followed its own policies and procedures in this case, he found that disclosure was not "necessary", as there were alternative and less intrusive means available to Mr Ali of achieving his legitimate aim. Further, disclosure under FOIA is disclosure to the world at large (and not just to the requestor), and would be equivalent to BCU publishing personal disciplinary data on all media platforms and websites. This led the Information Commissioner to reach the conclusion that disclosure would be unlawful, and in contravention of Article 5(1)(a) GDPR, therefore he did not go on to consider whether disclosure would be fair and transparent. He found that BCU were correct in applying the exemptions in s40(2) FOIA.

29. The Information Commissioner determined that there is insufficient legitimate interest to outweigh the fundamental rights and freedoms of the individuals in this case. The Information Commissioner considered that there is no legal basis for BCU to disclose the requested information, and it would thus be unlawful to do so. In summary the Commissioner supported BCU's entitlement to rely on section 40(2) FOIA to refuse to provide the requested information.

### **Section 40(1) FOIA**

30. Section 40(1) FOIA provides 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.

31. In his Decision Notice, the Information Commissioner decided that Mr Ali must obviously know whether he had been subject to suspension or disciplinary action, and that details of why BCU took any disciplinary action against him would be Mr Ali's own personal data. Requests relating to personal data must be made under the Data Protection Act 2018 as a subject access request. In summary the Commissioner supported BCU's entitlement to rely on section 40(1) FOIA to refuse to provide the requested information.

### **Section 12 FOIA**

32. The Information Commissioner's Decision Notice did not address the refusal of BCU to provide relation to the period 2010 to 2018 on the grounds that the information "is not readily available in recorded form".

33. The rights of persons under FOIA relate to requests for "information" of a public authority. "Information" is defined in s84 FOIA as "information recorded in any form".

34. Section 12(1) FOIA provides that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request

would exceed the appropriate limit. The relevant appropriate limit to this case is £450 (see the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulation 2004 (SI 2004 No 3244)). This exemption was not cited in BCU's response.

#### **DISCUSSION**

35. Mr Ali's grounds of appeal are that the Information Commissioner is biased against him because of his racial, religious, and sexual characteristics. He alleges that BCU are covering up incompetence, failings, and malicious practises.

36. However, Mr Ali does not particularise in what way the Information Commissioner is biased, or why the decisions set out in the Decision Notice are wrong in law. There is nothing in the Decision Notice or other material that suggests any bias on the part of the Information Commissioner and his staff, and there is nothing in his decisions (insofar as they relate to the exemptions in s40 FOIA) that would suggest that they are wrong in law. As regards Mr Ali's complaint as to why his request for information has been denied, we find that the reasons are set out in the Information Commissioner's Decision Notice.

37. For the above reasons we determine that the Information Commissioner was right to conclude that the public authority was entitled to withhold the requested information insofar as it relates to information created on or after 1st January 2019. We have concluded that it would not be lawful to disclose the information to the world at large and that the exemptions at section 40(1) and 40(2) FOIA have been appropriately applied.

38. The only error that is apparent to us in relation to the Decision Notice relates to the absence of any decision relating to the refusal by BCU to provide information created prior to 1 January 2019. In claiming exemption from disclosure on the grounds that

Prior to 2019, this information is not readily available in a recorded form.

it is uncertain whether (a) the information was not "recorded", and therefore outside the definition of "information" for FOIA purposes, (b) whether BCU are claiming that the costs of complying with the request for this information (because it is not "readily available") would exceed £450 (the appropriate limit), or (c) something else.

39. We conclude that there is an error of law in the Decision Notice for this reason. To this extent, the appeal succeeds in part (although not in relation to grounds advanced by Mr Ali).

**NICHOLAS ALEKSANDER  
TRIBUNAL JUDGE**

1 March 2024