Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **25 February 2019**

Public Authority: **Cardiff University**
Address: **Inforequest@cardiff.ac.uk**

Decision (including any steps ordered)

1. The complainant requested a copy of legal advice and communications relating to legal advice related to an allegation of breach of copyright against a Professor of Cardiff University ('the University'). The University withheld the information requested under section 42 of the FOIA. The Commissioner's decision is that the University correctly applied section 42 to the information requested. She does not require any steps to be taken.

Request and response

2. On 29 May 2018, the complainant wrote to the University and requested information in the following terms:

"On 25th January 2017 there was a meeting of the University Research Integrity and Ethics Committee (URIEC) of Cardiff University:

https://www.cardiff.ac.uk/__data/assets/pdf_file/0005/827609/25-January-2017-University-Research-Integrity-And-Ethics-Committee-Meeting-Minutes.pdf

The following is reported in the published minutes:

"17.2 (ii) an allegation of breach of copyright against an Emeritus

Professor of the University. Legal advice is being sought on the applicability of the ARM procedure."

A request to the Vice-Chancellor for a copy of this legal advice was refused on 25th May 2018 in an email from [name redacted] (PA to the Vice-Chancellor):

"I am writing on behalf of the Vice-Chancellor. With regards your email below, Cardiff University will not be providing any legal advice obtained as this is subject to legal professional privilege..."

This request under the Freedom of Information Act is for a copy of this legal advice and all communications, documents and notes related to this legal advice. These should include (but not be limited to) all documents etc. involving [name redacted] (Vice Chancellor), [name redacted] (former Chancellor), [name redacted] (former Director of Governance) [name redacted] (former Goverrnance [sic] Manager), [name redacted] (Head of Assurance Services) and [name redacted] Farnham (PA to the Vice Chancellor)".

3. The University issued a refusal notice on 27 June 2018 stating that the information requested was exempt under section 42 of the FOIA. The University also warned the complainant that any future requests on the same topic may be considered vexatious under section 14(1) of the FOIA.

4. On 2 July 2018 the complainant requested an internal review of the University's refusal to disclose the information requested.

5. The University provided the outcome of its internal review on 27 July 2018 and upheld its decision that the information requested was exempt under section 42 of the FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 29 May 2018 to complain about the way his request for information had been handled.

7. The Commissioner considers the scope of her investigation is to determine whether the University correctly applied Section 42(1) to the withheld information.

Reasons for decision

Section 42 – legal professional privilege

8. Section 42(1) provides an exemption for information in respect of which a claim to legal professional privilege ("LPP") could be maintained in legal proceedings. This exemption is subject to a public interest test.

9. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both these cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice. In this case, the University considers advice privilege applies.

10. The withheld information in this matter comprises legal advice prepared for the University by external legal advisors and email exchanges between the University and the legal advisors relating to the obtaining and provision of that legal advice. Having considered the withheld information the Commissioner is satisfied that the information represents communications that, at the time they were made, were confidential; made between a client and professional legal advisers acting in their professional capacity; and made for the sole or dominant purpose of obtaining legal advice.

11. Information will only be privileged so long as it is held confidentially. Based on the University's representations and as far as the Commissioner has been able to establish, the information was not publicly known at the time of the request and there is therefore no suggestion that confidence has been lost.

12. As the Commissioner is satisfied that all the withheld information is subject to LPP, she has concluded that section 42 of the FOIA is engaged. She will now go on to consider the public interest test.

Public interest arguments in favour of disclosing the requested information

13. The University accepts that there is a public interest in openness, transparency and accountability in its operations and the way it makes decisions.

14. The complainant in this case provided the Commissioner with background information about the subject matter associated with the request. He explained that in November 2016 he made a complaint of academic misconduct and in particular *"…plagiarism, copyright theft and breach of confidentiality"* against an Emeritus Professor at the University. At a meeting of the University's Research Integrity and Ethics Committee in January 2017 his complaint was discussed. The minutes of this meeting confirmed that *"Legal advice is being sought on the applicability of the ARM (Academic Research Misconduct) procedure"*.

15. Following an exchange of emails indicating that the University was carrying out an investigation into his complaint, in June 2017 the University wrote to him to advise that it was still considering the matter and seeking legal, professional and academic expertise. Following a change in staffing at the University, administration of the complaint was taken over by a new member of staff. She wrote to the complainant in December 2017 to confirm that the University was unable to investigate the complaint under the scope of the ARM procedure as the Professor in question was not employed by the University. The University also concluded that it had no other procedure under which it would be able to investigate the complaint. The complainant considers that this second email directly contradicts the email he received in June 2017 confirming that the University was still considering the issues involved in his complaint.

16. The complainant considers that the legal advice is crucial evidence as to how the ARM procedure and principles should be interpreted. He also believes that the communications surrounding the legal advice to be important evidence. The complainant contends that *"the public has the right to know what the correct interpretation should be of the University's published ARM Procedures".* He is of the view that the interpretation of the University's ARM procedure is *"completely unclear about the eligibility of Emeritus Professors".* He considers the University's actions in first carrying out an investigation into his complaint of academic misconduct and then subsequently abandoning it are confusing and contradictory. He also considers the administration of his complaint amounts to maladministration and the University has *"consistently acted to cover up serious academic misconduct by an Emeritus Professor; and senior administrators at the University misled me about the proper interpretation of the University's ARM Procedures".*

17. In light of the above the complainant considers that:

    - *"The public has the right to have issues of research integrity properly investigated: these are at the core of academic life.*

- *The public has the right to know about what happened to Cardiff University's abandoned investigation of my 'Complaint of Academic Misconduct': otherwise, how can there be any confidence in the integrity of the administration of Cardiff University?*

- *The public has the right to an open and transparent understanding of Cardiff University's published procedures, so that these procedures can be correctly interpreted. In particular, a legal opinion about the meaning of these procedures should be accessible to the public".*

Public interest arguments in favour of maintaining the exemption

18. The University referred to the importance of maintaining the principle behind LPP in relation to the confidentiality of communications between a client and his or her lawyer for the purpose of obtaining legal advice. It also considers there is a public interest in safeguarding the openness of communications between a client and lawyer to ensure access to full and frank legal advice, which is fundamental to the administration of justice.

19. The University does not consider it to be in the public interest to *"disclose information that would undermine the efficiency and effectiveness of public authorities by disallowing public authorities the ability to seek and obtain expert legal advice for consideration in private to assist with meeting its legal obligations"*.

20. The University also pointed out that the withheld information contains information which discusses the rights and freedoms of an individual other than the requestor which would also need to be considered when assessing disclosure.

21. The University does not accept the complainant's points that it has provided contradictory information about the way it investigated the allegations he made. The University acknowledged that there was a delay in investigating the allegations in question. However, the University confirmed that the complainant had been informed of the process and conclusions relating to the investigation. He has also been informed of the reasons for the University concluding the investigation at stage 1 of the ARM procedure, an option which is available under the procedure.

22. The University considers the matter to which the legal advice relates to be 'live' both at the time of the request and at the present time. It explained that the advice would continue to be considered in light of further questions around the operation of its ARM procedure. In

addition, the University pointed out that the complainant has indicated his intention to pursue a legal claim against the Emeritus Professor and another researcher who worked on the same project.

23. The University considers that the particular issue which the legal advice relates to "*is relatively narrow in its context in regards to public interest and directly concerns a limited number of individuals (3)"* ie 3 individuals directly affected by the matter to which it relates, one of whom is the complainant. The University acknowledges that the complainant has a personal interest in the matter as he raised the allegation of academic misconduct. However, it does not consider that there is a significant wider public interest in disclosure of the information that would override the principle of LPP in this case.

Balance of the public interest test

24. The Commissioner considers the University has, to some extent, underestimated the public interest in favour of disclosure in this case. In addition to the usual arguments that disclosure would aid transparency and accountability, the Commissioner accepts that the legal advice itself relates to a specific case (ie an allegation made against an Emeritus Professor), and therefore specifically affects a limited number of individuals. However, she considers that the legal advice could have implications for other individuals in the event of a similar allegation being made in the future. Disclosure of the legal advice would also enable members of the public to understand the scope of the ARM procedure and may therefore aid public debate. The Commissioner also recognises the complainant has a personal interest in seeing the withheld information in this case as it relates to allegations he made against the Professor in question.

25. However, the Commissioner recognises the general principle that clients should be able to receive free and frank legal advice from their lawyers The Commissioner considers that there will always be a strong argument in favour of maintaining legal professional privilege. The Information Tribunal affirmed this in the *Bellamy* case when it stated:"*…there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest…It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case…".*

26. The Commissioner accepts there will always be an initial weighting in terms of maintaining the exemption, because of the public interest in the maintenance of LPP. However, the Commissioner recognises that there are circumstances where the public interest will favour disclosure. The Commissioner considers that factors which might suggest equally strong countervailing arguments include circumstances where substantial amounts of money are involved, where a decision will affect a large amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following her inspection of the information, the Commissioner could see no sign of unlawful activity, evidence that the University has misrepresented any legal advice it has received or evidence of a significant lack of transparency.

27. In reaching a view on the balance of the public interest in this case and deciding the weight to attribute to each of the factors on either side of the scale, the Commissioner has considered the circumstances of this particular case and the content of the withheld information. She accepts that the complainant has a personal interest in disclosure of this information and that there may be a limited public interest in disclosure of the information. However, she is mindful of the strong public interest inbuilt into LPP in protecting the confidentiality of advice between a lawyer and his or her client. In the absence of any countervailing factors in favour of disclosure the Commissioner has concluded that the balance of public interest is weighted in favour of maintaining the exemption and consequently, the University was correct to rely on section 42 of the FOIA to withhold the information requested.

Right of appeal

28. 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: 0870 739 5836
    Email: GRC@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

29. 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.

30. 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 .....

Joanne Edwards
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF