

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 January 2012

Public Authority: Queen's University Belfast
Address: University Road Belfast
BT7 1NN

Decision (including any steps ordered)

1. The complainant asked Queen's University Belfast ("the University") for a copy of an administrative review undertaken by Deloitte ("the Deloitte Report") regarding the contract management and procurement arrangements for the Belfast Festival at Queen's ("the Festival"). The University refused to disclose that information, citing the exemptions under sections 31(1)(g) (prejudice to a public authority's functions) and section 40 (personal data) of the FOIA as a basis for non-disclosure.
2. The Information Commissioner's decision is that the University has correctly applied the exemption under section 31(1)(g) for the purposes set out in sections 31(2)(a) and (b) (the purpose of ascertaining whether any person has failed to comply with the law and the purpose of ascertaining whether any person is responsible for any conduct which is improper). He considers that section 31(1)(g) applies to all of the requested information and therefore orders no steps to be taken.

Request and response

3. On 28 September 2010, the complainant wrote to the University and requested information in the following terms:
"I would request that you forward a copy of the Deloitte Report".
4. The University responded on 25 October 2010. It stated that the requested information was exempt from disclosure under sections 31(1)(g) and 40(2) of the FOIA.
5. The complainant requested an internal review of the University's decision. Following its internal review the University wrote to the complainant on 25 November. It stated that it was upholding the

original decision not to disclose the requested information under the exemptions specified above.

Scope of the case

6. The complainant contacted the Information Commissioner (the Commissioner) to complain about the way his request for information had been handled. In particular he was concerned about the University's use of the exemptions at sections 31(1)(g) and 40 of the FOIA.

Reasons for decision

Section 31(1)(g) in conjunction with sections 31(2)(a) and (b)

7. Section 31(1) of the FOIA states that:

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice— ...

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)"

The purposes in subsection (2) cited by the University are:

- (a) *"the purpose of ascertaining whether any person has failed to comply with the law,*
 - (b) *the purpose of ascertaining whether any person is responsible for any conduct which is improper".*
8. The Commissioner finds that the use of the word "ascertaining", i.e. determining definitely or with certainty, limits the application of this exemption to those cases where the public authority in relation to whom the prejudice is being claimed, has the power to formally ascertain compliance with the law and judge whether any person's conduct is improper. The Commissioner acknowledges that this is likely to limit the use of these limbs of the exemption to law enforcement or regulatory bodies.
 9. However, the exemption refers to functions being exercised "*by any public authority*". This means that the prejudice does not have to relate to the public authority who is dealing with the request but can relate to another public authority who is exercising a function for a relevant purpose. For example, where a police investigation is in prospect or is

being carried out at the same time as the public authority is carrying out its own internal investigation, then the public authority could claim the exemption in relation to the prejudice that would or would be likely to be caused to the police investigation.

10. In this instance, although the University itself can conduct internal investigations into alleged misconduct, it does not have the power to formally ascertain compliance with the law or whether any person's conduct is improper, as it is neither a law enforcement nor a regulatory body. However, the University has informed the Commissioner that there is an ongoing Police Service of Northern Ireland ("PSNI") investigation into issues arising out of the Deloitte Report. The Commissioner accepts that the PSNI is a public authority which has a statutory function and power to carry out investigations with a view to ascertaining whether any person has failed to comply with the law or is responsible for any conduct which is improper, therefore the Commissioner has considered this exemption in light of any prejudice which may be caused to the PSNI's functions for the purposes as set out in sections 31(2)(a) and (b) of the FOIA.
11. When considering the application of a prejudice-based exemption, the Commissioner adopts the three-step process laid out in the Information Tribunal case of *Hogan v the ICO and Oxford City Council* (EA/2005/0026 and EA/2005/0030). The three steps are as follows:
 - Identify the applicable interests within the relevant exemption.
 - Consider the nature of the prejudice being claimed.
 - Consider the likelihood of the prejudice occurring.

Relevant applicable interest

12. The University advised the Commissioner that, under the University Charter, which derives from the Irish Universities Act 1908, the University's governing body, the Senate, is responsible for the ongoing strategic direction of the University, the management and administration of the University's revenue and property and the general conduct of its affairs. As part of this responsibility the Senate must safeguard the assets of the University and public and other funds.
13. The Commissioner accepts that reviews, such as the Deloitte Report, of the University's contract management arrangements and payments, may be necessary in order to fulfil the above responsibilities. The University has informed the Commissioner that, as a result of factors that came to light during Deloitte's investigation, a copy of the Deloitte Report was passed to the PSNI, which is conducting an ongoing investigation into procurement issues in relation to the Belfast Festival.

14. The Commissioner is satisfied that in seeking to protect the ability of the PSNI to carry out the above functions, the University has identified an applicable interest relevant to section 31(1)(g) and 31(2)(a) and (b). Therefore, the Commissioner has gone on to consider the nature of the prejudice identified and the likelihood of it occurring.

Nature of the prejudice

15. When considering the nature of the prejudice, the Commissioner is again guided by the Tribunal's comments in *Hogan* that a causal relationship must exist between the potential disclosure and the prejudice and that the prejudice is real, actual or of substance.
16. Therefore, the Commissioner takes the view that, for the exemption to be engaged, the disclosure of the information must have a causal effect on the applicable interest, this effect must be detrimental or damaging in some way, and the detriment must be more than insignificant or trivial.
17. The University has outlined the prejudice likely to be caused by disclosure of the requested information in this case, which would be to the PSNI's ability to effectively carry out its functions for the above purposes in the following respects:
- i. As regards section 31(2)(a), if those persons failing to comply with the law or contemplating non-compliance with the law were to become aware that their actions were attracting the attention of agencies responsible for detecting non-compliance, or become aware of the methods used by such agencies, they would be forewarned and able to take evasive action. In this instance, there are issues arising from the report which are still under investigation. Disclosure of the requested information, therefore, would be likely to result in detriment to the ongoing investigative process and could seriously hamper its effectiveness.
 - ii. As regards section 31(2)(b), those parties being investigated, if provided with the requested information, would be better equipped to frustrate the investigation. The interests prejudiced would be those of the University, the PSNI and the public. Knowledge of the requested information would forewarn and forearm those under investigation for improper conduct and enable them to design their activities in such ways as would reduce the risk to themselves of detection.
18. Having considered the arguments above, the content of the requested information and the context in which the material was created, the Commissioner accepts that disclosure could prejudice the ability of the

PSNI to effectively carry out important statutory functions. Therefore, he is satisfied that a causal link has been established. The Commissioner further considers that any prejudice caused to the PSNI's ability to effectively carry out those functions would not be trivial or insignificant. In view of this the Commissioner has gone on to consider the likelihood of such prejudice arising.

Likelihood of prejudice

19. In this case the University considered that disclosure 'would be likely to prejudice' the PSNI's functions. The Commissioner takes the view that, when a public authority considers that prejudice would be likely to occur, it must demonstrate that there would be a real and significant risk, rather than a mere hypothetical possibility, of prejudice occurring.
20. The University outlined how disclosure of the Deloitte report could lead to prejudice to the PSNI's functions. It argued that prejudice would be likely to occur, as the parties under investigation would be alerted to the investigative methods used and could take evasive action in order to frustrate the investigation and thereby hamper the effectiveness of the process. The Commissioner accepts that this is a valid argument, strengthened by the fact that the PSNI itself has confirmed to the Commissioner that it believes disclosure of the Deloitte report would be likely to prejudice its ongoing investigation.
21. In light of the above, the Commissioner accepts the University's arguments that disclosure of the requested information would be likely to prejudice the PSNI's functions in relation to future investigations. Therefore the Commissioner believes that disclosure of the requested information would mean a real and significant risk of prejudice to the PSNI's ability to carry out the functions specified above.
22. The Commissioner is therefore satisfied that the exemption under section 31(1)(g) by virtue of sections 31(2)(a) and (b) is engaged and has gone on to consider the public interest test.

Public interest arguments in favour of disclosing the requested information

23. The University has identified several factors in favour of disclosing the withheld information. These are as set out below.
24. There is a significant public interest in openness regarding investigations into irregularities in respect of spending public monies. Disclosure of the requested information could help to maintain public confidence in the running of the Festival and the effective and efficient use of public funds.

25. There is a strong public interest in ensuring that the conduct of those in positions of trust in public office and upon whose proper conduct the University and the public relies for the protection of their interests, are held accountable for improper conduct and subject to public scrutiny.
26. There is a public interest in ensuring that robust systems are in place to detect wrong-doing or impropriety, especially in the use of public funds, which would be evidenced by disclosure of the requested information to the public.

Public interest arguments in favour of maintaining the exemption

27. There is a very strong public interest in ensuring that the University and the PSNI are able to carry out their functions properly, including ensuring that the ability to take appropriate action in the event of improper or unlawful conduct is not prejudiced.
28. There is a need to avoid interference with an investigation designed to apprehend alleged offenders or gather relevant evidence. Information of this nature, if disclosed, would put the investigation in progress at risk and provide valuable assistance to any alleged perpetrators of crime, thereby possibly preventing the detection of such crime and the apprehension of offenders, which would not be in the public interest.

Balance of the public interest arguments

29. The Commissioner has considered the arguments put forward both in favour of disclosing the requested information, and in favour of maintaining the exemption. He has also considered the requested information itself and all the circumstances of this case.
30. The Commissioner considers, as set out in paragraphs 23-26 above, that there are some valid public interest grounds in favour of disclosing the requested information. However, whilst there is a strong public interest in transparency and accountability where the expenditure of public funds is involved, this needs to be weighed against the potential harm, through disclosure, to any investigation of financial irregularities in respect of spending public monies and to any investigation of improper conduct by persons authorised to investigate such matters.
31. The University accepts that there is a public interest in understanding the basis for the investigation and in increasing accountability. However it contends that disclosure of the requested information, prior to the completion of the ongoing PSNI investigation, would put at risk the full and proper conduct of that investigation and there would be a strong detriment to the public interest if an investigation were to be compromised by premature disclosure of information. The

Commissioner considers that significant weight must be given to the public interest inherent in ensuring that investigatory authorities such as the PSNI are able to carry out thorough and complete investigations without fear of premature disclosure of evidence.

32. The University acknowledges that there is a significant public interest in how public money is spent on the awarding of contracts and to this end, an extensive amount of detailed information, regarding the production of the Festival, has previously been released to the complainant and therefore into the wider public domain. In addition, public monies ie grants from the Arts Council NI, the Department of Culture, Arts and Leisure and the University's subvention only equate to just over a third of the funding for the Festival, with the remainder being from private sponsorship, fundraising and self-generating income. In view of this, the University does not believe that disclosure of the requested information would add anything to the public's understanding of how public money was spent in respect of the production of the Festival.
33. In light of the above the Commissioner has concluded that in this case the public interest in maintaining the exemption clearly outweighs the public interest in disclosing the requested information. Therefore the Commissioner is satisfied that the requested information should not be disclosed. He has been particularly persuaded by the strong arguments advanced by the University regarding the need to protect the investigative process and the proper carrying out of the PSNI's functions, and by the fact that the significant public interest in seeing how public money is spent has been addressed by the University's release of detailed and extensive information regarding the production of the Festival.

Section 40 – personal data of third parties

34. The University withheld that part of the information requested which would identify individuals, under the exemption at section 40 of the Act. However, as the Commissioner considers all of the requested information is exempt under section 31(1)(g), he has not gone on to consider the University's application of section 40.

Right of appeal

35. 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

36. 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.
37. 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

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