

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 January 2016

Public Authority: The Open University
Address: Walton Hall
Milton Keynes
MK7 6AA

Decision (including any steps ordered)

1. The complainant has requested information relating to the salary paid to a specified member of the University's staff. The University refused to disclose that information, citing section 40(2) of FOIA by virtue of section 40(3)(a)(i) as a basis for non-disclosure.
2. The Commissioner's decision is that the University has correctly applied section 40(2) of FOIA to the requested information.
3. The Commissioner therefore requires no steps to be taken by the University.

Request and response

4. On 23 July 2015, the complainant wrote to the University and requested information in the following terms:

"Please make a Freedom of Information request on the salary Open University students are paying [member of staff, name redacted]"
5. The University responded to the complainant on 27 July 2015. It refused to disclose the requested information, citing section 40(2) of FOIA as a basis for that refusal.
6. The complainant then requested an internal review of the University's decision, the result of which was communicated to her on 26 August 2015. The reviewer upheld the original decision.

Scope of the case

7. The complainant contacted the Commissioner on 3 August 2015 to complain about the way her request for information had been handled.
8. The Commissioner has considered whether the University has correctly applied section 40(2) to the complainant's request.

Reasons for decision

9. Section 40(2) of FOIA provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles. Consideration of this exemption involves two stages; first, whether the information in question constitutes personal data and, secondly, whether disclosure of that personal data would be in breach of any of the data protection principles

Is the withheld information personal data?

10. Personal data is defined by section 1 of the Data Protection Act 1998 ("the DPA") 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 the individual and any indication of the data controller or any person in respect of the individual..."

11. In order for the exemption to apply the information being requested must constitute personal data as defined by section 1 of the DPA.
12. The information sought in the request relates to an individual's employment at the University, specifically details of that individual's salary. The Commissioner is satisfied that information relating to an individual's salary is personal data in accordance with section 1 of the DPA.

Would disclosure breach the data protection principles?

13. The data protection principles are set out in schedule 1 of the DPA. The

Commissioner considers that the first data protection principle is most relevant in this case. The first principle states that personal data should only be disclosed in fair and lawful circumstances, the conditions of which are set out in schedule 2 of the DPA.

14. The Commissioner's considerations below have focused on the issues of fairness in relation to the first principle. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the data subject and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

Reasonable expectations of the data subject

15. When considering whether a disclosure of personal data is fair, it is important to take account of whether the disclosure would be within the reasonable expectations of the data subject. However, their expectations do not necessarily determine the issue of whether the disclosure would be fair. Public authorities need to decide objectively what would be a reasonable expectation in the circumstances.
16. The University has informed the Commissioner that, as part of their contracts of employment, University staff are advised of the uses of their personal information by the University, and these uses do not include the publication of personal information. The University would normally only disclose the salary details of senior staff, who would have an expectation that these details would be disclosed. The post holder specified in the complainant's request is not a senior member of the University's staff and would therefore not reasonably expect salary details for the post to be disclosed to the public.
17. The University has further informed the Commissioner that it approached the individual at the time of the request, seeking consent to the disclosure of their salary details. That consent was refused. The Commissioner has taken this into account in considering the reasonable expectations of the data subject, however refusal of consent is not absolutely determinative in deciding whether such disclosure would be fair.

Potential consequences of disclosure

18. As salary details for the specified post are not routinely disclosed, and the individual has refused consent to disclosure when approached, the Commissioner considers that such disclosure would constitute an unwarranted interference with the individual's privacy and would therefore be likely to cause distress to the individual.

Legitimate public interest in disclosure

19. The University has consulted the Commissioner's guidance regarding disclosure of salary details of public sector employees.¹ The University routinely publishes details of salaries of senior staff which are over £100,000, however it does not disclose details of salaries below that level unless, as per the Commissioner's guidance, there is a necessity to disclose them in order to meet a legitimate public interest and where the public interest factors are so strong that they outweigh any detriment which might be caused to the individual.
20. The University has considered whether any such strong public interest factors are present in this case. The University recognises that sometimes circumstances exist where there are controversies or credible allegations, or where an individual is being paid significantly more than the normal salary for a certain post. In those circumstances there may be a legitimate public interest in disclosure which would outweigh any detriment to the individual. However, the University has informed the Commissioner that none of those circumstances exist in this case.
21. The University has also informed the Commissioner that the request is worded in such a way as to infer that the individual's salary is entirely and directly funded by student tuition fees. The University has clarified that, if this were the case, it would be an additional public interest factor to consider. However, since student tuition fees only make up 50% of the University's overall income, this is not a consideration in this case.
22. Having taken into account all the circumstances of the case, and having considered the reasonable expectations of the data subject, the potential consequences of disclosure, and any public interest factors, the Commissioner has concluded that there is no legitimate public interest in disclosure which would outweigh any detriment which might be caused to the data subject as a result of disclosure of the requested information. Therefore, disclosure would be unfair and would breach the first data protection principle. Therefore, the Commissioner has concluded that the University has correctly applied section 40(2) of FOIA to the requested information.

¹http://ico.org.uk/for_organisations/guidance_index/~/_media/documents/library/Environmental_info_reg/Practical_application/section_40_requests_for_personal_data_about_employees.ashx

Right of appeal

23. 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

24. 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.
25. 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

Deirdre Collins
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF