

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 June 2023

Public Authority: The Council of the University of Exeter
Address: Stocker Road
Exeter
EX4 4PY

Decision (including any steps ordered)

1. The complainant has requested information about the University and the Stonewall Equality Index. The University disclosed some information, confirmed other information was not held and withheld the remainder under section 43(2) (commercial interests) of FOIA. The University then agreed to disclose further information but continued to withhold specific information under section 43(2).
2. The Commissioner's decision is that:
 - On the balance of probabilities, the University holds a copy of its submission to Stonewall as per section 3(2)(b).
 - Whilst the withheld information engages section 43(2), the public interest lies in disclosure.
3. The Commissioner requires the public authority to take the following steps:
 - Either disclose the submission (with all personal data redacted) or issue a refusal notice under section 17 which explains why it's exempt

- Disclose all withheld information (with all personal data redacted).
4. The public authority 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 the Act and may be dealt with as a contempt of court.

Request and response

5. On 11 August 2022 the complainant wrote to the University and requested:

"1. Confirm whether your organisation applied to be part of the Stonewall Workplace Equality Index in A) 2018 (for 2019), B) 2019 (for 2020) or C) 2021 (for 2022) (NB the index was suspended in 2020/21 because of Covid)

2. Give details of the total amount of money you paid to Stonewall in 2021 whether or not as payment for goods or services.

3. State whether you intend to continue your membership of any Stonewall scheme in the future, and if so which.

If the answer to any part of 1 is yes please supply:

4. Any application you made in 2021 to be included on Stonewall's Workplace Equality Index, including any attachments or appendices to those applications. Please redact personal details if necessary.

5. Any feedback you received in 2018/19 or 2019/20 or 2021/22 from Stonewall in relation to either application or programme. This must include the priorities or objectives written by your organisation's representative at the end of the feedback form (under the heading 'Priorities for the year ahead' in 2019; 'Your priorities' in 2020)."

6. On 6 September 2022 the University responded. It provided information in response to parts 1-3 of the request, it denied holding any information in response to part 4 and refused to disclose the information requested in part 5 under section 43(2).
7. On 21 September 2022 the complainant requested an internal review.
8. On 16 November 2022 the University provided the outcome of the internal review. It upheld its previous position.

9. The background information that is relevant to this case can be found in paragraphs 12-16 of IC-125081-Q8J6.¹

Scope of the case

10. The University originally withheld three entire documents under section 43(2): Stonewall Feedback for 2018-2019; 2019-2020 and 2022². During this investigation, the University confirmed that it was incorrect to apply section 43(2) blanketly and withhold the entirety of the three documents. The University confirmed 'the content should be released, except for the scores directly relating to the University.'
11. Therefore, the scope of this case is to consider whether the University is correct to withhold the scores that it received from Stonewall, as part of the feedback requested in part 5 of the request. The Commissioner will also consider whether the University holds any information that falls within the scope of part 4 of the request.

Reasons for decision

Section 3(2) – Information held by a public authority

12. The Commissioner believes there's been a misunderstanding regarding the University's position in relation to part 4 of the request. The complainant is concerned the University is refusing to provide it under section 43(2), when actually the University has confirmed it cannot provide this information because it doesn't hold it.
13. When the University wrote to the complainant on 6 September 2022, it explained that 'Stonewall's Workplace Equality Index is a subscription-based benchmarking tool (included within membership of their Diversity Champions programme). Applications are submitted via their online portal and therefore held by Stonewall.'
14. Section 3(2) explains that, for the purposes of FOIA, information is held by a public authority if
- a) "It is held by the authority, otherwise on behalf of another person, or

¹ [Reference: IC-125081-Q8J6 \(ico.org.uk\)](https://ico.org.uk/referencenumber/IC-125081-Q8J6)

² Stonewall's Equality Index was not conducted in 2021 due to Covid-19.

- b) It is held by another person on behalf of the authority.”
15. As explained in the Commissioner’s published guidance³, each case needs to be reviewed individually to determine whether a public authority holds information for its own purposes.
 16. There are various factors that will assist in determining whether the public authority holds the information for the purposes of FOIA. Factors that would indicate the information is not held by a public authority include:
 - the authority has no access to, use for, or interest in the information;
 - access to the information is controlled by the other person;
 17. The University has confirmed that ‘On receipt of the FOI request the Information Governance contact the department within the business who handles this data, which includes the submissions and responses regarding Stonewall to supply the data. We were informed that we do not hold a copy of the submission as it can be viewed directly on line by Stonewall.’
 18. The University has clearly compiled and then submitted information directly to Stonewall via Stonewall’s online portal. It has confirmed that it did not download, retain, save, or print a copy of its own submission to Stonewall.
 19. However, in order to determine whether the submission was held by Stonewall on behalf of the University, for the purposes of FOIA, the Commissioner asked the University to explain the circumstances in which it would look to access the submission again. For example, upon receiving Stonewall's feedback based on the submission in question, would the University return to the submission to ensure any aims and goals are met or would it revisit the submission again as a starting point for any future submissions. The University didn’t answer these specific questions.
 20. The Commissioner notes that the University can access the submission through Stonewall’s portal at any time. Furthermore, the submission relates to the monitoring of equality which the University had delegated to Stonewall and the submission will directly inform the University’s performance. For these reasons, the Commissioner considers it likely that the information is held by Stonewall on the University’s behalf.

³ [Information you hold for the purposes of FOIA | ICO](#)

21. It's therefore the Commissioner's decision that the submission is held by the University as per section 3(2)(b) of FOIA – the University must either disclose it (with all personal data redacted) or issue a valid refusal notice which explains why it is exempt.
22. To reiterate, the University failed to provide adequate evidence to explain why it doesn't hold the submission for the purposes of FOIA. On the balance of probabilities, and given the lack of evidence to the contrary, the Commissioner has concluded the information is held based on the facts of this case.

Section 43(2) – commercial interests

23. The complainant disputes the University's decision to withhold the information requested in part 5 of the request, the feedback that the University received from Stonewall. To reiterate, the University has now conceded to disclose all of the feedback received except the scores that Stonewall awarded the University. There are multiple scores that relate to different topics across the relevant years; as well as the University's ranking. All scores are expressed numerically.
24. In order for section 43(2) to be engaged the Commissioner considers that certain criteria must be met:

"It is not sufficient for you to simply argue that because information is commercially sensitive, its disclosure would, or would be likely to, prejudice commercial interests. You must be able to demonstrate a causal relationship between the disclosure of the information in question and the prejudice you envisage."⁴
25. The University has explained 'It is felt that the marking of the sections would put the University at a disadvantage in that it may discourage staff within the LGBT+ to apply to study or apply for work. It could also affect the University's ability to encourage new research. Both these elements would have a significant long-term impact on the University in ratings, staffing and student applications and financially.'
26. It also explained that it believed competitors of the University would use the scores to highlight its weaknesses, attracting students to study at their establishment over the University.

⁴ [Section 43 - Commercial interests | ICO](#)

27. The University has indicated that 'Within the contract with Stonewall, it is believed there is a clause which means they do not anticipate the sharing of their feedback information publicly.'
28. The Commissioner has considered a similar case⁵⁵ in which the public authority withheld information because to disclose it would be likely to prejudice the commercial interests of Stonewall. The argument in paragraph 23 is insufficient to engage section 43(2) in this instance, as the University has failed to demonstrate the causal link between disclosure of the scores and the prejudice to Stonewall.
29. However, he does accept that disclosure of the scores might influence an individual's perception of the University and their decision to be affiliated with it and by extension the University's commercial interests.
30. It's not clear to the Commissioner what level of prejudice the University is relying upon in this instance. It has cited both the lower threshold, 'would be likely to' and the higher threshold, 'would'. The Commissioner doesn't believe that the University has supplied sufficient evidence, or arguments, to indicate that the prejudice is more likely than not to occur. Therefore, he considers section 43(2) engaged but on the lower threshold of prejudice, 'would be likely to.'

The public interest test

31. Even though the exemption is engaged, information can only be withheld if the public interest in maintaining the exemption outweighs that of disclosure. The University has acknowledged the public interest in 'transparency and accountability in the way a public authority performs its functions.' It's repeated its previous arguments that disclosure 'is likely to prejudice the University's market position and could be used by competitor institutions to negatively impact the University's standing.'
32. There is a public interest in understanding the role of, and influence, of Stonewall upon public authorities. Disclosure of the scores awarded to the University, and its ranking, for the years 2018, 2019, 2020 and 2022 would demonstrate whether the University has improved according to Stonewall's Equality Index. It would also contextualise the qualitative feedback that the University has already conceded to disclose.
33. Disclosure of the scores would provide a full picture of the University's performance and Stonewall's influence; rather than choosing to just disclose the feedback without the scores or alternatively disclose the

⁵⁵ [Reference: IC-125081-Q8J6 \(ico.org.uk\)](https://ico.org.uk/referencenumber/IC-125081-Q8J6)

scores without the feedback. The University has expressed concern that the scores 'are not reflective' of the work that its undertaking in 'promoting to develop a diverse student and staff ratio.' However, the scores are an accurate reflection of Stonewall's perception of the University's performance at that time; the University should not withhold the scores solely because they disagree with their accuracy.

34. The decision in IC-125081-Q8J6 was that the public interest in disclosing Stonewall's feedback outweighed that of maintaining section 43(2). Since the University has conceded to disclose all of the feedback that it received from Stonewall, the Commissioner isn't wholly convinced that the prejudice that would arise from disclosure of the scores is as significant or as likely as the University thinks.
35. The Commissioner believes that the prejudice that the University has described is just as likely to occur from disclosure of the feedback as it is the scores; the scores are just a numerical representation of the information that the University has now agreed to disclose. If public authorities are continuing to utilise Stonewall's services, it's important that they are transparent about all aspects of their own performance. Therefore, it's the Commissioner's decision that the scores, and all information previously withheld under section 43(2) should be disclosed, with any personal data redacted.

Right of appeal

36. 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

37. 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.
38. 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

Alice Gradwell
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