

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 May 2024

Public Authority The Governing Body of the Royal Agricultural University
Address: Tetbury Road
Cirencester
GL7 6JS

Decision (including any steps ordered)

1. The complainant has requested information relating to the University and Colleges Employers Association. The Royal Agricultural University ("the University") refused to provide the requested information, citing section 41(1).
2. The Commissioner's decision is that the withheld information engages section 41 (information provided in confidence) and the balance of the public interest lies in maintaining the confidence.
3. The Commissioner does not require further steps.

Request and response

4. On 29 November 2023 the complainant requested:

"Part I The contents of the 2022-2023 and 2023-2024 formal UCEA consultation that correspond to Stage 3 of the "Consultation process", and which you need to fill when you decide to partake in the New JNCHES mechanism. I refer to the mechanism described in the "UCEA Code For Participating Employers", for further contextualization.

Part II Electronically recorded information (memorandums, e-mails, briefings, guidance, etc.) related to the "3 in 3" strategy deployed by UCEA and its members in response to UCU's Marking Boycott. You can restrict search from the 01-08-2022 to the 25-11-2023 (1 year 4

months approx.) and only deal with the accounts of your "Senior Management Team" (SMT or equivalent)."

5. The University responded on 21 December 2023, refusing the request under section 14 (vexatious or repeated requests) because the request was a round robin request.
6. The complainant requested an internal review on the same day.
7. The University provided the outcome to its internal review on 19 January 2024. It upheld its previous position.

Scope of the case

8. The complainant contacted the Commissioner on 19 January 2024 to complain about the way their request for information had been handled.
9. During the Commissioner's investigation, he explained to the University that there is nothing inherently vexatious about a round robin request and the University withdrew its reliance on section 14. Instead it refused the request under section 41(1) (information provided in confidence) and section 43(2) (commercial interests).
10. The Commissioner considers that the scope of his investigation is to consider whether the withheld information is exempt from disclosure. He'll begin by considering the University's application of section 41(1). Depending on his findings, he may go onto consider the University's application of section 43(2).

Reasons for decision

11. Section 41(1) of FOIA states that information is exempt from disclosure under the FOIA if:
 - a) it was obtained by the public authority from any other person (including another public authority), and
 - b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
12. The withheld information in this case is emails, all of which originated from the UCEA, and were therefore obtained by the University from another person.

13. The complainant has expressed concern that:

“Usage of section 41 is precluded by the simple fact that the substantive information requested in my FOIA emanates from RAU as the PA. They are the ones answering a series of skeleton questionnaires which, by themselves, do not attract the Coco vs Clark quality of confidence. I am interested in the information that RAU generated.”

14. The Commissioner has looked at the withheld information, one email from the UCEA to the University does include a blank copy of the questionnaire referred to in part 1 of the request.

15. Looking at part 1 of the request, the Commissioner is satisfied it covers a copy of the questionnaire as it's provided by the UCEA to its members; not a copy completed by the University, if indeed it did go onto complete this questionnaire.

16. In order for the disclosure of these emails to represent a breach of confidence, the information:

- must have the necessary quality of confidence;
- must have been imparted in circumstances importing an obligation of confidence;
- must be an unauthorised use of the information to the detriment.

17. The University has explained:

“The University is a member of UCEA and pays a membership fee to access UCEA's services. Pay negotiations are conducted on behalf of the University and other HE institutions (not all of which are public authorities within the meaning of the FOIA) by UCEA on a confidential basis. The withheld information is not publicly available.”

18. The Commissioner is satisfied that the withheld information is worthy of protection in the sense that the UCEA has a genuine interest in the contents remaining confidential, because its business model usually charges for the information.

19. The complainant has drawn the Commissioner's attention to information in the public domain that they **believe** is the same as the information being withheld in this instance. This information appears to have been disclosed under FOIA.

20. The Commissioner accepts that there is a website, containing communications between a higher education provider and UCEA, that appears to have been disclosed under FOIA.

21. For information to maintain the necessary quality of confidence, it cannot be in the public domain. For information to be in the public domain, for the purposes of FOIA, it must easily, readily and realistically be accessible to a member of the general public. The Commissioner's guidance expands on this, saying that the information must be found through a simple internet search and finding it must not require unrealistic persistence or efforts nor any specialised knowledge.¹
22. The complainant has specialised knowledge, and an interest, in the UCEA and its communications with higher education providers. However, the Commissioner can't find the information in question from a simple, or any, internet search – therefore it's not in the public domain.
23. The Commissioner is satisfied that the withheld information is neither trivial nor otherwise accessible. Therefore, it has the necessary quality of confidence.
24. The Commissioner is also satisfied that the information was imparted in circumstances imparting an obligation of confidence. All emails are marked up 'private and confidential' and clause 4.2 of the UCEA's terms and conditions² for members states:

"UCEA materials, or extracts from them, which are not publicly available on the UCEA website cannot be made public or distributed to other organisations or individuals without UCEA's explicit prior consent."
25. Furthermore, the University consulted with the UCEA regarding disclosure when it received this request. The UCEA didn't consent to the disclosure of the withheld information.
26. The Commissioner must now consider whether unauthorised disclosure would cause a specific detriment to the party that provided it or any other party.
27. If the requested information were disclosed, it would allow individuals to access information which is usually protected behind a paywall, thus undermining the UCEA's commercial interests and business model.
28. The University is also concerned that disclosure would damage its reputation, as well as the trust between the University and the UCEA.
29. The Commissioner has also reminded himself of the role of the UCEA. It describes itself 'the leading voice on employment and reward matters in

¹ [Information in the public domain | ICO](#)

² [Conditions of Membership \(ucea.ac.uk\)](#)

the UK HE sector. We support our members to be employers of choice through collaboration, advocacy and expert advice.' Much of the withheld information relates to the UCEA's work to support Universities in times of ongoing industrial action.

30. The Commissioner notes that disclosure wouldn't just cause substantial harm to UCEA's commercial interests or reputational damage to the University, but it could also adversely affect the position of UCEA members regarding union and pay disputes.
31. Were the University to breach this confidence and disclose the requested information, it's likely that the UCEA would be able to bring against it an actionable breach of confidence. This means all of the criteria at paragraph 16 have been met and therefore the exemption is engaged.
32. Although section 41 is an absolute exemption, it's accepted that if there is an overriding public interest in disclosure, this can be used as a defence against any breach of confidentiality that might be brought against a public authority disclosing information under FOIA. In other words, the Commissioner must balance the public interest in the information with the inherent public interest in preserving the principle of confidentiality.
33. The complainant has a specific interest in the UCEA, its role and its engagement with higher education providers, this is a valid interest for them to have. However, the Commissioner can't identify any public interest in the requested information, beyond the general public interest in public authority's being transparent and accountable by complying with requests that it receives under FOIA.
34. The University is concerned that:

'disclosing the information will have a detrimental impact on the public interest, by potentially undermining negotiations connected to the withheld information. UCEA, as a non-public body, has a right of privacy, and UCEA expects a commitment of confidentiality from its members. Also, as between UCEA's members, there is an expectation that UCEA information, some of which may have been imparted to UCEA in confidence by its members, will be treated as confidential and (as observed above) the membership of UCEA includes institutions that are not public authorities. The relationship of trust between the University and the UCEA would be undermined by disclosure.'
35. The UCEA makes a significant amount of information, including its approach to pay negotiations and industrial action, available to the

public on its website³ which goes a long way to satisfy the public interest in the request. The Commissioner must consider whether undermining the trust between the University and the UCEA would be proportionate, given the information that's already in the public domain.

36. Whilst the Commissioner acknowledges that another public authority appears to have disclosed similar information under FOIA, it would be remiss of the Commissioner to ignore the fact that, in relation to this case, the UCEA specifically requested the information not be disclosed.
37. On this occasion, the Commissioner is satisfied that section 41 applies and the public interest lies in preserving the principle of confidentiality. The Commissioner doesn't need to go onto consider the University's application of section 43(2) to the same information.

³ [Home \(ucea.ac.uk\)](https://www.ucea.ac.uk); [Union disputes 2023-24 \(ucea.ac.uk\)](https://www.ucea.ac.uk); [2023-24 New JNCHES pay round \(ucea.ac.uk\)](https://www.ucea.ac.uk)

Right of appeal

38. 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

39. 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.

40. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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