

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 July 2024

Public Authority: The Governing Body of Royal Holloway
Address: University of London
Egham
Surrey
TW20 0EX

Decision (including any steps ordered)

1. The complainant has requested information relating to the number of applicants, for a specific course intake, who have disabilities. Royal Holloway University of London ('the University') refused to provide the requested information, citing section 43(2) (commercial interests) of FOIA.
2. The Commissioner's decision is that:
 - The University isn't entitled to withhold any information under section 43(2) (commercial interests).
 - The University is entitled to withhold the information it has under section 40(2) (personal information), except that requested at part 2.
 - In failing to confirm or deny that it held information relevant to the request, and disclose any non-exempt information, within the statutory timeframe, the University breached section 1 (general right of access to information) and section 10 (timescale for compliance) of FOIA.
3. The Commissioner requires the University to take the following steps to ensure compliance with the legislation:
 - Disclose the information requested at parts 1, 2 and 10 of the request.

4. The University must take these steps within 30 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 12 October 2023 the complainant made the following request:

"With regard to the position(s) that [Redacted] applied for:

1. How many of the applicants were there?
2. How many of the applicants had disabilities?
3. How many of the applicants had Asperger's Syndrome?
4. How many of the applicants who made it to interview had disabilities?
5. How many of the applicants who made it to interview have Asperger's Syndrome?
6. How many of the successful applicants had disabilities?
7. how many of the successful applicants have Asperger's Syndrome?

Furthermore, relating to all positions rather than just [Redacted's] application:

8. How many applicants to all PhD and DPhil courses in all subjects in the last four years?
9. How many applicants to all PhD and DPhil courses in all subjects in the last four years had disabilities?
10. How many successful applicants to all PhD and DPhil courses in all subjects in the last four years had disabilities?
11. How many successful applicants to all PhD and DPhil courses in all subjects in the last four years had Asperger's Syndrome?

The last four years being: 2020/2021, 2021/2022, 2022/2023, 2023/2024.

If the figures for 2023/2024 are not yet finalised, please provide the figures up to the date of this email."

6. The University responded on 7 November 2023, it refused to provide the requested information, citing section 43(2).
7. The complainant requested an internal review on 8 November 2023.
8. The University provided the outcome to its internal review on 13 December 2023. It upheld its original position, except in relation to parts 8 and 9 of the request and it disclosed this information.
9. During this investigation, the University confirmed its final position to be:
 - The University confirmed it didn't hold the information requested at parts 3, 5, 7 and 11.
 - It continues to withhold the information requested in parts 1, 2 and 10 under section 43(2).
 - It confirmed it was withholding the information requested at parts 2, 4 and 6 under section 40(2) (personal information).

Scope of the case

10. The complainant contacted the Commissioner on 24 January 2024 to complain about the way their request for information had been handled.
11. The Commissioner considers that the scope of his investigation is to be to determine whether the University is entitled to withhold parts 1, 2 and 10 under section 43(2) and parts 2, 4 and 6 of the request under section 40(2).
12. The Commissioner will also consider whether the University is correct when it says it doesn't hold parts 3, 5, 7 and 11 of the request.
13. Finally, the Commissioner will consider whether any procedural breaches of FOIA have occurred during the University's handling of the request.

Reasons for decision

Section 1 – information held/not held

14. In cases where a dispute arises over the recorded information held by a public authority at the time of a request, the Commissioner, following the outcome of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities. This means that the Commissioner will determine whether it is likely, or unlikely, that the

public authority has identified all information relevant to the complainant's request at the time that the request was received.

15. In order to make his determination, the Commissioner has considered the University's explanation as to why the information requested at parts 3, 5, 7 and 11 isn't held.
16. The University has explained that it doesn't record whether applicants have asperger's syndrome. It also confirmed with its recruitment partner that this information isn't collected at application stage.
17. If the University doesn't record whether applicants have aspergers, it follows that the information requested at parts 3, 5, 7 and 11 of the request won't be recorded. On the balance of probabilities, and in the absence of any alternative evidence from the complainant, the Commissioner is satisfied that this information isn't held.

Section 43(2) – commercial interests

18. Section 43(2) of FOIA states:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

19. The Commissioner's guidance¹ states 'A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent.'
20. Section 43(2) is a qualified exemption, which means its subject to the public interest test. Before considering the public interest, the Commissioner must be satisfied that the public authority has demonstrated a causal link between disclosure of any information being withheld, and the prejudice against which the qualified exemption is designed to protect.
21. Universities are higher education establishments. However, they are also businesses and must operate in a commercially competitive environment.

¹ [Section 43 - Commercial interests | ICO](#)

22. In its submission to the Commissioner, the University has explained that:

“recruitment of students is a commercial activity which enables the University to remain solvent. The University receives public funds. Therefore releasing information that could be used to undermine that activity would not be in the public interest. Applicant data is commercially sensitive, as it would give insights into recruitment strategies and approaches adopted by the University, and the success of those strategies. This applicant data could be analysed and the strategies exploited by competitor institutions to the detriment of the University.”

23. The Commissioner doesn't see the link between disclosure of the number of applicants, the number of whom had disabilities and the number of successful applicants with disabilities, and how this information would provide insights into the University's recruitment strategies or provide its competitors with any advantage over the University.

24. To the Commissioner, the information being requested here is the same as that requested at parts 8 and 9 of the request, and which was disclosed to the complainant. An applicant will be successful for a whole host of reasons, including assessment, application and merit. The information requested at parts 1, 2 and 10 is too vague to give away any of the University's strategies when it comes to determining which applicants will be successful and which won't.

25. During this investigation, the Commissioner gave the University another opportunity to expand on this argument, which it failed to do. Since the University has failed to convince the Commissioner of the causal link between disclosure and prejudice to its commercial interests, the exemption isn't engaged and the University isn't entitled to rely on it. This is in line with a previous decision² of the Commissioner's.

26. It follows that the information requested at parts 1 and 10 must be disclosed. The University isn't entitled to rely upon section 43(2) to withhold the information requested at part 2, however, since it's also applied section 40(2) to this information, it will be considered in the Commissioner's analysis below.

² [IC-253319-Y7V8 \(ico.org.uk\)](https://ico.org.uk)

Section 40(2) – personal information

27. To reiterate, the University is relying upon section 40(2) to withhold the number applicants who had disabilities, how many of those applicants progressed to interview and how many successful applicants had disabilities.
28. All of this information is being withheld in relation to a specific course, in different years. At a first glance, numerical admissions data isn't personal data. However, the Commissioner must consider the possibility that the applicant to whom the request relates, or any one else on the course, could use their prior knowledge to learn something new about a fellow applicant or phd student.
29. Taking the number of applicants who had a disability first, the Commissioner has considered the withheld information against the total number of applicants. He disagrees with the University that it represents a 'a small subset of persons.'
30. The University has failed to explain to the Commissioner **how** an individual, at applicant stage, would be able to deduce which fellow applicants had a disability from the disclosure of the information withheld at part 2, especially for past years' intakes.
31. The Commissioner recognises that, as applicants are invited to interview, the pool decreases significantly. However, applications are submitted online and the Commissioner fails to see how disclosure of the number of applicants with disabilities could lead to the identification of any such applicant.
32. Since no applicant can be identified from this information, it's not personal data and therefore can't be withheld under section 40(2). It must be disclosed.
33. Turning next to how many of those applicants progressed to interview and how many successful applicants had disabilities, the Commissioner has undertaken a detailed analysis of similar withheld information as part of his consideration of IC-253319-Y7V8 (paragraphs 12 – 36) which he doesn't consider necessary to replicate in this notice.
34. However, he does consider the information being requested at parts 4 and 6 to be personal data and none of the conditions required for processing special category data have been satisfied. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of FOIA.

Procedural matters

35. Section 1 of FOIA states:

“Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

36. Section 10 of FOIA states:

“...a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

37. In failing to confirm or deny that it held information relevant to the request, and disclose any non-exempt information, within the statutory timeframe, the University breached section 1 and section 10 of FOIA.

Right of appeal

38. 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

39. 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.
40. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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