

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 February 2014

Public Authority: University of Ulster
Address: Cromore Road
Coleraine
County Londonderry
BT52 1SA

Decision (including any steps ordered)

The complainant has requested information relating to talks which took place in Cardiff regarding parades in Northern Ireland. The University of Ulster (the University) provided the complainant with some information, however it refused to disclose the remainder, citing sections 40(2) and 41 of FOIA as a basis for non-disclosure. The Commissioner's decision is that the University has correctly applied the above exemptions to the information not disclosed to the complainant. Therefore, the Commissioner requires no steps to be taken.

Request and response

1. On 14 May 2013, the complainant wrote to the University and requested information in the following terms:

"It has been widely reported in the media that the PSNI in conjunction with the University of Ulster is facilitating parade talks in Wales. Can you provide me with any documents relating to this - ie emails internal external / minutes of meetings etc.?"
2. The University responded on 9 July 2013. It provided some information in relation to the complainant's request and stated that some personal information was being redacted under section 40(2) of FOIA and that it was applying section 41 of FOIA to the remaining information held.

3. Following an internal review the University wrote to the complainant on 26 July 2013. It stated that the reviewer was upholding the original decision.

Scope of the case

4. The complainant contacted the Commissioner on 28 July 2013 to complain about the way his request for information had been handled.
5. The Commissioner has considered the University's handling of the complainant's request, and specifically its application of sections 40 and 41 to the information it did not disclose to the complainant ("the withheld information.")

Reasons for decision

Section 40(2) of FOIA – personal information of third parties

6. Section 40(2) of FOIA states that information is exempt from disclosure if it constitutes personal data and either the first or the second condition in section 40(3) is satisfied. The first condition in section 40(3) states that the disclosure of personal data would (i) contravene any of the data protection principles, or (ii) section 10 of the DPA. In this case the University has explained that it considers disclosing certain information redacted from e-mails provided to the complainant would be unfair and would breach the first data protection principle. Therefore, this satisfies the first condition in section 40(3) of FOIA.
7. 'Personal data' is defined under section 1(1) of the DPA as data which relates to a living individual who can be identified from that data, or from that data and other information which is in the possession of the data controller or is likely to come into possession of the data controller.
8. The Commissioner considers that the information withheld under section 40(2) is personal data, as it consists of the names of police officers, who are living individuals and would clearly be identifiable from the information.

Would disclosure of the information be unfair?

9. The Commissioner has considered whether the disclosure of this information would be fair. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
- the individuals' reasonable expectations of what would happen to their information;
 - the consequences of disclosure, (if it would cause any unnecessary or unjustified damage or distress to the individual concerned); and
 - the balance between the rights and freedoms of the data subject and the legitimate interests of the public.

Reasonable expectations of the data subject

10. The University explained that the redacted information contains personal information relating to PSNI officers, i.e. their names, and whilst it is important to be clear that police officers do not have an absolute right to anonymity it considers that officials, however senior, involved in sensitive talks of this nature, which have been described as 'secret' talks, would not expect their names to be disclosed into the public domain in connection with attending such talks.

Seniority of officials

11. The Commissioner's guidance states that:-

"It is reasonable to expect that a public authority would disclose more information relating to senior employees than more junior ones. Senior employees should expect their posts to carry a greater level of accountability, since they are likely to be responsible for major policy decisions and the expenditure of public funds. However, the terms 'senior' and 'junior' are relative. It is not possible to set an absolute level across the public sector below which personal information will not be released; it is always necessary to consider the nature of the information and the responsibilities of the employees in question."

12. As well as receiving requests about their own staff, an authority may receive requests that involve disclosing the names of employees or representatives of other organisations, for example, people from outside bodies who attended a meeting with the authority. In such cases, the question is whether disclosure would be exempt under section 40(2) because it would contravene the DPA principles. In this case, the University has received a request involving the disclosure of the names of employees of another organisation who were involved in talks facilitated by the University. Normally, the more senior the

representative of the other organisation, the more likely it is that it would be fair to release their names.

13. The Commissioner in this case notes that the names redacted in this case are those of senior PSNI officers. He notes the University's comments that it has consulted with colleagues involved in the talks, who have stated that in this case the officers involved would have a reasonable expectation that their names would not be disclosed into the public domain in connection with those talks.
14. The Commissioner has also consulted the PSNI regarding this, due to the seniority of the officers. He has been advised that officers of this rank could generally expect to have their names disclosed as part of documents released under FOIA, unless they are in connection with a private matter or a sensitive policing operation.
15. The Commissioner is aware of the sensitive nature of the talks and considers that, in this context, despite their seniority, the police officers involved would not expect their names to be disclosed into the public domain.

Would disclosure cause damage and distress to the data subjects?

16. The University has not provided any arguments to suggest that disclosure would cause damage or distress to the data subjects involved. It has also informed the Commissioner that it did not consider it appropriate to seek the consent of the data subjects, so the Commissioner has no indication of whether damage or distress would be caused to the data subjects by disclosure of their personal information.
17. The Commissioner considers that, due to the reasonable expectations of the data subjects in this situation, disclosure of their names would constitute an intrusion into their privacy, which would be likely to cause them some degree of distress, if they did not expect this. The Commissioner has gone on to consider whether this intrusion would be unwarranted, or whether there is any legitimate interest in disclosure of the data subjects' personal information.

The legitimate public interest

18. The Commissioner considers that there is a legitimate public interest in transparency and accountability regarding talks of the nature facilitated by the University, for example in relation to the expenditure of public money. Programme. However, he considers that disclosure of the redacted names would go little way to meeting any legitimate public interest in this case.

19. The Commissioner considers that the University has disclosed a significant amount of information to the complainant in response to this request. He considers that disclosure of the redacted names would not meet any legitimate public interest in any further substantive way. The Commissioner accepts that the data subjects would have a reasonable expectation that their names and contact details would not be disclosed into the public domain and that disclosure would be likely to cause some damage and distress due to the nature of information to which their identities would be linked. The Commissioner therefore considers that the interests of the data subjects outweigh the legitimate public interest in this case and this information should therefore remain redacted.

Section 41 – information provided in confidence

20. Section 41(1) is an absolute exemption under FOIA and provides that information is exempt from disclosure if it was obtained by the public authority holding it from any other person (including another public authority) and the disclosure of the information to the public by the public authority would constitute an actionable breach of confidence. The University has withheld some information within the scope of the complainant's request on the basis that it is exempt from disclosure under section 41. The Commissioner has considered whether this is correct by asking the following questions:-
- Was the information obtained by the public authority from a third party?
 - Would the disclosure of the information constitute an actionable breach of confidence?
21. The University has applied the section 41 exemption to information it has received from a third party, i.e. the PSNI, in relation to the proposed talks. This is therefore information which was provided to the University by a third party. However, for the exemption to be engaged disclosure of the withheld information must also constitute an actionable breach of confidence. In the Commissioner's view a breach will be actionable if:
- i. The information has the necessary quality of confidence. (Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial; information which is of importance to the confider should not be considered trivial.)
 - ii. The information was communicated in circumstances importing an obligation of confidence. (An obligation of confidence can be expressed explicitly or implicitly. Whether there is an implied obligation of confidence will depend upon the nature of the information itself, and/or the relationship between the parties.)

iii. Unauthorised disclosure would cause a specific detriment to either the party which provided it or any other party.

Does the information have the necessary quality of confidence?

22. After viewing the withheld information and taking into account the submissions made by the University, the Commissioner considers that the information withheld under section 41 is not trivial and is not publicly available. This is not considered to be trivial information to the third party involved in the correspondence.

Was the information communicated in circumstances giving rise to an obligation of confidence?

23. The University has argued that the PSNI, at the time it provided the information to the University, had an expectation, due to the nature of the information, that it would not be disclosed to the public. Therefore it argues that there is an implied obligation of confidence in this case. Having viewed the withheld information, the Commissioner accepts that, given the nature of the information, the PSNI would not expect the University to disclose it to the public. Therefore he accepts that the information was communicated in circumstances importing an obligation of confidence.

Would disclosure of the information cause detriment to any party?

24. In many cases it may be difficult to argue that disclosure will result in the confider suffering a detriment in terms of any tangible loss. The real consequence of disclosing information provided in confidence is an infringement of the confider's privacy and there is a public interest in the protection of privacy.

25. The case of *Pauline Bluck v IC & Epsom & St Helier University NHS Trust*¹, which dealt with the confidentiality of a deceased person's quotes from the *Attorney General v Guardian Newspaper* case² in which first Lord Goff agreed that it was appropriate "to keep open the question of whether detriment to the plaintiff is an essential ingredient of an action for breach of confidence ...". However later in the same ruling Lord Keith of Kinkel found that it would be a sufficient detriment to the confider if information given in confidence were disclosed to

¹ EA/2006/0090

² [1990] 1 AC 109

persons to whom he "... would prefer not to know of it, even though the disclosure would not be harmful to him in any positive way."

26. Therefore, it can be seen that there are two ways of looking at the issue of detriment in relation to information provided in confidence. One can say it is not necessary that the confider will suffer a detriment as a result of a disclosure, or one can view the loss of privacy as a detriment in its own right as the Tribunal did in the *Bluck* case above.
27. The Commissioner in this case has adopted the first approach, i.e. the detriment is not a prerequisite of an actionable breach, as the University has not made any submissions to the effect that disclosure would cause detriment to any party.

Is there a public interest defence for disclosure?

28. Although section 41 of the FOIA is an absolute exemption and is therefore not subject to the public interest test outlined in the FOIA, case law on the common law concept of confidence suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence.
29. The Commissioner must therefore now consider whether there is a public interest defence on which the University could rely. Public interest considerations under section 41 are different to the considerations of the public interest test outlined in the FOIA. In the FOIA a presumption in favour of disclosure must always be applied. However, under section 41 the starting point is that the information must not be disclosed unless the public interest arguments in favour of disclosure exceed the public interest arguments in favour of maintaining the confidence.
30. In correspondence to the Commissioner the complainant outlined that he felt there was a strong public interest in the disclosure of this information. He stated that there has been a considerable amount of public money spent on the talks, with very little information being disclosed as to what went on at those talks. Disclosure of the remaining withheld information would assist public debate by enabling the public to understand the process by which these talks took place and any conclusions reached during them.
31. The Commissioner considers that there is a public interest in openness and accountability in the activity of public bodies and also in allowing individuals to understand decisions made by public bodies and potentially allowing the same to be challenged. However, the Commissioner considers that, as the University has disclosed some information relating to the talks, this public interest has been met.

32. The Commissioner has considered whether the University could rely on a public interest defence so that a breach of confidence would not be actionable. After viewing the remaining withheld information and taking into account the nature of that information, he does not consider that there is an exceptional public interest in disclosure which would override the duty of confidence in this case.

33. The Commissioner therefore considers that section 41 FOIA was correctly applied by the University in this case.

Right of appeal

34. 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

35. 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.
36. 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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