

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 June 2024

Public Authority: The Governing Body of the Royal Academy of Music

Address: Marylebone Road
London NW1 5HT

Decision (including any steps ordered)

1. The complainant has requested information relating to the contents of a formal Universities and Colleges Employers Association (UCEA)¹ consultation with the Royal Academy of Music (RAM) within certain date parameters. RAM refused to provide this information citing section 41 of FOIA – information provided in confidence.
2. The Commissioner's decision is that RAM has cited section 41 of FOIA appropriately to the requested information, apart from some limited information where section 41 is not engaged. However, RAM breached sections 1(1)(a) and 10(1) of FOIA by not confirming whether it held the requested information until the internal review and breached section

¹ UCEA explains on its website that it "provides its member institutions with timely advice and guidance on all employment and reward matters relevant to the HE sector". It conducts "voluntary collective negotiations at a national level on the annual base pay uplift to apply to non-senior staff".

17(1)(b) of FOIA by citing an exemption for the first time at the review stage.

3. The Commissioner requires RAM to take the following steps to ensure compliance with the legislation.
 - Disclose the single line response from RAM at part three, question four (2020-2021).
 - Disclose each response provided by RAM under part two, question one of the surveys, excluding contact details.
4. The public authority must take these steps within 30 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 29 November 2023, the complainant wrote to RAM and requested information in the following terms:

'Pursuant to the FOIA 2000, I'd like to respectfully ask for:

Part I The contents of the 2020-2021 and 2022-2023 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)'

6. On 15 December 2023 RAM responded and directed the complainant to the UCEA and information in the public domain.
7. The complainant requested an internal review on 17 January 2024 querying why section 21 had not been cited if the information was accessible and why RAM had not responded in line with the FOIA. The

complainant also referred to a particular email that they believed had been sent, falling within scope of Part II of the request.

8. On 22 January 2024 RAM provided its internal review and confirmed that it held some of the requested information under Part 1 but was withholding it under section 41 of FOIA. It stated that Part 11 was “not applicable...as we did not participate in the Marking and Assessment Boycott in 2022-23”.

Scope of the case

9. The complainant contacted the Commissioner on 14 February 2024 to complain about the way their request for information had been handled.
10. The Commissioner wrote to the complainant on 14 June 2024 outlining his view that any decision notice was likely to uphold RAM’s citing of section 41 and that it did not hold information relating to part II of the request. Checks had been made with the Senior Management Team as to whether this information was held. RAM stated that retaining this information is “not relevant to our purposes or operations”.
11. The complainant responded on 16 June 2023 to the Commissioner and accepted that the Commissioner did not need to continue with their complaint about part II of the request. However, they disagreed with the Commissioner’s view on part I of the request and asked for a decision to be made.
12. The Commissioner considers that the scope of his investigation is to look at whether RAM is entitled to rely on section 41 of FOIA as a reason for not disclosing the requested information at Part 1.

Reasons for decision

Section 41 – information provided in confidence

13. Section 41(1) of FOIA provides that

“(a) Information is exempt information if 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”.

14. The Commissioner has been provided with the withheld information. It consists mainly of consultation questions from the UCEA.

15. The Commissioner’s advice on section 41 states that -

“information will be covered by Section 41 if -

- it was obtained by the authority from any other person,
- its disclosure would constitute a breach of confidence.
- a legal person could bring a court action for that breach of confidence, and
- that court action would be likely to succeed.”²

Was the information obtained from any other person?

16. Section 41(1)(a) states that the information must have been obtained from “any other person”. In this instance, “any other person” is UCEA.

17. Not all the information held was obtained from UCEA. The Commissioner will consider this matter later in the decision notice.

Would disclosure constitute an actionable claim for breach of confidence

18. The usual test for section 41 cases is set out in the case of *Coco v Clark* [1969] RPC 41 which sets out three elements which must be present in order that a claim can be made. According to the decision in this case a breach of confidence will be actionable if:

- the information has the necessary quality of confidence;
- the information was imparted in circumstances importing an obligation of confidence; and

² <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

- there was an unauthorised use of the information to the detriment of the confider.

19. However, for that claim to be 'actionable' within the meaning of section 41(1)(b) of FOIA, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed.

Does the information have the necessary quality of confidence?

20. In order for information to have the necessary quality of confidence, it must be more than trivial and not otherwise accessible.

21. RAM contends that "The information is not trivial" and goes on to emphasise "that disclosure of it to a third party would place us in a highly invidious position as members of UCEA". The Commissioner's decision in [ic-260096-p5v9.pdf \(ico.org.uk\)](#) outlines the reasons why UCEA information is considered confidential and the UCEA's terms of membership state that it should not be shared with anyone who is not a member³.

Was the information imparted in circumstances importing an obligation of confidence?

22. RAM explained to the complainant in its internal review that -

"UCEA communicated the requests for information to its members marked explicitly 'in confidence' as part of the pay negotiation consultation process and under the terms and conditions of its membership. This information is therefore worthy of protection."

Would disclosure be detrimental to the confider?

23. RAM argues that "the potential consequences of disclosure are serious, could undermine the process, our relationship with UCEA..." The internal review describes the information as "highly sensitive".

24. RAM had told the complainant in the internal review that disclosure "had the potential to undermine the Academy's involvement in collective pay negotiations". The confider is UCEA and RAM contends that "disputes from the 2023-24 pay negotiations are ongoing". Though not stated, the Commissioner takes this to mean that the implications of previous information being released could undermine current negotiations.

³ [Conditions of Membership \(ucea.ac.uk\)](#)

Is there a public interest defence for disclosure?

25. RAM has not suggested that there would be any public interest defence for disclosure.
26. RAM's view is that there could be resulting "court action from staff or even students" should this information be disclosed.

The complainant's view

27. The complainant argued that -

"the substantial information (i.e., the answers) are generated by *themselves* [RAM] as the PA. Now, RAM will continue to argue that the questionnaire was provided 'in confidence' by UCEA, but this argument does not hold water because the overall nature of these questionnaires does not attract the *Coco vs Clark* qualities of confidence".

Their view is that, public repositories have detailed the process of consultation as part of the "UCEA Guide to Negotiations" and, most importantly, the nature of the questions. No substantial or inventive work is required to know the nature of the questionnaires." The complainant provided a link to information they state is accessible to the public.

The Commissioner's view

28. The Commissioner does not accept that the information is accessible to the public and he supports this view by referring to paragraphs 20-22 of [ic-283331-t1j9.pdf \(ico.org.uk\)](#).
29. In this same decision the Commissioner was satisfied that section 41 applied and the public interest lay in preserving the principle of confidentiality.
30. The Commissioner agrees that the UCEA would have considered the information that RAM is being asked to disclose as confidential. RAM explained to the Commissioner that it was sent securely, required passwords, was "marked confidential" and was only for members. The information is clearly not trivial and the Commissioner does not consider it to be "otherwise accessible". In view of UCEA's role its release is likely to be detrimental to the confider as it could undermine its ability to negotiate.
31. Section 41 is an absolute exemption but if there was an overriding public interest in disclosure that could be used as a defence, this might alter matters. Here there would appear to be no public interest defence

for disclosure and the complainant has not provided one, other than their belief that the information is already publicly accessible and therefore should be disclosed.

32. The Commissioner supports his decision by referring to his previous decision in [ic-283331-t1j9.pdf \(ico.org.uk\)](#) where the Commissioner was satisfied that section 41 applied and the public interest lay in preserving the principle of confidentiality.
33. The Commissioner has also decided that the majority of the very limited information that was created by RAM is not disclosable because it would require disclosing the questions asked by UCEA in order to be understood. In any case, he considers that any selected responses from a drop-down/multi-choice menu to have been "obtained from any other person", even if the selection has been made by RAM.
34. However, the Commissioner has decided that a small amount of information should be disclosed as it was written in a free-text box, created entirely by RAM. Additionally section 41 does not apply to the responses to part two of the surveys for the same reason. Although some of this is personal data, it was not exempted by RAM (except under section 41) and the individual is a person of seniority in the organisation who might reasonably expect their name and role in the organisation to be released.

Procedural matters

35. Section 1(1) of FOIA states that an individual who asks for information is entitled to be informed whether the information is held. RAM failed to confirm whether the information was held by the time for statutory compliance.
36. Section 10(1) of FOIA requires these actions to be taken and compliance with section 1(1) within 20 working days of receipt of the request.
37. RAM indicated that it held the requested information at internal review, outside the 20-working day requirement, and so breached sections 1(1) and 10(1) of FOIA.
38. RAM only cited the exemption it was relying on at internal review, breaching section 17(1) of FOIA.

Right of appeal

39. 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

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

Janine Gregory
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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