

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 2 August 2022

Public Authority: The University Council
Cardiff University

Address: inforequest@cardiff.ac.uk

Decision (including any steps ordered)

1. The complainant requested various information relating to a particular report produced by Cardiff University (the University). The University provided some information, stated other information was not held and withheld other information under section 43 (commercial interests) of the FOIA. The Commissioner's decision is that the University applied section 43 correctly to some information and that it does not hold any further information relevant to the request.
2. The Commissioner requires the University to take the following steps to ensure compliance with the legislation.
 - Disclose a copy of the withheld information with the exception of names, job titles and signatures within the tenderer's declaration and the contract.
3. The University must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

Request and response

4. On 17 November 2020, the complainant wrote to the University and requested information in the following terms:

"1. Please supply all documents setting out the basis of the preparation of the Cardiff University School of Journalism report entitled 'The Range and Depth of BBC News and Current Affairs: A Content Analysis'. Who instructed Cardiff University? The report is online at: https://www.ofcom.org.uk/data/assets/pdf_file/0025/173734/bbc-news-review.pdf

2. Who paid Cardiff University to conduct this report? Please supply all relevant documents including contracts and documents.

3. Has Cardiff University been involved in the preparation of the research that underpinned OFCOM's second Annual Report on the BBC and the accompanying performance report relating to 2018/2019? If so please provide all contractual and briefing documents between Cardiff University and OFCOM. In relation to this research:

a) Indicate how the research teams were selected for the content analysis;

b) By reference to pages 30, 34, 51 and 52 of OFCOM's report covering April 2018 to March 2019 and Annex 2 the accompanying performance report at pages 17, 18, 21, 25, 26, 29 and 30 giving the results for several survey questions and giving in various contexts the percentages of people asked who think that the BBC is performing in providing impartial news. The source is given as BBC Performance Tracker of which brief details are given at page 107. Please provide a copy of and details of the brief that was given or any relevant meeting notes for any surveys conducted by Cardiff University that led to these results;

c) How was the decision reached on the remit for the content analysis and audience research sections of the Report and the audience sample selected?

d) The remit focused on breadth of coverage and avoided assessing impartiality. Was this a decision taken by Cardiff University or was it taken in conjunction with OFCOM and/or the BBC?;

e) It is noted in the OFCOM survey that the audience research carried out into impartiality excluded those with strong opinions on the BBC and/or Brexit. Was this a decision taken by Cardiff University or in concert with OFCOM and why?; and

f) Whether OFCOM altered or changed the presentation of any relevant Cardiff University reports and why.

Please provide all relevant documents relating to the above questions including a copy of any original report and any interim reports by Cardiff University to the BBC;

4. To what extent was Cardiff University involved in the BBC Prebble Report in 2013, and any work undertaken during the 2016 referendum and, if so, in respect of each item of work:

- a) how were the research teams selected for the content analysis;
- b) a copy of and details of the brief that was given or any relevant meeting notes for the surveys in all such research work or surveys on which Cardiff University was involved;
- c) how was the decision reached on the remit for the content analysis and audience research sections and audience sample of any such work;
- d) details as to how the survey answers were coded in each case or otherwise how the raw data was extrapolated to create the percentage results or findings shown in any such reports; and
- e) Whether the BBC sought changes or alterations to the report or otherwise altered or changed the presentation of any results or findings.

Please provide any relevant documents including copies of original reports and any interim reports by Cardiff University given to the BBC;

5. In the work for Ofcom, and in the earlier work by the media department in connection with the BBC Prebble report of 2103, was there any vetting process or internal discussion about researchers with very strong pro-EU views working on research commissioned by the BBC relating to the BBC's coverage of the Brexit debate? Was there any assessment undertaken of researchers' understanding of the basic EU terrain, or whether their own preconceptions might influence their conclusions on the data? For example, was such influence considered in reaching the finding in OFCOM's Annual Review of the BBC that EU sources had been poorly represented; in the decision to relegate to a footnote the assertion that there had been a 50% fall in UKIP sources between 2007 and 2012 along with the assumption that eurosceptic voices were adequately represented elsewhere in coverage; or in the decision to focus on the gender of political speakers rather than on a clear discrepancy between numbers of speakers from particular parties in the referendum debate. Please provide all relevant documents in each case;

6. A copy of all collected data used to compile the content analysis work undertaken to support any research commissioned by the BBC, including the OFCOM report referred to above and full list of all sources coded as part of the Brexit subsection;
 7. All monitoring data collected during the 2016 referendum, in particular the full list of sources coded as part of the research undertaken into BBC News at Ten. Details of who funded this research. Please provide all relevant documents;
 8. All monitoring and coding data from the two periods surveyed in 2007 and 2012 and used as part of the Prebble Report. Also any information on why these two particular monitoring intervals were selected. Please provide all relevant documents;
 9. Whether News-Watch reports on the subject of the BBC's impartiality obligations played any part in the production of the preparation of Cardiff University reports re monitoring the BBC and, if so, what?
 10. Whether there are any direct links or funding arrangements between the EU itself and the Cardiff School of Journalism. Please provide copies of any relevant documents".
5. The University responded on 20 February 2021, provided some information, stated other information was not held and withheld some information under section 43 of the FOIA.
 6. On 19 April 2021 the complainant wrote back to the University and requested an internal review in respect of its application of section 43 of the FOIA to parts 1 and 2 of the request and the response relating to part 5 of the request.
 7. The University provided the outcome of its internal review on 19 April 2021 and upheld its decision that section 43 had been properly applied. The University also confirmed that no further information was held relevant to the request other than that which had been provided and that withheld under section 43.

Scope of the case

8. The complainant contacted the Commissioner on 8 July 2021 to complain about the way their request for information had been handled.
9. The scope of the Commissioner's investigation into this complaint is to consider whether the University correctly applied section 43 to the information held relevant to parts 1 and 2 of the request. He will also be

investigating whether the University holds any further recorded information relevant to part 5 of the request.

10. The withheld information relevant to parts 1 and 2 of the request comprise the contract between the University and Ofcom and a tenderer's declaration form relating to the contract.

Reasons for decision

Section 43 – commercial interests

11. Section 43(2) of the FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.
12. The exemption can be engaged on the basis that disclosing the information either "would" prejudice commercial interests, or, the lower threshold, that disclosure "would be likely" to prejudice those interests.
13. The term "likely" is taken to mean that there has to be a real and significant risk of the prejudice arising, even if it cannot be said that the occurrence of prejudice is more probable than not. For the Commissioner to accept that prejudice "would" result, he must be satisfied that this outcome is more likely than not.
14. The Commissioner's guidance¹ on section 43(2) of the FOIA at paragraph 13 states:

"There are many circumstances in which a public authority might hold information with the potential to prejudice commercial interests. The range of activities below indicates where this is most likely, although there may be other situations where commercial information is held.

- Procurement – many public authorities will be involved in the purchase of goods and services and will hold a wide range of information relating to this procurement process. This can include: information provided during a tendering process about both

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

successful and unsuccessful tenders; details of a contract with a successful company; future procurement plans; and performance about a contractor”.

15. In this case, the Commissioner is satisfied that the withheld information is commercial in nature as it relates to the performance of a commercial contract. It includes information such as method statements and financial information.
16. Having determined that the information is commercial in nature, the Commissioner has gone on to consider the prejudice which disclosure would or would be likely to cause and the relevant party or parties that would be affected.
17. For section 43(2) to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed must relate to the commercial interests;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice to those commercial interests; and
 - Thirdly, it is necessary to establish whether the alleged prejudice would, or would be likely, to occur.

The applicable interests

18. The University considers that disclosure of the withheld information would be likely to prejudice its own commercial interests. The University advised the Commissioner that, as part of its initial response process, it noted that disclosure would be likely to prejudice Ofcom’s commercial interests. This view was shared with Ofcom for comment who confirmed that “they were content with this argument”. The University confirmed that it “took into account the fact that Ofcom indicated their commercial interests would also be prejudiced but it was and is not a deciding factor in our use of this exemption”. The Commissioner has taken this to mean that the University is only claiming the section 43 exemption on the basis that disclosure would prejudice the University’s own commercial interests.
19. The University has advised that:

“A loss of research income and consequently reduced research output due to an inability to compete effectively for research funding. High-quality research output is a metric in the Research Excellence

Framework (REF) across the Higher Education sector. A reduction in this would lead to a diminished position in the REF rankings which in turn would lead to a further reduction in research funding and opportunities. It is noted that there are likely to be future opportunities for funding in this field and so we believe the exemption would still apply”.

20. The Commissioner accepts that the prejudice envisaged would be to the University’s own commercial interests. Therefore, the Commissioner is satisfied that the first criterion is met. This is not to say that he agrees it will happen; simply that the criterion is met.

The nature of the prejudice

21. The University stated that its School of Journalism, Media and Culture (JOMEC) had recently been ranked second in the UK and not only best in Cardiff but also best in Wales in all subjects in REF2021. In light of this success, the University believes it would be held up as an example of good practice by its competitors.
22. The University considers that disclosure of the withheld information would reveal the design, strategy and costings for each aspect of its successful tender application. It would allow a competitor an unfair insight into what is required for a successful tender application. Competitors, some of whom may not be subject to FOIA, would be likely to benefit from disclosure and would draw on the University’s expertise and costings to further their own commercial gain. This would undermine the University’s ability to compete and negotiate, in a highly competitive market, on a level playing field in future similar projects. It would also affect the University’s ability to distinguish itself from its competitors in the future and impact on the author of the report’s ability to apply for funding in the future.
23. The University believes that disclosure of “Ofcom’s commercial information” might comprise the relationship between the two organisations and have an adverse effect on any future relationship between the University and any company that it submits tenders to in the future.
24. The University argues that disclosure would also be likely to have an impact on any colleagues within the academic school who wished to apply for any future funding opportunities. As such the University considers that “the impact of release of these documents is not limited to only the author of the document, but to the entirety of the School of Journalism, Media and Culture”.
25. The University is also of the view that disclosure of the withheld information will not only prejudice its commercial interests in respect of JOMEC’s ability to effectively compete for research funding, it is also

concerned that “disclosure of this type of information sets a precedent which could allow for this harm to undermine all other Schools in the University, were the same requested of them”.

The likelihood of the prejudice occurring

26. The University considers the prejudice envisaged to be likely to occur. Although the contract in question is dated May 2019, other competitive tenders are available from both Ofcom and other media organisations.

27. According to the University, the author of the report in question has a proven strong track record of applying for, and being successful in applications for funding from media regulators². The University stated that:

“Because these applications relate to work with industry bodies there is a degree of confidentiality to protect an author’s ability to apply for funding without being undermined by competitors”.

Since this application, the author has already applied for further research funding with Ofcom and was successful in this application. It is expected, from the author’s involvement with colleagues in the field, that future funding opportunities will continue to arise and the author may wish to apply for these, as they have done consistently over the last several decades” (as evidenced in the link above relating to the author’s academic staff page).

The Commissioner’s analysis

28. The Commissioner has reviewed the withheld information, in conjunction with the University’s arguments. He notes that the University has applied section 43(2) to the contract in its entirety as well as the tenderer’s declaration.

29. The contract itself consists of:

- Generic conditions of contract
- Annex A - Ofcom’s Standard Terms and Conditions of Contract for Services
- Annex B – Contract Price information

² <https://www.cardiff.ac.uk/people/view/182923-cushion-stephen>

- Annex C – Specification of Service
 - Annex D – Contractor Proposal
30. The Commissioner is not persuaded that disclosure of the generic and standard terms and conditions of the contract for Services would be likely to prejudice any party's commercial interests. In reaching this view the Commissioner notes that Ofcom already publishes its standard terms and conditions of contracts. In addition, Annex C appears to the Commissioner to be the contract 'brief' which Ofcom would have published when the contract was put out to tender. Again, the Commissioner is not persuaded the disclosure of Annex C would be likely to prejudice any party's commercial interests. Finally, the tenderer's declaration consists of standard terms and conditions and names and signatures of the parties to the contract. Again, the Commissioner is unable to see the causal link between disclosure of this document and the prejudice envisaged by the University to its commercial interests.
31. Annex B and Annex D of the contract relate directly to information which has been supplied by the University as part of its tender. Annex B refers to the pricing for each element of the research plan/project. Amongst other things Annex D includes information about the research plan, the methodology that would be used for the research project and detailed information about the sampling that would be undertaken as part of project.
32. Annex B refers to pricing for various elements of the project. The University has not submitted any specific representations in relation to disclosure of the pricing information. The Commissioner accepts that pricing information can be commercially sensitive and has the potential to give competitors an insight into the University's pricing for this specific contract. The Commissioner also notes that the University has provided evidence that it is likely to retender for similar contracts in the future. However, the Commissioner notes that the contract was agreed around 18 months prior to the request being made. As such, he considers that any pricing for any new contract is likely to have changed in this period. In addition, he considers that the pricing information within the contract is a fairly high level breakdown and doesn't provide a great deal of granularity into the University's pricing mechanisms. The Commissioner is of the view that any new tender/contract is unlikely to be as similar as this one so that would allow a competitor to simply reproduce the pricing information within the contract in any new tender. Finally the Commissioner considers that price is only one element that is taken into account when an organisation undertakes a tender evaluation exercise to determine who to award any contract to.
33. Having considered the content of information within Annex D in conjunction with the University's representations, the Commissioner has

noted that a large proportion of the information contained within this annex is reproduced, almost word for word, within the report³ which was produced on completion of the research carried out, in particular the information within pages 31 to 35 of the contract. In terms of the other information contained within Annex D, the Commissioner does not consider it to be dissimilar in type to the information which has been reproduced within the report.

34. The Commissioner also considers that the University has not taken into account arguments considering the other factors which might affect the likelihood of prejudice to its commercial interests. These include the different approach it would be likely to need to take in respect of other tenders, how other weighting systems might affect which tenders are successful, and other factors or circumstances which might effect the likelihood of success of submitting similar tenders in future tendering exercises. The Commissioner considers it would be unlikely to be enough to simply copy and paste the tender approach taken in this case to another tendering competition with the myriad of other different factors which might come into play.
35. In conclusion, the Commissioner has not been persuaded by the University's arguments in respect of its application of section 43(2) to the withheld information.
36. For the above reasons, the Commissioner finds that prejudice to the University's commercial interests would not be likely to occur through disclosure of the information in question. As this test is not met, there is no requirement for the Commissioner to proceed to carry out the public interest test required by section 2 of the FOIA.

Section 1 – general right of access

37. Section 1 of the FOIA states that any person making a request for information is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request and, if that is the case, to have that information communicated to him.
38. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the authority to check that the information is not held and he will consider any other

³ https://www.ofcom.org.uk/__data/assets/pdf_file/0019/174205/bbc-news-review-content-analysis-full-report.pdf

reasons offered by the public authority to explain why the information is not held. The Commissioner will also consider any reason why it is inherently likely or unlikely that information is not held.

39. Request 5 seeks information as to whether there was any vetting process or internal discussion about researchers with strong pro EU views working on research commissioned in connection with the BBC Prebble report of 2013. In their complaint to the Commissioner the complainant stated that, in their view, the University has disregarded this question and in the first instance "ignored the specific point about a drop in UKIP support by replying that the coding process was not influenced by political views". The complainant considers that this answer ignores that the interpretation of coding might have been influenced by political view. The complainant does not consider that this point was addressed in the internal review.
40. During his investigation the Commissioner advised the complainant that the FOIA only applies to recorded information held by a public authority and does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold. As such, the Commissioner confirmed that he would only be able to investigate whether the University holds any further recorded information falling within the scope of this particular request.
41. In its initial response dated 20 February 2021 the University stated that:

"For work associated with the Prebble Report, there was no discussion of the political views of researchers who carried out the content analysis at any point in the process. The design of the content analysis was agreed in consultation with the BBC as discussed above, and the process of coding for content is not influenced by political views. Our intercoder reliability tests have been reported in the published journal article, and showed high reliability for all variables used in published content (including the report for the BBC and the peer reviewed article). For the Ofcom study, all data was interpreted independently by author".
42. In its internal review response the University confirmed that it did not hold any further information relevant to part 5 of the request.
43. As it was not clear, the Commissioner asked the University to confirm whether the information provided in its initial response constituted recorded information held relevant to the request or background/normal course of business information provided in response to the request. The University confirmed that no recorded information was held in relation to this part of the request. It also explained that any further information held in respect of the Prebble report was destroyed in June 2018 in line with the University's retention schedules.

44. In terms of the searches carried out, the University advised the Commissioner that contact was made with the individual who would hold the information – the author of the report - and they confirmed that some information was never held and any remaining information on the topic was only held until July 2018. The University advised that the author of the report is the only relevant person who could have held the information in question and as such no wider searches were necessary.
45. The Commissioner understands that the Prebble Report is a report on political bias at the BBC compiled by JOMEC which was published in 2012. In its initial response to the request, the University confirmed that in respect of the Prebble report “in accordance with its data retention schedules, the collected data was retained only up until July 2018, five years after the completion of the project”.
46. The Commissioner is satisfied that the University has conducted an appropriate search to identify relevant information held. He is also satisfied that if the University did at one time hold information falling within the scope of the request, due to its age it is reasonable to expect that information to have been destroyed in accordance with the University’s retention procedures.
47. In conclusion, based on the searches undertaken and the other explanations provided, the Commissioner is satisfied that, on the balance of probabilities, the University does not hold any recorded information within the scope of part 5 of request.

Right of appeal

48. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

49. 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.
50. 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
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