Criminal convictions – advice from the Information Commissioner's Office

UCAS' higher education admissions schemes currently include the following questions about criminal convictions:

- **Question one** – all applicants are required to declare whether they have any relevant unspent criminal convictions.
- **Question two** – where an applicant applies to a course leading to certain professions or occupations which are exempt from the Rehabilitation of Offenders Act (1974), they are also asked to declare whether they have any criminal convictions, including spent convictions.

Providers will be aware that we've has decided to remove question one from Apply, from the start of the 2019 admissions cycle. One of the reasons for making this decision was to ensure compliance with the General Data Protection Regulation (GDPR).

At the Admissions Conference in March 2018, we agreed to share the advice we received from the Information Commissioner's Office (ICO). This is provided below, accompanied by a summary of our dealings with the ICO, and other stakeholders.

Liaison with the ICO, and their advice

The Government published a draft of the Data Protection Bill in September 2017 – its provisions require organisations processing personal data about criminal convictions to satisfy one of the conditions listed at parts one, two, or three of Schedule 1 to the Bill. A review of the Bill failed to identify a relevant condition to support asking question one, meaning UCAS risked breaching data protection legislation once the Bill was enacted.

We therefore wrote to the ICO, and set out the arguments for continuing to ask both questions, highlighting universities' use of this information to support admissions decisions, and referring to good practice guidance on the use of personal data regarding criminal convictions.

The ICO formally responded on 19 February 2018, addressing the arguments we made. Its advice regarding question one was as follows:

'It seems likely that UCAS does not have a lawful basis to continue asking applicants this question.

As with all processing of personal data, in order to carry on collecting this information, there must be a lawful basis to do so, under Article 6 of the GDPR. In

addition, the processing of personal data relating to criminal convictions and offences must be authorised by Union or Member State law, providing for appropriate safeguards for rights and freedoms of data subjects, as per article 10. This latter condition of authorisation by United Kingdom law requires that the processing meet one of the conditions in Parts 1, 2 or 3 of Schedule 1 of the Data Protection Bill.'

Our representative suggested that the lawful basis for processing this data is Article 6(1)(e):

> processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.

With respect to the Article 10 requirement to meet one of the conditions laid out in Parts 1, 2 or 3 of Schedule 1 of the Data Protection Bill, UCAS suggests it could appeal to two possible conditions: Schedule 1, Part 2, Paragraph 8 – preventing or detecting unlawful acts:

> (1) This condition is met if the processing—
>
> (a) is necessary for the purposes of the prevention or detection of an unlawful act
>
> (b) must be carried out without the consent of the data subject so as not to prejudice those purposes, and
>
> (c) is necessary for reasons of substantial public interest

And also, Schedule 1, Part 2, Paragraph 9 – protecting the public against dishonesty, etc.:

> (1) This condition is met if the processing—
>
> (a) is necessary for the exercise of a protective function,
>
> (b) must be carried out without the consent of the data subject so as not to prejudice the exercise of that function, and
>
> (c) is necessary for reasons of substantial public interest.
>
> (2) In this paragraph, "protective function" means a function which is intended to protect members of the public against—
>
> (a) dishonesty, malpractice or other seriously improper conduct,
>
> (b) unfitness or incompetence,
>
> (c) mismanagement in the administration of a body or association, or
>
> (d) failures in services provided by a body or association.

However, it is not clear that UCAS' processing of criminal convictions and offences data would actually meet these conditions.

The basis offered by us as justification for asking all candidates to declare any relevant unspent convictions is article 6(1)(e) – that the processing is necessary for

the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. Specifically, UCAS claims that processing personal data about relevant unspent convictions is necessary for it to assist universities in assessing the suitability of applicants for courses, and to reduce the risk of harm or injury to students and staff as a result of the criminal behaviour of other students, and that this is a task it carries out in the public interest.

I am not convinced that the conditions for article 6(1)(e) to apply are met here. It is unclear why asking all applicants, no matter what course they are applying to, to declare their unspent convictions is necessary for assessing those applicants' suitability for their chosen course. For many degree courses – perhaps the majority – possession of a criminal conviction, even for quite serious offences, will not be relevant to the matter of their suitability to study that particular subject. Clearly, there are many cases where information about criminal convictions would be necessary for assessing suitability to study, such as those courses involving clinical practice or work with vulnerable people. But this could be achieved by asking only question 2, that is, asking questions about criminal convictions only of people applying for courses leading to professions exempt from the Rehabilitation of Offenders Act (if indeed there is a lawful basis for asking question 2). But for the vast majority of courses, there is no reason to assume that having an unspent criminal conviction will have any implications whatsoever for their suitability for the course'.

The ICO's initial advice in respect of question two was as follows:

'It seems likely that UCAS does not have a lawful basis to continue asking applicants this question.

Again, here UCAS appeals to article 6(1)(e) – that the processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. A case could plausibly be made that asking applicants for these types of degrees whether they have any criminal convictions meets this condition, as UCAS is a public authority, to the extent that is performs its admissions service on behalf of public authority universities. (When appealing to Article 6(1)(e) generally, UCAS may wish to take their own legal advice to decide if they are exercising official authority, or whether a particular activity falls within their public task. The important thing to note here is that there should be some law they can point to that provides the basis for the public task.)

However, even if the processing does have a lawful basis under Article 6(1)(e), it must also meet the Article 10 requirement to be authorised by UK law, namely, the Data Protection Bill. UCAS appeals to Schedule 1 Part 2 Para 9 quoted above, about protecting the public against dishonesty, malpractice or other seriously improper conduct. UCAS also suggests it might meet the following other conditions:

Schedule 1 Part 1 Para 1 – Employment, social security and social protection:

(1) This condition is met if—

(a) the processing is necessary for the purposes of performing or exercising obligations or rights of the controller or the data subject under employment law, social security law or the law relating to social protection

Schedule 1 Part 1 Para 2 (1 & 2) – health or social care purposes:

(1) This condition is met if the processing is necessary for health or social care purposes.

(2) In this paragraph "health or social care purposes" means the purposes of—

(a) preventive or occupational medicine,

(b) the assessment of the working capacity of an employee,

(c) medical diagnosis,

(d) the provision of health care or treatment,

(e) the provision of social care, or

(f) the management of health care systems or services or social care systems or services.

It is reasonable to think that universities have these obligations, and that it is important to ensure that people accepted for courses with elements of clinical practice or that involve working with vulnerable people are suitable, and do not pose a risk to those they will come into contact with. It is reasonable for universities to collect this data in some form at some stage in the admissions process, for reasons of protecting the public against malpractice, unfitness, incompetence or other seriously improper conduct, and for social protection and health and social care purposes. Part of the management of social care services or systems does plausibly involve assessing the suitability of individuals who will be providing these services as part of their studies.

However, it does not appear that UCAS collecting this data in the form it currently does is **necessary** for realising this purpose. Presumably, many (or all) of these courses also require applicants to undergo an enhanced Disclosure and Barring Service check before admission, which would achieve the same purpose, and in a more targeted and proportionate manner. It may be more efficient for universities to screen out applicants with convictions at the stage of application to UCAS, rather than accepting them subject to a DBS check if that check is then going to reveal convictions. But since the DBS check will need to take place regardless of whether the applicant answers question 2, it is unclear that UCAS collecting this data by asking question 2 is a targeted, proportionate means of achieving its purpose'.

Further consultation

The ICO's initial position – that UCAS was unable to ask either question – had significant implications for our admissions schemes.

Following further feedback from sector bodies, and some professional statutory and regulatory bodies, and conversations with the ICO, we sent a further letter to the ICO in March, focusing on the importance of asking question two at an early stage in the application process, and the need for potential issues to be considered at an early stage, and, how the answer to this question influences both the timing of Disclosure and Barring Service checks, and the decision to conduct 'fitness to practice' assessments.

The ICO has been receptive to these arguments. We may therefore continue to ask for the information in question two. However, it remains of the opinion that UCAS asking question one is inconsistent with the Data Protection Bill as currently drafted.

Providers – possible action

Providers may wish to seek advice on whether they can collect this information independently from applicants. However, verbal advice from the ICO was that it could not identify a lawful basis, consistent with the Data Protection Bill, that would allow providers to do so. Providers should therefore carefully review the provisions of the Data Protection Bill before taking any such decision.

Alternatively, providers could consider approaching the government, individually or collectively, to seek an amendment to the current Bill, and provide a clear legal basis for collecting this information from all applicants.