

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **31 March 2021**

Public Authority: **Council of the University of Bath**
Address: **Claverton Down**
Bath
BA2 7AY

Decision (including any steps ordered)

1. The complainant has requested demographic information about successful applicants to a clinical psychology traineeship. The Council of the University of Bath ("the University") provided some information but withheld the remainder relying on section 40(2) of the FOIA (third party personal data) in order to do so.
2. The Commissioner's decision is that the University holds no further information within the scope of the first three elements of the request. In respect of the fourth element, it was not entitled to rely on section 40(2) to withhold information, although it does not hold some of the information which has been requested. In failing to respond within 20 working days, the University also breached section 10(1) of the FOIA. Finally, the University failed to comply with its section 16 obligation to provide advice and assistance.
3. The Commissioner requires the University to take the following steps to ensure compliance with the legislation.
 - Disclose the information it holds in respect of elements (4.1), (4.2), (4.3) and (4.5).
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 the Act and may be dealt with as a contempt of court.

Request and response

5. On 3 July 2020 the complainant requested information of the following description:

"The University of Bath is requested to provide the following information:

- (1) Full true copy/copies of the contract/contracts between the University of Bath and Health Education England in respect of the recruitment, selection, employment and training of Trainee Clinical Psychologists employed by Somerset NHS Foundation Trust (formerly Taunton and Somerset NHS Foundation Trust) covering years 2017-2020.*
- (2) Full true copy/copies of the contract/contracts between the University of Bath and Somerset NHS Foundation Trust (formerly Taunton and Somerset NHS Foundation Trust) in respect of the recruitment, selection, employment and training of Trainee Clinical Psychologists employed by Somerset NHS Foundation Trust (formerly Taunton and Somerset NHS Foundation Trust) covering years 2017-2020.*
- (3) Full true copies of all contracts between the University of Bath and the 'Clearing House for Postgraduate Courses in Clinical Psychology' [covering] the years 2016-2020.*
- (4) Details of the demographics (numbers per item for each year below) of Trainee Clinical Psychologists whose employment commenced (i) 2017, (ii) 2018, (iii) 2019, (iv) 2020:*
 - (4.1) Male? Female?*
 - (4.2) Age at commencement of employment:*
 - 20-30?*
 - 31-40?*
 - 41-50?*
 - 51-60?*
 - 60 and above?*
 - (4.3) Disability declared?*
 - (4.4) Nationality:*
 - UK?*
 - Non-UK*
 - (4.5) Qualifications:*
 - Undergraduate degree classification?*
 - Highest qualification held?*

6. On 4 August 2020, the University responded. It provided information within the scope of elements (1), (2) and (3) of the request but refused to provide most of the information it held within the scope of element (4). It stated that the numbers involved were small and there was thus

a risk of identifying individuals. The University therefore relied on section 40(2) of the FOIA to withhold the information.

7. The complainant requested an internal review on 4 August 2020. The University sent the outcome of its internal review on 2 September 2020. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 30 September 2020 to complain about the way his request for information had been handled.
9. The Commissioner considers that the scope of her investigation is to determine whether the information the University has withheld is personal data and, if it is, whether it can be disclosed without breaching the data protection principles. She will also look at the extent of the information that is held.

Reasons for decision

Section 40 personal information

10. 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.
11. 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').
12. 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.

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

13. 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?

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

"any information relating to an identified or identifiable living individual".

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.
17. 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.
18. The Commissioner recognises that small numbers carry a greater risk of identification than larger ones – but that does not mean that every small number identifies any individual. Whether individuals can be identified will depend on the particular facts, such as the size of the overall dataset, the number of data points that have been requested and the information, already in the public domain, that could potentially be cross-referenced with the disclosed information. It is not sufficient for there to be only a hypothetical risk of identification. If there is no realistic route to identification, the information is not personal data, regardless of its sensitivity. This is consistent with the binding Upper Tribunal ruling in *Information Commissioner v Miller* [2018] UKUT 229 (AAC).

The University's position

19. At the outset of her investigation, the Commissioner asked the University to set out how the individuals covered by the withheld information could be identified either directly from the data or from a combination of the data and other obtainable sources.
20. The University responded by pointing out that the overall dataset was relatively small and some of the numbers that it had withheld were smaller still. It argued that:

"it is our belief that, if this data was disclosed it could identify one or more of the individuals and reveal personal and sensitive data (in the case of the disability data) either in its own right, or via triangulation ('mosaic' identification) with other information held or otherwise known."

21. The University did not expand on how mosaic identification would be possible or what other sources of information a person would need (or were available) to enable identification.
22. In respect of element (4.3), the University also argued that the information was special category personal data because it related to medical information about the trainees.

The Commissioner's view

23. The Commissioner does not consider that the University has explained how individuals could be identified from the withheld information.
24. When considering the possibility of identification, the Commissioner applies the "Motivated Intruder Test." This test starts with a hypothesis that there exists a person who wishes to identify the individuals covered by the disputed information. The person is willing to devote a considerable amount of time and resources to the process of identification. They may have some inside knowledge (ie. information not already in the public domain) but will not resort to illegality – they are determined but not reckless. The Commissioner looks to see how such a person would go about identifying the individuals involved.
25. The University has made vague references to the withheld information being cross-referenced with other sources – but it has not explained what those other sources are and how they would be of use.
26. Another way of looking at the issue of identification is to imagine a hypothetical drinks party attended by every person within the dataset – for example the 15 people who successfully obtained traineeships in 2017. If a person was provided with a copy of the withheld information, how would they go about matching the various trainees with the withheld information?
27. The Commissioner accepts that the number of successful candidates in three out of the four years was under 20 – and therefore the overall dataset is small. She also accepts that the numbers in some of the categories are particularly small – but that does not automatically mean that individuals are identifiable.
28. Suppose that, of the 15 people who were awarded traineeships in 2017, only one had obtained an upper second class undergraduate degree

- (2:1). Even if a person were to attend the hypothetical drinks party with all 15 successful candidates and were told that one of the candidates had received a 2:1, the Commissioner considers that that person would struggle to identify which candidate it was. Yes, they could interview each candidate in turn – but they could do that already. Having access to the withheld information would not make the candidate with the 2:1 any more identifiable.
29. It is true that some of the categories of data sought are categories which might link to visual characteristics (such as gender or age), but the Commissioner does not consider that this makes the withheld information personal data. Firstly, visual characteristics are not an accurate method of identification. Not every person who presents as male necessarily identifies as male. People can appear older (or younger) than they really are. Secondly, even if visual characteristics were an accurate method of identification, those visual characteristics could already be used to identify individuals – the withheld information makes no difference to a person's ability to identify an individual by visual characteristics.
30. The way that the request has been structured does not allow a person to compare the various breakdowns to deduce information. For example, if the complainant had asked for a breakdown of trainees by degree classification and then asked for that data to be further broken down by age, a person who knew the age of some of the candidates would be able to use that data to deduce their degree classification (or vice versa). However, because the request asks for separate breakdowns of the same dataset, it isn't possible to use one breakdown to identify the individuals from another.
31. Whilst the Commissioner agrees with the University that information about an individual's disability status would be special category data about that individual, she does not agree that, on the facts of this case, that data is any more likely to be linked to an individual than any of the other data. A person could declare a disability for a host of reasons – some of them (such as using a wheelchair or having a guide dog) would be visible, others (such as dyslexia or colour-blindness) would not be. However, once again, having the withheld information would not give a person, who wished to identify an individual, any advantage over any visual clues that might already exist. Information cannot be special category data unless it can be linked to an individual.
32. The University has not explained how the individuals could be identified from the withheld information and the Commissioner cannot see a route by which individuals could be identified. As the individuals cannot be identified, the information cannot be personal data and therefore section 40(2) of the FOIA is not engaged.

Held/not held - elements (1), (2) and (3)

33. In his request for an internal review, the complainant challenged the information the University provided to him. He argued that the information was not a "true copy" of the contract because it was not signed. He also raised concerns about the validity of the contracts. The Commissioner understands that the complainant has concerns about the way trainees are employed and which organisation is responsible for them.
34. The Commissioner is satisfied that the University has provided the information it holds. Even if the complainant's concerns about validity were correct (and the Commissioner has seen no evidence to support the complainant's assertion), the University would still have complied with its obligations because it has provided the information it holds.
35. Furthermore, the Commissioner considers that, even if the University did hold signed copies of the contracts, it is likely that it would be entitled to withhold the actual signatures themselves – as the signatures would clearly identify the individuals involved. Therefore the actual information the complainant would be entitled to receive would be the same. The FOIA provides a right to information, not a right to specific documents.

Held/not held – element (4.4)

36. In explaining why it was relying on section 40(2) of the FOIA to withhold information within the scope of element (4.4) of the request, the University explained to the Commissioner that:

"The demographic data supplied by the Clearing House does not ask a 'nationality' question but rather records ethnicity and categorises sub-totals as 'British/Non British/Other' for year 2017-2019. Data for 2020 entry is based on categories of ethnic group 'British – English/Welsh/Scottish, White & Asian, Black, Black British, Black English, Black Scottish or Black Welsh, Chinese/Middle Eastern/Other ethnic background' used by the Clearing House in the initial application stages and has not yet been summarised by them and reported to courses in the same way as previous years data. Therefore this category has been recorded as a best summary/allocation to the UK/Non-UK question."

37. The Commissioner considers that the University has attempted to respond to this element of the request in good faith by substituting information that it held for information that it did not. This was presumably done on the basis that the University considered "ethnicity" and "nationality" to be suitably similar. Unfortunately it did not explain

to the complainant that the information it held related to ethnicity and not nationality.

38. The Commissioner considers that ethnicity and nationality, whilst similar, are distinct concepts.
39. A person's nationality is an objective fact, determined by both international and domestic law. A person asked to demonstrate their nationality could point to their passport. A person's nationality will determine whether they do or do not have the automatic right to work in this country or whether they need to apply for a visa.
40. A person's ethnicity, by contrast, is a much more subjective concept. It may well be linked to their nationality, but it will also be influenced by other factors such as the person's country of birth, their cultural heritage and, most importantly, how they see themselves.
41. The University apparently felt that it could overcome this distinction by grouping the ethnic categories that included the word "British" together – but to do so is to make significant assumptions about each trainee's mindset when answering this particular question, how they interpreted the question, how they interpreted the ethnic categories and how they saw themselves.
42. There is nothing to prevent a person declaring themselves to be "Black-British", even though they only hold a Nigerian passport. Equally, a person born in the UK and with a British passport would be entitled to declare their ethnicity to be "Chinese" if that is how they saw themselves.
43. Whilst the Commissioner accepts that the University has dealt with the request in good faith and attempted to be helpful, the fact remains that the information it holds is not the information that was requested. Whilst she cannot be certain that, if the University did hold the requested information, it would look any different to that which has been withheld, the Commissioner still considers the University response to this element of the request to be based on guesswork.
44. The Commissioner is therefore satisfied that the University does not hold the information sought by element (4.4) of the request.
45. Because it held similar information, the Commissioner therefore also finds a breach of the University's section 16 duty to provide the requestor with reasonable advice and assistance.
46. When it realised that it did not hold the required data on nationality, the University should not have attempted to pass its *ethnicity* data off as data on *nationality*. It should have explained that it only held data on

ethnicity and asked the complainant if he was happy to receive this instead. The complainant may have been happy to accept this – or he may have felt that this was of little use. Either way, he was entitled to be told what information the University held.

47. The Commissioner therefore finds that the University failed to comply with its section 16 duty to provide advice and assistance.
48. The Commissioner also considered whether it would be proportionate, having identified a breach of section 16, to order the University to take steps to remedy that breach. She considers that it would not be. This notice sets out clearly the information that the University does and does not hold. If the complainant wishes to make a further request, he is now suitably equipped to do so.

Procedural Matters

49. Section 10 of the FOIA states that responses to requests made under the Act must be provided "*promptly and in any event not later than the twentieth working day following the date of receipt.*"
50. From the evidence presented to the Commissioner in this case, it is clear that, in failing to issue a response to the request within 20 working days, the University has breached section 10 of the FOIA.

Other matters

51. When the University responded to the Commissioner's investigation letter, whilst satisfied that the section 40(2) exemption applied, it also asked the Commissioner:

"to consider the vexatious element of this request, following the explanation and evidence submitted."

52. The University then pointed to recent litigation brought against it by the complainant. The litigation had been dismissed as being without merit, with the judge being particularly unimpressed with the complainant's conduct. The University suggested that this request was merely a means, by the complainant, to keep the issue alive and impede the work of the institution.

53. The Commissioner replied to the University to say that, whilst she was happy for the University to change its position, because section 14(1) of the FOIA would relieve it of its duty to comply with the request altogether, she would need to look at that exemption first. She therefore asked the University to confirm whether or not it wished to amend its position and rely on section 14(1).

54. The University responded on 5 March 2021 to say that:

"The University does not wish to rely on section 14(1) of the FOIA to refuse the request in its entirety - we have already provided a substantial amount of the information requested in our original response to the applicant."

"As noted in the response to ICO, we remain satisfied that the section 40(2) exemption under FOIA was validly engaged, in that the release of sensitive and confidential personal information would breach Data Protection legislation."

55. The Commissioner therefore considers that the University had clearly decided that it was content to comply with the request and she thus did not consider whether or not the request was vexatious.

Right of appeal

56. 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@justice.gov.uk

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

57. 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.
58. 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

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