

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 February 2014

Public Authority: King's College London
Address: Room G37
James Clerk Maxwell Building
57 Waterloo Road
London
SE1 8WA

Decision (including any steps ordered)

1. The complainant requested information from King's College London on the specific job titles, departments and £10,000 salary bands, for its senior staff earning above £100,000 per annum. King's College London withheld the information citing sections 43(2) and 40(2) of the FOIA.
2. The Commissioner's decision is that King's College London has not successfully engaged sections 43(2) and 40(2) of the FOIA.
3. The Commissioner requires King's College London to take the following steps to ensure compliance with the legislation.
 - Disclose the specific job titles, departments and £10,000 salary bands for its staff earning above £100,000.
4. King's College London 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 15 June 2013 the complainant wrote to King's College London and requested information in the following terms:

'I would like one line per person paid above 100,000 with their full and specific (that is exact) job title including for example their department. A title of only "chair" or "director" is not what I intended.

Looking at the spreadsheet you sent¹, for Professor this could be for example, Laughton Professor of Naval History in the Department of War Studies. For Senior Lecturer this might only be Senior Lecturer in the Department of English in the Department of English, for example if there is no more specific designation.

Salary bands of 10K are no problem'.

6. King's College London responded on 28 June 2013. It stated that held the requested information but was withholding it under section 43(2) of the FOIA.
7. On 28 June 2013 the complainant requested an internal review as he was unhappy with the response from King's College London.
8. Following the internal review King's College London wrote to the complainant on 23 August 2013. In its response it stated that it was maintaining its reliance on section 43(2) of the FOIA to withhold the requested information.

Scope of the case

9. The complainant contacted the Commissioner on 12 September 2013 to complain about the way his request for information had been handled.
10. Although the complainant first requested information on £5,000 salary bands for senior staff at King's College London on 15 May 2013 he confirmed to the Commissioner on 7 January 2014 that he was content for the investigation to be restricted to the responses to his refined request made on 15 June 2013.

Chronology

11. On 15 November 2013 the Commissioner contacted King's College London and requested a copy of the withheld information together with
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¹ This is a reference to a spreadsheet sent to the complainant by King's College London on 14 June 2013 containing £10,000 salary bands between £100,000 and £270,000 for 36 generic job titles.

any further arguments it wanted to advance in respect of its application of section 43(2) of the FOIA. At the same time, he drew its attention to various job adverts in the 'situations vacant' section of its website and pointed out that the advertised jobs included details of the person's job title, job description and salary range. As a specific example, the Commissioner cited the Grade 7 position of 'Research Fellow' in the School of Medicine with a salary range (including a London allowance) of between £40,845 and £48,264.

12. In addition to requesting the withheld information, the Commissioner invited King's College London to let him have copies of the job adverts relating to the senior members of its staff earning in excess £100,000.
13. King's College London responded on 13 December 2013 and disclosed the withheld information comprising of 127 posts with associated £10,000 salary bands. With regard to the job adverts for the 127 posts, King's College London said that it has 'significant difficulty in identifying' these. However, it did attach the small number it was able to identify and pointed out that many of the senior roles advertised did not list a specific salary. King's College London said that a number of its senior academic positions were often filled through a process of internal promotion and in such cases no adverts were generated. In other cases it pointed out that no adverts were available as the individuals concerned had transferred to it from one of its predecessors (for example, the Institute of Psychiatry which merged with it in the late 1990s).
14. In its response to the Commissioner dated 13 December 2013, King's College London also provide further arguments in support of its application of section 43(2) of the FOIA to the information requested and at the same time said that it also wished to rely upon the exemption in section 40(2). In relation to the latter exemption, the College said that the requested information constituted the personal data of the individuals concerned, who it argued, would not expect their salary data to be disclosed to the world at large under the FOIA.

Reasons for decision

15. In this case King's College London has withheld the requested information under the exemptions set out sections 43(2) and 40(2) of the FOIA. The Commissioner will now deal with each of these in turn.

Section 43(2) of the FOIA

16. Section 43(2) of the FOIA states that information is exempt if disclosure would, or would be likely to prejudice the commercial interests of any person (including the public authority holding it).
17. In this case King's College London has argued in its initial and internal review responses dated 28 June and 23 August 2013 that disclosure of the requested information would or would be likely to prejudice its commercial interests.
18. Following the Commissioner's intervention, King's College London has since clarified that it intends to rely upon the lower threshold test that disclosure would be likely to prejudice its commercial interests.

Commercial interests

19. King's College London has described the type of commercial interests it believes that disclosure of the requested information would be likely to prejudice. It has pointed out that it operates autonomously in a highly competitive environment which is different to that of other public authorities (for example local or central government departments) under a funding model which has changed radically in recent years. King's College London has argued that it competes nationally and internationally with other universities for 'talent' among academic and senior professional staff together with research grants, external funding, publication in major journals and students. It believes that there is a genuinely global market for 'star' researchers and has pointed out that many of the institutions it competes with internationally for such staff are not publicly funded. It has argued that its position in the job market in which it competes is more analogous to a body like the BBC (which competes directly with its commercial rivals) than a government department. However, it has added that unlike the BBC much of its funding is from non-public sources (e.g. tuition fees, research contracts).
20. The Commissioner is mindful of comments made by the Information Tribunal in the cases of The Student Loans Company and Information Commissioner EA/2008/0092 and the University of Central Lancashire and Information Commissioner and David Colquhoun (EA/2009/0034) in which it said that 'commercial interests' is a term which deserves a broad interpretation dependant largely on the particular context.
21. King's College London (together with other domestic universities) depends upon being able to recruit high calibre academic and professional staff in the competitive environment in which it operates in order to attract fee paying students (from both home and abroad), research grants and external funding.

22. In the Commissioner's view a public body that depends upon income from such sources to carry out its functions has a commercial interest in maintaining the assets (including its staff) upon which its ability to generate income depends.
23. The Commissioner is therefore satisfied that in this case that King's College London has commercial interests which it is entitled to protect.

Prejudice to commercial interests

24. King's College London has argued that disclosure of the requested information would be likely to prejudice its commercial interests in three ways.
25. Firstly, it believes that disclosure would increase the costs of recruiting and retaining staff by encouraging competitor universities to raise their salary offers to outbid it by making higher salary offers.
26. Secondly, it believes that disclosure would impede salary negotiations by encouraging candidates for senior posts to bid for higher salaries based on posts they consider comparable. King's College London has argued that this would not represent an effective use of its resources, including the public funding it receives.
27. Thirdly, it believes that disclosure would prejudice its public research funding through the Research Excellence Framework (REF)². REF is the new system for assessing the quality of research in UK higher education institutions. The REF is undertaken by the four UK higher education funding bodies³. The exercise is managed by the REF team based at HEFCE⁴ and overseen by the REF Steering Group, consisting of representatives of the four funding bodies. The REF submission deadline for 2013 was 29 November.
28. King's College London has pointed out that its performance in the REF affects the public research funding it receives in the future and this funding is only allocated on the basis of research of the highest (3* or

² <http://www.ref.ac.uk/>

³ Higher Education Funding Council for England (HEFCE), Higher Education Funding Council for Wales, Scottish Funding Council and Department of Education and Learning

⁴ <http://www.hefce.ac.uk/>

4*) quality. King's College London has said that its REF submissions include research outputs (articles, books etcetera) from its staff. The staff are not assessed on their 'quality' directly but the quality of their outputs. King's College London has argued that its senior academic staff will be more likely to have high quality outputs. It therefore believes that any reduction in the number of these staff as a result of other universities headhunting them with the lure of higher salaries could potentially reduce its REF score. This in turn, it believes, would have an adverse effect on the amount of research funding it receives in the future through the REF.

29. In the Information Tribunal's decision of Hogan and Oxford City Council and the Information Commissioner; EA/2005/0026 and EA/2005/0030 it was pointed out that the evidential burden fell upon a public authority citing section 43(2) of the FOIA to show that some causal relationship existed between the potential disclosure and the prejudice claimed and that such prejudice was real, actual or of substance.
30. Based on the arguments put forward King's College London, the Commissioner is satisfied that there is a causal connection between the potential disclosure of the withheld information and the prejudice to its commercial interests.

Likelihood of prejudice

31. In this case, King's College London has argued that the chance of prejudice as a result of disclosure is subject to the lower threshold test of 'would be likely' to occur as opposed to 'would' occur.
32. In relation to this lower threshold, the Commissioner believes that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk.
33. King's College London has not provided the Commissioner with any tangible evidence or strong arguments to show that the likelihood of prejudice is more than just a hypothetical possibility.
34. King's College London has advanced three arguments in relation to the prejudice it believes disclosure would be likely to cause to its commercial interests. Firstly, it believes that disclosure would result in competitor universities outbidding it. Secondly, salary negotiations would be impeded by staff bidding for higher salaries. Finally, it believes that its performance in the REF (which determines the amount it public research funding it receives) will be adversely affected if it loses senior academic staff to its competitor universities offering higher salaries.

35. Dealing with King's College London's first argument the Commissioner believes that it must have made a number of assumptions to support its view that competing universities would outbid its salaries for comparable posts if the requested information was disclosed.
36. The first assumption would be that a vacancy for a comparable post would have to exist at the same time King's College London was recruiting.
37. Secondly, it would be assumed that the competing university would have to have the necessary funds to pay for the vacancy. If the salary offered by King's College London was significantly higher than that of one its competitors for a comparable position (assuming a vacancy existed), the competitor may not even consider it possible or worthwhile to make an increased bid. If the salary offered by King's College London was less than that offered by a competitor for a comparable position, it would beg the question as to whether King's College London was offering a figure below the market rate.
38. Thirdly, there is an assumption that a candidate looking for a new position is influenced solely by the salary and benefits offered. The Commissioner believes that other factors would also be relevant such as the job responsibilities, geographical location, the reputation of the organisation and the available facilities.
39. Fourthly, it would appear that King's College London has assumed that the possibility of it being outbid by a competitor university for a comparable position only applies to senior staff earning significant salaries (for example, those earning in excess of £100,000). The Commissioner has already noted that in the 'situations vacant' section of its website, King's College London, gives details of the person's job title, job description and salary range for positions paying less than £100,000. For example, a Grade 7 scale (Lecturer), currently £38,907 - £46,400 per annum, plus £2,323 per annum London Allowance and a Grade 8 scale (Senior Lecturer), currently £47,787 - £55,375, per annum plus £2,323 per annum London Allowance⁵.
40. Dealing with King's College London's second argument the Commissioner believes that it must have made a number of assumptions to support its view that salary negotiations would be

⁵ See the job advert for Lecturer/Senior Lecturer – The Shell Lectureship in International Dispute Resolution on King's College London's website in January 2014.

impeded by staff bidding for higher salaries if the requested information was disclosed.

41. Firstly, the fact that a potential candidate might be able to make reference to a higher salary being paid for a comparable position would not mean that King's College London would have to pay it. Factors such as the applicant age, experience and qualifications would be relevant in determining the level of any salary offered. However, in terms of transparency, fairness and equity it might be regarded as unfair if (for example) an internal applicant was precluded from being made aware of salaries for comparable positions.
42. Secondly, King's College London has assumed that possibility of candidates bidding for higher salaries only applies to senior staff earning significant salaries (for example, those earning in excess of £100,000). The Commissioner has already noted above that for graded positions paying less than £100,000 information on salary scales is already available via the situations vacant section of King's College London's website.
43. Dealing with King's College London's third and final argument the Commissioner believes that it must have made a number of assumptions to support its view that its public research funding through the REF will be adversely affected in the requested information is disclosed.
44. These assumptions are the same or very similar to those in respect of King's College London first argument as detailed above.
45. The above assumptions lead to the Commissioner to conclude that King's College London has not produced sufficient evidence to establish that the likelihood of prejudice by disclosure is more than a hypothetical possibility rather than a real and significant risk.
46. In view of the above, the Commissioner finds that section 43(2) of the FOIA is not engaged. Accordingly, he has not gone on to consider the public interest test.

Section 40(2) of the FOIA

47. The second FOIA exemption that King's College London has cited as grounds for withholding the requested information is section 40(2).
48. In its letter to the Commissioner dated 13 December 2013 King's College London has argued that the requested information is the

'personal data' of the individuals that it relates to who would not expect it to be disclosed under the FOIA.

49. King's College London has made the point that the requested information, consisting of the job title, department and £10,000 salary bands for 127 different positions would allow the individuals concerned to be identified from other information in the public domain including that on its website where academic and some professional services staff have public profiles. This information would therefore be regarded as the individuals' 'personal data' under the DPA the processing of which by disclosure would be 'unfair'.
50. King's College London has informed the Commissioner that it has not previously published salary data for individual post holders earning over £100,000 with the exception of its Principal (whose remuneration is published in its annual financial statement). However, King's College London has pointed out that it does publish in its annual financial statements⁶ the number of staff earning over £100,000 in £10,000 bands broken down by whether the post holder is a clinical academic or 'other academic and related'. Individual post holders are not identified.
51. The Commissioner will now consider whether section 40(2) of the FOIA is engaged in this case.

The law

52. Section 40(2) of the FOIA provides that:

'Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and*
- (b) either the first or the second condition below is satisfied.'*

53. Section 40(3) of the FOIA provides that:

"The first condition is-

- (a) in a case where the information falls within any of paragraphs (a)*

⁶ See <http://www.kcl.ac.uk/aboutkings/orgstructure/ps/finance/statements/index.aspx>

to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene–

(i) any of the data protection principles"

Is the withheld information personal data?

54. 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"

55. In order for the exemption in section 40(2) to apply, the information being requested must constitute personal data as defined by section 1 of the DPA.

56. In this case, the Commissioner agrees with King's College London that the requested information, comprising of the job titles, departments and £10,000 salary bands of 127 different posts, is the personal data of the individuals to whom it relates. This is because this information together with other information in the public domain (including the staff profiles on King's College London's website) may lead to the specific individuals being identified.

Would disclosure breach the data protection principles?

57. The data protection principles are set out in schedule 1 of the DPA. The first principle, and the most relevant in this case, states that personal data should only be disclosed in fair and lawful circumstances.

58. The Commissioner's considerations below have focused on the issue of fairness. 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

59. When considering whether a disclosure of personal information 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.
60. In this case King's College London has informed the Commissioner that it has not previously published salary data for individual post holders earning over £100,000 with the exception of its Principal. It therefore believes that the 127 individuals to whom the requested information relates would not expect details of their position, department and £10,000 salary band to be disclosed to the world at large under the FOIA.
61. King's College London has also pointed out to the Commissioner that, unlike some public bodies (for example, local authorities), it is not subject to specific statutory regulations⁷ and central government guidance⁸ that require salary data on senior staff to be routinely published.
62. King's College London believes that its position in the job market in which it competes is more analogous to a body like the BBC (which competes directly with commercial rivals) than a government department, although unlike the BBC much of its funding is from non-public sources (e.g. tuition fees, research contracts).
63. The Commissioner has referred to his guidance on 'Requests for personal data about public authority employees'⁹ and would make the point that anyone paid from the public purse should expect some information about their salaries to be made public.

⁷ The Accounts and Audit (Amendment No. 2) (England) Regulations 2009

⁸ The Code of Recommended Practice for Local Authorities on Data Transparency.
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/5967/19974_68.pdf

⁹http://ico.org.uk/~media/documents/library/Environmental_info_reg/Practical_application/section_40_requests_for_personal_data_about_employees.ashx

64. The Commissioner believes that an individual's expectations in this respect should depend upon a number of factors; including whether the requested information relates to their professional role, their seniority, whether they are public facing, any general policy on transparency, the consequences of disclosure and the balance of private rights and freedoms with legitimate public interests.

Professional or private

65. In this case the information requested, namely the job titles, departments and £10,000 salary bands of 127 different posts relates to the individuals' professional role as opposed to their private matters (such as their health or disciplinary record, tax code). The Commissioner therefore believes that the individuals must have some expectation that this type of information would be made public.
66. The Commissioner accepts the point made by King's College London that it already publishes some information regarding the salaries of its senior employees in its annual financial statements¹⁰. He also accepts that, along with other universities, King's College London, is different from other public bodies (such as local authorities) in how it is funded; which is by a mixture of public and private money. However, Universities are classed as public authorities under the FOIA and still receive significant public funds. The Commissioner therefore believes that their senior staff and particularly those earning in excess of £100,000 should reasonably expect a level of information concerning their salaries to be disclosed.

Seniority

67. The Commissioner also believes that it may be fair to release more information about employees who are not senior managers but who represent their authority to the outside world, such as a spokesperson or at meetings with other bodies. This implies that the employee has some responsibility for explaining the policies or actions of their authority; it would not apply simply because an employee deals with enquiries from the public or sends out material produced by others.
68. In this case all of the employees of King's College London falling within the scope of the complainant's request are senior in the sense that they earn over £100,000. Furthermore, a number of them represent King's College London to the outside world.

¹⁰ See <http://www.kcl.ac.uk/aboutkings/orgstructure/ps/finance/statements/index.aspx>

69. The Commissioner's view is that increased seniority is commensurate with increased responsibility, especially in relation to the making of influential policy and expenditure decisions.

Public facing role

70. The Commissioner's view is that it may also be fair to release more information about employees who are not senior managers but who represent their authority to the outside world, such as a spokesperson or at meetings with other bodies. This implies that the employee has some responsibility for explaining the policies or actions of their authority; it would not apply simply because an employee deals with enquiries from the public or sends out material produced by others.
71. In this case, it is clear to the Commissioner that some of the employees falling within the scope of the complainant's request have public facing roles in that they represent the interests of King's College London.

General policy on transparency

72. King's College London's general practice in relation to salary transparency is to publish information in its annual financial statement on the number of staff earning over £100,000 in bands of £10,000 and the exact remuneration of its Principal.

Consequences of disclosure and potential distress to the data subject

73. King's College London has not produced any evidence to demonstrate that it has approached any of the 127 senior staff covered by the scope of the complainant's request to see whether they had any objection to the disclosure their salary bands or indeed whether they believed that any such disclosure would cause them any distress or harm.

Balancing private rights and freedoms with legitimate public interests

74. The complainant has argued that there is a clear and strong public interest in understanding which specific jobs in the public sector attract very high salaries and in particular those in excess of £100,000 per annum.
75. King's College London has acknowledged that increasing access to information on senior staff salaries has an important function in advancing transparency in how public funds are used. However, it believes that this is already achieved by the information it publishes in

its annual financial statements which lists the number of staff earning over £100,000 in £10,000 bands.¹¹

76. King's College London has also pointed out that as its staff are not identified in the information it publishes in its annual financial statements they have an expectation that their individual salary data will be treated in confidence and not disclosed to the world at large. It has suggested that this expectation is supported by the fact that many senior positions are not advertised with a specific salary band and some are not advertised at all as they are filled by internal promotions.
77. Finally, King's College London has pointed out that it is not subject to the same regulations¹² and central government guidance¹³ regarding the publication of salary data as other public bodies (such as local authorities).

Conclusion

78. The Commissioner's view as expressed in his guidance on 'Requests for personal data about public authority employees'¹⁴ is that anyone paid from the public purse should expect some information about their salaries to be made public. The Commissioner accepts that King's College London is in a different position to other public bodies (like public authorities) in that it is reliant on both public and private funding. However, as it is partially reliant upon public funding he believes there should be an expectation by its staff that some information relating to salaries, particularly for senior staff earning in excess of £100,000, should be made public.
79. King's College London is of the view that this expectation is already met by the information it publishes in its annual financial statements. The Commissioner accepts that this goes some way to meeting the expectations of its staff and the legitimate public interests. However,

¹¹ See <http://www.kcl.ac.uk/aboutkings/orgstructure/ps/finance/statements/index.aspx>

¹² The Accounts and Audit (Amendment No. 2) (England) Regulations 2009

¹³ The Code of Recommended Practice for Local Authorities on Data Transparency.
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/5967/19974_68.pdf

¹⁴ http://ico.org.uk/~media/documents/library/Environmental_info_reg/Practical_application/section_40_requests_for_personal_data_about_employees.ashx

because the individuals concerned all earn in excess of £100,000 per annum and occupy senior positions, some of which are public facing and/or involve responsibility for influential policy and expenditure decisions, the Commissioner believes that (in line with his previous Decision Notices and current guidance) it is not unreasonable for King's College London to disclose the individuals' job titles, departments and £10,000 salary bands.

80. The Commissioner is mindful of the fact that adverts for specific graded jobs advertised on King's College London's website contain detailed information regarding salary bands (sometimes less than £5,000), job descriptions and roles.
81. Having considered all the circumstances of this case, the Commissioner is of the view that the individuals' right to privacy is outweighed by the legitimate public interest in transparency and openness and therefore considers it appropriate for the job titles, departments and £10,000 salary bands for senior staff at King's College London earning in excess of £100,000 per annum to be disclosed.

Right of appeal

82. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

83. 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.

84. 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

Rachael Cragg
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