

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 November 2022

Public Authority: The Council of the University of Southampton
Address: University Road
Southampton
SO17 1BJ

Decision (including any steps ordered)

1. The complainant requested from the University of Southampton (the University) information concerning special considerations requests relating to examinations during January 2022 that referenced COVID-19 or Coronavirus. The University said it can neither confirm nor deny whether it holds information within the scope of questions 1 and 2 of the request, as it considered that doing so would breach the data protection principles.
2. The Commissioner's decision is that the University was not entitled to neither confirm nor deny that it holds the information requested.
3. The Commissioner requires the University to take the following steps:
 - Issue a fresh response, which must confirm or deny whether the requested information is held and, if information is held, either disclose that information or issue a valid refusal notice compliant with section 17 of FOIA.
4. The Council 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 Freedom of Information Act and may be dealt with as a contempt of court.

Request and response

5. On 29 January 2022 the complainant wrote to the University and requested information in the following terms:
 - “1. The total number of special considerations requests received in relation to examinations taking place in the January 2022 exam series that referenced COVID-19 or coronavirus
 2. The total number of special considerations requests received in relation to examinations taking place in the January 2022 exam series that referenced self-isolation
 3. The total number of students who reported that they were self-isolating following a positive COVID-19 test result during the January 2022 exam season.”
6. On 28 February 2022 the University responded and refused to confirm or deny whether it held information of the description specified in questions 1 and 2 of the request. It said that the information was exempt by virtue of section 40(2) and section 40(3A)(a) (third party personal data) of FOIA. With regard to question 3, the University provided the complainant with information to this part of the request.
7. On 1 March 2022 the complainant asked the University for an internal review as he disputed the exemptions cited.
8. Following our involvement, on 28 April 2022 the University provided its internal review response to the complainant. It maintained its original position to refuse to confirm or deny whether it holds the information within the scope of questions 1 and 2 of the request.

Reasons for decision

9. The following analysis focuses on whether the University is entitled to refuse to confirm or deny whether it holds the information within the scope of questions 1 and 2 of the request.

Neither confirm nor deny (NCND)

10. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in a request.

11. However, there may be occasions whereby complying with section 1(1)(a) would itself disclose information which would be covered by the relevant exemption. In circumstances such as this the public authority may respond by neither confirming nor denying whether it holds the requested information.
12. The decision to use a NCND response will not be affected by whether a public authority does or does not hold the requested information. The key issue for NCND in most cases, will be theoretical considerations about the consequences of confirming or denying whether a particular type of information is held.
13. In this case, the University explained to the complainant that "because of the operation of section 40, you are not entitled to the information requested - indeed, you are not even entitled to confirmation of whether or not the University holds that information you have requested because to fulfil even the duty to confirm or deny (if University holds information of the description specified in your request), the University would have to search in individual student records, which would be a breach of section 40."
14. The Commissioner notes that the complainant has asked for the total numbers of special considerations requests received. In order to comply with its obligation under section 1(1)(a) of FOIA, the University is only being asked to state whether it does or does not have a total number of special consideration requests received. It is not being asked to provide that number – only confirming whether such a number exists.
15. In this instance, there is no individual named within the request and, for that reason, the Commissioner does not accept that either confirming or denying information is held would disclose the identity of any student, or reveal any further information relating to an identifiable individual. The University can only rely on section 40 of FOIA if complying with section 1(1)(a) would, in itself, disclose personal data.

The Commissioner's decision

16. The University has failed to explain why issuing a confirmation or a denial would reveal anything about any identifiable student. The Commissioner is not satisfied that any student is identifiable from the request. If a student is not identifiable, issuing a confirmation or denial cannot, in itself, reveal any personal data. The University is therefore, not entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether this information is held.
17. The Commissioner requires the University to comply with the steps outlined at paragraph 3 of this decision notice.

Other matters

18. Within its responses, the University indicated if it did hold any information, that information would be the personal data of those students. The Commissioner is not convinced that, in the absence of other identifying data, providing an aggregated number (if in fact the University holds it) is likely to identify any individual and, if an individual cannot be identified, the information cannot be personal data.

Right of appeal

19. 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

20. 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.
21. 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

Phillip Angell
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF