

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 September 2011

Public Authority: The University of Exeter
Address: The Queen's Drive
Exeter
Devon
EX4 4QJ

Decision (including any steps ordered)

1. The complainant made a request to the University of Exeter (the University) for the names and academic institutions of individuals who were listed as possible external assessors in 2009 and the names and institutions of the two individuals who were eventually chosen to act as external assessors from that list. The University refused to disclose the list of potential assessors under section 40(2) of the Freedom of Information Act 2000 (FOIA). It also refused to disclose the two chosen external assessors under section 40(2) and section 36(2)(b)(i) and (ii) and section 36(2)(c).
2. The Commissioner's decision is that the University correctly applied section 40(2) to withhold the list of potential external assessors. The Commissioner also considers that the University correctly applied section 36(2)(b)(ii) to withhold the identities of the two chosen external assessors.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 25 January 2011, the complainant wrote to the University and requested information in the following terms:
(i) The names and academic institutions of those on the list of possible external assessors compiled by Professor Eston and Professor Jones in 2009 that were submitted to Professor Kay and the VCEG.

- (ii) The names and academic institutions of the two persons who were actually chosen by Professor Kay and the VCEG in 2009 from the list compiled by Professor Eston and Professor Jones, and who subsequently acted as the external assessors of the RAE 2008 submission made by the School of Sport & Health Sciences.*
5. The University responded on 18 February 2011. It refused to provide the complainant with the information he requested at point i of the request under section 40(2) of the FOIA. In relation to point ii of the request, the University refused to provide this information under section 40(2) as well as section 36(2)(b)(i) and (ii) and section 36(2)(c).
 6. Following an internal review the University wrote to the complainant on 22 March 2011. It upheld its original decision.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The Commissioner has considered whether or not the exemptions applied were correctly engaged in this case.

Reasons for decision

Point i of Request

Section 40(2)

9. Section 40(2) of the FOIA provides an exemption for information that is the personal data of an individual other than the applicant, and where one of the conditions listed in sections 40(3) and 40(4) apply.
10. In this case the withheld information is the names and institutions of individuals who were considered as potential candidates to act as external assessors for the University. It has said that this constitutes the personal data of those individuals and is exempt under section 40(2) of the FOIA by virtue of section 40(3)(a)(i). It said that this was because to release this information would breach the data protection principles.
11. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:
 - a. from that data, or

- b. from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
12. The Commissioner considers that the information withheld under section 40(2) and described at paragraph 12 above would constitute information from which the data subject would be identifiable.
13. Such information is exempt if either of the conditions set out in sections 40(3) and 40(4) of the FOIA are met. The relevant condition in this case is at section 40(3)(a)(i) of the FOIA, where disclosure would breach any of the data protection principles. The University has argued that disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully". Furthermore at least one of the conditions in Schedule 2 should be met.
14. To determine whether disclosure of the requested information would contravene the first data protection principle the Commissioner has considered the following: -

Likely Expectation of the Data Subject

15. The University has explained that the individuals contained on the list of potential external assessors were not aware that they had been considered for this post. It explained that only the two individuals who were appointed as external assessors were aware that they had been considered. It therefore explained that as the individuals on the list were not aware that they had been considered they would have no expectation that this information would be disclosed into the public domain.
16. The Commissioner will consider the two individuals who were ultimately appointed as external assessors under point ii of the request. In relation to the individuals who were potential candidates on the list but who did not become external assessors, as those individuals were not aware that they had been considered for this post, the Commissioner accepts that they would have no expectation that this information would be disclosed into the public domain.
17. The University also confirmed that it had not endeavoured to obtain the individuals consent to disclosure because as stated above those individuals were not ultimately appointed as external assessors and were not aware that they had been considered. The Commissioner considers that this is reasonable under the circumstances.

The Legitimate Public Interest

18. The University has argued that whilst there is a legitimate public interest in ensuring the review process is carried out fairly, the

disclosure of names of potential assessors who it was later decided not to contact or involve in the review process, does not meet this public interest. It argued that this legitimate public interest described is met through existing University Governance procedures.

19. The Commissioner does not consider that there is a legitimate public interest in disclosing the names of potential external assessors who were not ultimately appointed and have not become involved in the review process.
20. As the Commissioner considers that the data subjects would not have expected this information to be disclosed into the public domain and because the Commissioner does not consider there is a legitimate public interest in disclosing this information, his decision is that section 40(2) was correctly engaged in relation to point i of the request.

Point ii of the Request

Section 36(2)(b)(ii)

21. A number of exemptions have been applied to the information relevant to this part of the request, however the Commissioner has decided to first consider the application of section 36(2)(b)(ii).
22. Section 36(2)(b)(ii) provides that information is exempt if in the reasonable opinion of the qualified person, disclosure of the information would, or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.
23. In this case the University has explained that the Vice-Chancellor is the qualified person. It has explained that his opinion was sought on 11 February 2011, he formed his opinion on 15 February 2011 and this was detailed in a letter to the complainant dated 18 February 2011. The University has provided the Commissioner with a copy of the qualified person's opinion as well as the submissions which were put to the qualified person to enable him to reach the opinion.
24. The following submissions were put to the qualified person:
 - Peer review provides a valuable contribution to ensuring academic excellence.
 - There is an underlying expectation of anonymity, which if we were unable to meet could prevent assessors from providing honest and impartial advice/comment.
 - The RAE/REF is a competitive exercise, and the commissioning of confidential reports provides an important input to the University's performance.

- Anonymous peer review is the widely accepted norm and an important method for assessment of academic work.
 - In this exercise the external assessors were informed that information relating to the external peer review process would not be disclosed into the public domain without prior discussion. Following discussions with the assessors there is concern that following the changes that have taken place within Sports Science following the review, there is specific concern that these changes could be held against the assessors if their identities were disclosed.
25. The University explained that if the names of assessors were to be made public, particularly where they have been requested to provide candid and honest reviews, in the future assessors would be likely to be inhibited from providing such opinions and the appropriate degree of openness is very unlikely to be achieved. It explained that assessors must be free to exchange views openly and candidly without the fear that their names or views will be made public.
26. The qualified person's opinion is that the prejudice in this case would be likely to occur. The threshold to prove would be likely to prejudice is lower than if the University had claimed that the prejudice would occur. However whilst the risk of prejudice need not be more likely than not, it must be substantially more than remote.¹
27. The Commissioner considers that it is important that within the peer review process, assessors are able to put forward and exchange views openly and candidly and that individuals do expect anonymity when involved in this process. The Commissioner also notes that in this case one of the individuals involved has expressed concern that changes which were invoked following the review process may be linked to the particular assessors in this case and held against those assessors. The Commissioner considers that the above would increase the likelihood of the prejudice occurring.
28. Upon considering the withheld information to which section 36(2)(b)(ii) has been applied to, the submissions put to the qualified person and the qualified person's opinion, the Commissioner accepts that it was reasonable to conclude that disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. He considers that the peer review process requires extremely open and candid discussion and exchange of views and that this would not be possible if those involved within that process expected that their identity would be disclosed into the public domain. The Commissioner has also

1. The issue of prejudice has been considered in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005).

taken into account the particular concerns of one of the individuals in this case.

29. The Commissioner is of the view that the opinion of the qualified person is a reasonable one and that it has been reasonably arrived at. He therefore finds that section 36(2)(b)(ii) was correctly engaged.
30. As the Commissioner has decided that the exemption is engaged, he has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Brooke Appeal².
31. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would, or would be likely to inhibit the free and frank provision of advice.

Public arguments in favour of disclosing the requested information interest

32. The University has acknowledged that there is a need for transparency in its decision making processes.
33. The University considers that there is a public interest in disclosing information which can inform public debate on decisions made as a result of the review process.
34. The University also considers there is a public interest in ensuring that the review process was carried out fairly.
35. The Commissioner also considers that there is a public interest in accountability for decisions made by a public authority.

2. Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC(EA/2006/0011 & EA/2006/0013)

Public interest arguments in favour of maintaining the exemption

36. It is in the public interest for the University to be able to call upon the advice and insight of external experts. It has suggested that if it wasn't able to offer anonymity it would be impaired in its ability to do this.
37. It is in the public interest that experts feel free to offer honest and impartial opinions and views, again it has suggested that if it were unable to offer anonymity experts would not be as candid in the sharing of opinions and views.
38. The performance of anonymous peer reviews support the University in identifying strengths and weaknesses and developing strategies for the best course of action and subsequently the best use of public funds. If this process were undermined by the reluctance of expert reviewers to carry out reviews or if those involved were less open and candid in putting views and opinions forward, this would not be in the public interest.

Balance of the public interest arguments

39. The Commissioner considers that there is a public interest in the University being open and accountable in its decision making processes. Part of that process in this case was the appointment of external assessors as decisions have been taken as a result of this external input.
40. The Commissioner also considers that there is a public interest in disclosure of information which will inform public debate on decisions made by the University. The Commissioner does not however consider that disclosure of the names of the two assessors would significantly inform or further public debate and therefore disclosure of the particular information requested in this case would be limited in meeting this public interest argument.
41. The Commissioner does consider that there is a public interest in ensuring the review process was carried out fairly. Disclosing the identities of the external assessors may go some way to meeting this public interest but again the Commissioner considers that disclosure of this information has a limited capacity in meeting this public interest argument. Furthermore the University has argued that there are internal governance procedures in place to ensure that the review process is carried out fairly.
42. The Commissioner does however consider that there is a very strong public interest in the University being able to seek the views and opinions of external experts, and that those views and opinions are shared as openly, honestly and candidly as possible. He considers that if the University were unable to offer anonymity to external reviewers and it became unable to obtain the honest and open views of external

experts this would undermine the quality of decisions taken by the University which would not be in the public interest.

43. The Commissioner considers that in this case the public interest in favour of maintaining the exemption outweighs the public interest in disclosure.

44. The Commissioner considers that section 36(2)(b)(ii) was correctly applied to withhold the information requested at point ii of the request and therefore he did not consider the application of any of the other exemptions.

Right of appeal

45. 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: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

46. 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.
47. 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

**Pamela Clements
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