

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 October 2018

Public Authority: Student Loans Company
Address: 100 Bothwell Street
Glasgow
G2 7JD

Decision (including any steps ordered)

1. The complainant has requested the investigation report into the actions of a former Chief Executive (CEO) of the Student Loans Company (SLC). SLC responded, refusing to disclose the requested information under sections 31, 36, 40 and 43 of the FOIA.
2. The Commissioner's decision is that SLC is entitled to refuse to disclose the information under section 40 of the FOIA. She therefore does not require any further action to be taken.

Request and response

3. On 20 November 2017, the complainant wrote to SLC and requested information in the following terms:
 - 1) The percentage of customer phone calls that were mishandled by SLC staff for the academic years:
 - a. 2013-14
 - b. 2014-15
 - c. 2015-16
 - d. 2016-17
 - 2) Please provide a monthly breakdown of the above figures

- 3) The number of cases of customer information being lost in the academic years:
 - a. 2013-14
 - b. 2014-15
 - c. 2015-16
 - d. 2016-17
 - 4) How many customers overpaid loan repayments for the academic years:
 - a. 2013-14
 - b. 2014-15
 - c. 2015-16
 - d. 2016-17
 - 5) How much money in total was overpaid in loan repayments for the academic years:
 - a. 2013-14
 - b. 2014-15
 - c. 2015-16
 - d. 2016-17
 - 6) Please provide a copy of the disciplinary report on the actions of former chief-executive [name redacted] in which he was found to have breached ethical standards expected of public office holders.”
4. SLC responded on 19 December 2017. Regarding questions 1 and 2, it advised the complainant that it would now respond to these elements of the request by 3 January 2018. It stated that it had asked for clarification around the use of the word 'mishandled' and the statutory time for compliance therefore commenced from the date clarification was received (30 November 2018). In response to question 3, it applied section 12 of the FOIA. In respect of questions 4 and 5, SLC provided the requested information. Regarding question 6, it advised the complainant that the information is exempt from disclosure under section 36(2)(b)(ii) and (c) and section 40 of the FOIA.

5. The complainant requested an internal review on 20 December 2018. He stated that he remained dissatisfied with SLC's response to question 6 and felt it had not given enough consideration to the public interest in disclosure.
6. SLC carried out an internal review on 27 March 2018 and notified the complainant of its findings. It upheld its earlier decision to withhold the information held in response to question 6 of the request and stated that it also considered sections 31, 41 and 43 of the FOIA apply.

Scope of the case

7. The complainant contacted the Commissioner on 9 April 2018 to complain about the way his request for information had been handled. He stated that he remains unhappy with SLC's handling of question 6 of his request and believes the disclosure of this information is in the public interest.
8. The Commissioner considers the scope of her investigation is to consider SLC's handling of question 6 of the request – namely the complainant's request to be provided with a copy of the disciplinary report into the actions of a former CEO of SLC. During the Commissioner's investigation SLC disclosed a number of appendices to the report, which are standard policies and procedures in place at SLC (disciplinary procedure, code of conduct, respect at work policy and so on). A very small amount of personal data was redacted under section 40, relating to a former employee of SLC.
9. The Commissioner understands the complainant is happy with the appendices disclosed but wishes to pursue his complaint about the remainder of the report. The remainder of this notice will therefore concentrate of the remaining withheld information at this time. The Commissioner will first consider the application of section 40 of the FOIA. She will only go on to consider the application of the other exemptions cited if she finds that some or all of the remaining withheld information is not exempt from disclosure under section 40.

Reasons for decision

10. Section 40 of the FOIA states that a public authority may refuse to disclose information if it constitutes the personal data of a third party and the disclosure of that information would breach any of the data protection principles outlined in the Data Protection Act 1998 (DPA 1998).

11. It must be noted first of all that the Data Protection Act 1998 has been superseded by the Data Protection Act 2018. However, as this request was made whilst the 1998 Act was in force and SLC considered the application of section 40 of the FOIA in conjunction with the 1998 Act because this was the Act in force at that time, it is the 1998 Act the Commissioner will also consider in this notice.
12. In the DPA 1998 personal data is defined as:
...“data which relate to a living individual who can be identified-
 - (a) from those data, or
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,And includes any expression of opinion about that individual and any indication of the intentions of the data controller or any other person in respect of the individual...”
13. The Commissioner considers the first data protection principle outlined in the DPA 1998 is the most relevant in this case. The first data protection principle states -
“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
 - (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”
14. The Commissioner must first consider whether the requested information is personal data. If she is satisfied that it is, she then needs to consider whether disclosure of this information would be unfair and unlawful. If she finds that disclosure would be unfair and unlawful the information should not be disclosed and the consideration of section 40 of the FOIA ends here. However, if she decides that disclosure would be fair and lawful on the data subject(s) concerned, the Commissioner then needs to go on to consider whether any of the conditions listed in schedule 2 and 3, (sensitive personal data) if appropriate, of the DPA are also met.

Is the requested information personal data?

15. SLC confirmed that the withheld information is the investigation report into the conduct of a former CEO of SLC. It constitutes the former CEO's personal data and the personal data of a number of third parties who

assisted with the investigation. It stated that the former CEO and a number of other people can be identified from the contents. With regards to the possibility of redaction, SLC stated in this case that it is not possible to redact the report in such manner that would allow for disclosure.

16. The Commissioner has reviewed the withheld information. She is satisfied that it is the personal data of a former CEO of SLC and the personal data of a number of third parties who assisted with the investigation and provided evidence. It is information from which those data subjects could be identified, either from the report alone or from this and other information that may be otherwise available.
17. She acknowledges that it is sometimes possible to redact information in order to prevent the data subjects being identified. But it is not simply the data subject's name that can make them identifiable. In a situation like this it will often be the case that data subjects can be identified from their description of events and the specific evidence they provide. The Commissioner considers it would be possible for those that have knowledge of the matter and events described (i.e. other employees of SLC) to link the contents of the withheld information to other information that is available to them and identify those involved. In this case, the Commissioner does not consider the withheld information could be sufficiently redacted to prevent the identification of the third parties subject to and referred to in the report.

Would disclosure be unfair?

18. Addressing the former CEO first, SLC confirmed that they are the subject of the investigation report and as the senior most employee of SLC at the relevant time it should be expected that more information about them be publicly available. It acknowledges that the matter was subject to media coverage at the time of the report. However, specific details of the criticisms of, alleged conduct of, and findings against the former CEO were not, particularly any aspects which did not feature or form part of the reason for the termination of their position. It went on to say that the report discusses sensitive issues and allegations, which if disclosed would cause the former CEO distress and upset and could potentially have serious implications for their future career.
19. SLC stated that it wished to highlight the distinction between professional information and genuinely personal and sensitive information held about public sector employees, with information that is genuinely personal, sensitive, relating to one's character and personal style being regarded as personal information of any employee regardless of their seniority. It stated that it is reasonable to expect a public authority to disclose more information relating to senior employees than

more junior ones. Senior employees should expect their posts to carry a greater level of accountability since they are likely to be responsible for major policy decisions and the expenditure of public funds. SLC argued that although the former CEO was the most senior employee of SLC at that time and it is proper that more information about them should be in the public domain (and the matter did receive publicity at that time) it remains of the opinion that it would still be unfair on the former CEO to release the full investigation report due to its specific contents.

20. With regards to all other third parties, SLC stated that these individuals assisted the investigation. They were either interviewed, asked to assist with the enquiries or provide specific evidence or information to enable the allegations made to be fully considered. It stated that they were all provided with assurances that they would be protected against any repercussions from giving evidence and assured that the information supplied would be treated with the strictest confidence. It argued that if it was to disclose the evidence and information gathered it would be likely to open up those third parties to further intense scrutiny and possible difficulties for those that remain employees of SLC. Such scrutiny would be unfair in the circumstances and would also be likely to inhibit third parties from freely providing information in the future in similar situations.
21. SLC also made the point that it may even be the case that some of the third parties mentioned in the report do not know they are named in it.
22. The Commissioner will first address the former CEO. The Commissioner agrees a distinction should be drawn between junior staff and senior staff and especially the most senior member of staff within an organisation. Individuals that take on such roles are responsible for the operation of the organisation, ultimately responsible for important and often widely influential decision making. They are ultimately in charge of all staff and the management of public funds. They should expect transparency and accountability and for information relating to them to be disclosed into the public domain. However, the Commissioner also considers a distinction should be drawn between personal information relating to the job they are doing, the decisions they have made and so on and more personal and sensitive information relating to their actual employment, particularly any information relating to their professional conduct and any alleged disciplinary matters.
23. Disclosure under the FOIA is to the world at large, for anyone to see and with very few restrictions on how long it stays available and its use. The Commissioner considers more personal information relating to the professional conduct of staff and any disciplinary matters regardless of their seniority is personal information that warrants privacy and more protection. Such information will often discuss candidly specific issues

and events which if disclosed to the world at large would cause those involved considerable distress and upset. Often in such cases it can also be argued that disclosure may have damaging effects on the reputations and careers of those involved going forward. Despite their seniority the Commissioner is of the opinion that a CEO will still hold the reasonable expectation that the type of information contained within the investigation report in question would remain private and confidential, would only be used to determine the SLC's enquiries and establish what action if any is required. They would not expect the specific details of the investigation and the evidence considered to be released to the world at large and the Commissioner considers that despite their position that is a reasonable expectation to hold.

24. Turning now to all other third parties mentioned in the investigation report, the Commissioner accepts that they will all hold the reasonable expectation that the information they supplied would remain private and confidential. SLC has stated in this case that it offered many of those involved direct assurances that the information they provided would remain private and offered direct assurances that there would be no repercussions for them as a result of assisting the investigation. Disclosure in this case would cause those involved considerable distress and upset, could potentially result in them being scrutinised positively or negatively for the action they took and the information they supplied and could damage their ongoing careers. This would be unfair and an unwarranted intrusion into the more private and confidential aspects of their employment or former employment at SLC.
25. In terms of any legitimate public interest in the information, the Commissioner agrees that there is considerable public interest in the alleged conduct and style of such a senior public sector employee and in finding out how any issues have been handled. However, in this case the Commissioner does not consider such public interest is compelling enough to warrant disclosure, the clear prejudice to the rights and freedoms of the third parties involved as a result and the considerable distress and upset those involved would suffer.
26. The Commissioner considers there are already appropriate mechanisms in place to deal with and investigate any allegations of misconduct against public sector employees, including those of such seniority, rather than seeking public disclosure under the FOIA.

Other matters

27. The Commissioner notes in this case that SLC failed to complete its internal review within 20 working days of receipt. She would therefore

like to remind SLC of its obligations under the section 45 code of practice. This recommends that public authorities carry out internal reviews within 20 working days of receipt and certainly no later than 40 working days.

Right of appeal

28. 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

29. 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.
30. 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:

Samantha Coward
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