

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 September 2024

Public Authority: Governing Body of the University of Nottingham

Address: University Park
Nottingham NG7 2RD

Decision (including any steps ordered)

1. In a two part request, the complainant has requested information associated with Universities & Colleges Employers Association (UCEA) and the marking and assessment boycott. The University of Nottingham refused to disclose the information, citing sections 41(1) and 36(2)(b) of FOIA which concern information provided in confidence and prejudice to the effective conduct of public affairs, respectively.
2. The Commissioner's decision is that the University of Nottingham was entitled to rely on section 41(1) of FOIA to withhold the information requested in part 1 of the request and on sections 36(2)(b)(i) and (ii) in respect of the information within scope of part 2.
3. It's not necessary for the University of Nottingham to take any corrective steps.

Request and response

4. On 29 November 2023, the complainant wrote to the University of Nottingham ('the University') and requested information in the following terms:

“Part I

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)

Part II

Electronically recorded information about the "UCEA MAB/IA guidance". I refer to the materials linked in UCEA's communication of the 26-04-2023 (or around). For reference, this is the guidance I'm talking about:

UCEA's industrial action/MAB [guidance](#), includes specific guidance for withholding pay for staff participating in the MAB, and includes the legal position and FAQs. Members are reminded that the guidance is updated regularly and is confidential and should only be made available to senior HR and other managers. The guidance includes suggestions on how to identify whether staff are participating in the boycott.

I'm interested in conversations between your SMT on this guidance and on a facsimile of the guidance itself. You can restrict search from the 01-08-2022 to the 25-11-2023 (1 year 4 months approx.)”

5. The University responded on 21 December 2023. It advised it didn't hold the information requested in part 1 and refused to provide the information it holds within scope of part 2 under section 36(2)(b) of FOIA.
6. The complainant requested an internal review on 23 December 2023.
7. Following an internal review the University wrote to the complainant on 14 February 2024. It referred to correspondence from the complainant dated "12 December 2023." The Commissioner understands this to refer to the complainant's request for a review of 23 December 2023.
8. Regarding part 1 of the request, the University noted that the complainant had queried the University's position that it didn't hold any relevant emails. The complainant had said that, at the very least, they'd expect to receive attachments to an email trail they were aware of.
9. Regarding part 2 of their request and section 36, the complainant had requested information associated with the Qualified Person's opinion.
10. In its internal response, the University confirmed that it does hold information within scope of part 1 of the request – ie attachments -

which it was withholding under section 41(1) of FOIA. The University maintained its reliance on section 36(2)(b) with regard to part 2 of the request.

Scope of the case

11. The complainant contacted the Commissioner on 18 March 2024, to complain about the way their request for information had been handled.
12. The Commissioner considers that the scope of his investigation is to determine if the University was correct to withhold information within scope of part 1 of the request under section 41(1) of FOIA and to withhold information within scope of part 2 under sections 36(2)(b)(i) and (ii).

Reasons for decision

Section 41 – information provided in confidence

13. Section 41(1) of FOIA, which the University has applied to part 1 of the request, states that information is exempt from disclosure if (a) the information was obtained by the public authority from any other person and (b) disclosing the information to the public would constitute an actionable breach of confidence.
14. With regard to part 1 of the request, the focus of the complainant's interest is information attached to a particular email exchange dated 26 April 2023. The Commissioner understands that the complainant already has a copy of that exchange.
15. The Commissioner has previously considered the application of section 41(1) to a request for the same information that the complainant sent to a different university, in IC-283331-T1J9¹. In that case the Commissioner was satisfied that section 41(1) was engaged.
16. In the current case, with regard to section 41(1)(a), the information was again provided to the University by another person, UCEA.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2024/4029883/ic-283331-t1j9.pdf>

17. Regarding section 41(1)(b), for the same reasons as in IC-283331-T1J9, the Commissioner is satisfied that the information has the necessary quality of confidence, was imparted in circumstances importing an obligation of confidence and disclosing it would cause a detriment to UCEA (and the University).
18. Finally, on the basis of the factors above, the Commissioner is satisfied that, with regard to UCEA, disclosing the information would constitute a breach of confidence. This is because of UCEA's reasonable expectations of confidentiality.
19. But for section 41 to apply the breach must be actionable. This means that there must be a good chance of such an action succeeding because the public authority wouldn't have a valid defence to such a claim.
20. A public authority can defend itself against an action for a breach of confidence if it can establish a public interest defence – that the breach of confidence was necessary in the public interest. The Commissioner isn't satisfied that such a defence would be viable here.
21. He acknowledges that 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.
22. As the University noted in its internal review response, UCEA makes a significant amount of information, including its approach to pay negotiations and industrial action, available to the public on its website, which goes a long way to satisfy the public interest in the request.
23. The Commissioner has considered whether undermining the trust between the University and UCEA would be proportionate. He finds that it wouldn't be proportionate and that, given the information that's already in the public domain, there's greater public interest in the two parties maintaining a strong relationship.
24. In the absence of a compelling public interest defence, the Commissioner is satisfied that it would be an actionable breach of confidence for the University to disclose the withheld information under FOIA. As such, section 41(1)(b) is met and, as in the earlier case, the Commissioner's decision is therefore that the University is entitled to rely on section 41(1) of FOIA to withhold the information in scope of part 1 of the request.

Section 36 – prejudice to the effective conduct of public affairs

25. Under section 36(2)(b)(i) of FOIA information is exempt from disclosure if, in the reasonable opinion of a qualified person, its disclosure would otherwise prejudice or would be likely to otherwise prejudice the free and frank provision of advice.
26. Under section 36(2)(b)(ii) information is exempt from disclosure if, in the reasonable opinion of a qualified person, its disclosure would otherwise prejudice or would be likely to otherwise prejudice the free and frank exchange of views.
27. The qualified person (QP) in this case was Professor Shearer West, the University's Vice-Chancellor. The Commissioner is satisfied that this individual is authorised as the QP under section 36(5) of FOIA.
28. The University has provided the Commissioner with a copy of its submission to the QP about the request. From the submission the Commissioner accepts that the QP gave their opinion that the two exemptions were engaged and notes that they gave their opinion on 18 December 2023. This was an appropriate time, prior to the University responding to the request.
29. The QP was provided a copy of the request and advised which section 36(2) exemptions were being considered. The QP discussed arguments and counter arguments for why the prejudice envisioned under the two exemptions would or would be likely to occur, and other factors they'd taken into account.
30. Regarding section 36(2)(b)(i) and 36(2)(b)(ii) and the provision of advice and exchange of views, the QP acknowledged that the public must have confidence that the University is able to deal with significant matters in an open and transparent way.
31. However, the QP considered that provision of advice and exchange of views would be inhibited by disclosure for the following reasons:
 - The Vice-Chancellor engages in internal communications with their senior management; in particular on matters of sector and national importance, such as the marking and assessment boycott (MAB).
 - The MAB had the potential to have a huge impact on the University's students, their studies and overall marks, including the ability of some students to graduate in the summer. The Vice-Chancellor must be able to seek the advice and guidance from their senior management team, their honest and candid opinion on

matters of the day and be able to undertake deliberations with them in a free and frank way.

- The Vice-Chancellor must be able to discuss the University's own strategy as well as linking that to any guidance received from UCEA in the face of significant challenges, such as the MAB, in order to minimise disruption to students. The Vice-Chancellor also has a role in contributing to the sector's strategy which is developed with their senior management team and colleagues as well as with colleagues within the Higher Education Sector.
 - The Vice-Chancellor needs to receive the best advice possible from their senior colleagues to assist with key decision-making activities around the MAB and other key matters. These include exploring options, considering risks, providing solutions and considering the University's potential response in the context of the sector's approach overall. It is indispensable to the efficient and effective running of the University in times of severe challenges, such as the MAB, that senior staff are able to engage in open dialogue without the fear that their correspondence will be put into the public domain.
 - Disclosure would have an inhibiting effect on the Vice-Chancellor, as well as other senior staff, who would be very reluctant in future to engage in the documented open exchange of ideas and the provision of advice that are critical to the University's decision-making. It goes without saying that the Vice-Chancellor must be able to have open discussions about industrial relations and the University's strategy in response to industrial disputes in order to support its students.
32. The QP's signed opinion confirms that they considered that disclosing the information both "would" and "would be likely to" cause the prejudice envisioned under the two exemption. The Commissioner can't accept both. However, he will accept that the lower level is a credible level of likelihood ie that there's a more than a hypothetical or remote possibility of the envisioned prejudice occurring.
33. It's important to note that 'reasonableness' in relation to the QP's opinion isn't determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it's a reasonable opinion, and not necessarily the most reasonable opinion.

34. The Commissioner considers that the QP had sufficient background knowledge and was provided with sufficient information to enable them to make a decision on the matter. The Commissioner finds that the QP's opinion about withholding the information under sections 36(2)(b)(i) and (ii) of FOIA was a reasonable one. He accepts that, in the circumstances of this case, disclosing the information at the time of the request would have been likely to inhibit the provision of advice and the exchange of views and would have been likely to have a disruptive effect.
35. The University was therefore entitled to apply the exemptions under section 36(2)(b) to the request. The Commissioner has gone on to consider the public interest tests associated with these exemptions.

Public interest test

36. As noted, the QP acknowledged the need for the University to be open and transparent about matters of significance, such as the MAB. The University acknowledged the same in its correspondence to the complainant.
37. The complainant hasn't presented any public interest arguments for the information's disclosure, in their request for a review or complaint to the Commissioner.
38. In its correspondence to the complainant the University noted the following arguments against disclosure:
 - Impaired decision making.
 - Negative effect on future discussions between colleagues when there are similar matters to be discussed within the sector.
 - Negative impact on the University's consideration of the marking boycott which in turn has negative consequences for the University and its students.
 - Potential for wider inhibition of free and frank discussions/provision of advice from other agencies, such as UCEA.
39. As with all public authorities in receipt of public money, there's a public interest in the University being transparent, particularly about matters of significant impact such as the MAB. While the MAB appears to have been ended in September, its impact, and discussion about it, would still have been ongoing at the time of the request.

40. The Commissioner considers the public interest in good decision-making by the University to be a compelling argument in favour of maintaining the exemption. The Commissioner acknowledges that the public interest in openness and transparency would be served if the information was disclosed. However, on balance, he finds the public interest in the University's senior management team being able to have full and frank discussions at the time of the request when the effect of the MAB was still a somewhat live matter - to be a stronger argument.
41. The Commissioner notes that the University says that it has placed a wealth of information for students into the public domain which is available on the University's website. This explains how the University has and will continue to support its students. In the University's view, this should reassure the general public that the University is taking its responsibilities seriously and is, first and foremost, thinking of and supporting its students. The Commissioner considers the information the University, and UCEA, actively publishes – about the MAB and other matters - adequately addresses the public interest in transparency .
42. To summarise, the Commissioner's decision is that the University correctly applied section 36(2)(b)(i) and section 36(2)(b)(ii) of FOIA to the withheld information and that the public interest favours maintaining these exemptions.

Right of appeal

43. 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

44. 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.
45. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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