

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 21 September 2009

Public Authority: University of East Anglia
Address: Offices of the Registrar & Secretary
Norwich
NR4 7TJ

Summary

The complainant requested information from the University of East Anglia relating to the University's Transparent Approach to Costing (TRAC) system. The University replied to the request, refusing to release any information, citing exemption under section 41 (1) of the Freedom of Information Act 2000 (the "Act"), but informing the complainant of his right to a review and appeal. The complainant requested an internal review. Following the review, the University maintained its claim for exemption. This time, in addition to section 41 (1), it claimed exemption under sections 36 (2) (b) (ii) and 43 (2) of the Act. It also maintained that the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

The Commissioner has decided that all of the withheld information should be released. He holds that while section 36 (2) (b) (ii) is engaged, he has decided that in all the circumstances of the case, the public interest in maintaining the exemption did not outweigh the public interest in disclosure. In addition, the Commissioner has decided that the exemptions under sections 41(1) and 43 (2) are not engaged in this case.

The public authority had therefore breached section 1 (1) (b) in failing to disclose this information. In addition, in its dealings with the complainant, the University failed to cite the relevant subsections by completion of its internal review in breach of section 17 (1) (b).

The Commissioner requires that the information be released within 35 days.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant emailed the University of East Anglia on 3 February 2007 and requested the following information under the Act:

“(1) The Schools or Sectors participating in TRAC 2004-5 and 2005-6, the number of colleagues in each School / Sector, total number of colleagues participating, rate of participation by Teaching / Research / Other for each School /Sector

(2) For the 2004-5 and the 2005-6 returns, the average number of ‘actual hours worked during week’ for each participant (anonymized over the year)

(3) For the 2004-5 and 2005-6 returns, the ‘actual hours worked during week’ for each week. (For each number n of ‘actual hours reported, the number of returns stating n, from all participants, in each week).”

3. The University responded to this request in a letter on 2 March 2007. The reply did not include any information and claimed exemption, citing section 41 of the Act. The University informed the complainant of his right to request an internal review and his right to complain to the Commissioner.
4. In an email dated 25 April 2007, the complainant requested an internal review.
5. The University replied in a letter dated 31 May 2007, informing the complainant of the outcome of the internal review. It upheld its earlier decision to withhold the information in question and argued that to provide any information would breach the assurances (section 41) given by the University to those providing the information, as to the storage and use of the data. The University maintained that to release this information would represent a breach of trust and that it could lead to less cooperation in collating future returns. As such, it would harm the University’s commercial interests (section 43) and prejudice the effective management of the University’s business (section 36). The University did not explain which subsections it was claiming exemption under. This time the University did not inform the complainant of his right to complain to the Commissioner but did offer to meet with the complainant.

The Investigation

Scope of the case

6. The Complainant contacted the Commissioner on 19 July 2007 in order to complain about the way his request for information had been handled.

Background

7. TRAC is a computer system that provides, at an institutional level, first an allocation of costs between publicly and non-publicly funded research, teaching and activity by the University against which the income received for those activities can be benchmarked, and second an allocation for the full economic costing of research projects. This subsequently provides the basis on which funding is received from Research Councils.

Chronology

8. The Commissioner wrote to the University of East Anglia on 24 June 2008 and asked it to provide him with further submissions in respect of the exemptions claimed under sections 36 (2) (b) (ii), 41 (1) and 43 (2). This was especially relevant as the Review was undertaken by the section 36 Qualified Person and was only introduced by the University as grounds for exemption as a result of that Review.
9. In particular, the Commissioner asked for a detailed explanation of the University's reasons for refusing to provide anonymised information (as requested by the complainant), an explanation as to how the University believed that such information would fall under Section 36 (2) (b) (ii), for copies of any communication between the University and those who agreed to complete the TRAC Returns, specifically any confirmation that the information would be treated as a matter of confidence, and the expected impact of any release on the University's commercial interests.
10. The University provided a response in a letter dated 21 July 2008, in which it stated that the academic staff had always been hesitant in providing information on their time allocation, despite it being essential to the University that they do so. To allay staff concerns, the University had agreed that the information would be protected and used solely for the purpose for which it was given. If this information was released, the University maintained that it would have a detrimental affect on future TRAC exercises. The University argued that it was crucial to them, as well as other authorities involved in the funding process, that this information be as accurate as possible, and that any outcome that affected this was detrimental to the effective conduct of the University, and could, as a consequence, affect the future funding of the University. It also raised some concerns as to what the complainant would do with the information.
11. On 26 August 2008, the Commissioner wrote to the University seeking further clarification in respect of the Section 36 (2) (b) (ii), whether it would be possible to identify individuals from any anonymised information, and giving the University a final opportunity to expand on this possible effect on the University's business.
12. The University replied to the Commissioner on 18 September providing some further explanation.

Analysis

Procedural

13. The Commissioner has considered whether the University has complied with its obligations under sections 10 (1) and 17 (1) of the Act.
14. Section 1(1) states that any person making a request for information to a public authority is entitled
 - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.
15. Section 10 (1) maintains that subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
16. Section 17 (1) requires a public authority, which is relying upon an exemption in order to withhold requested information, to issue a refusal notice which
 - (a) states the fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies
17. The Commissioner finds the University to be in breach of section 1 (1) (b) as the information was not provided by the completion of the internal review.
18. The University informed the complainant of the grounds for refusal upon internal review. However, it only referred to the appropriate section number, but did not quote the subsections of the exemptions claimed and thus the University is in breach of Section 17 (1) (b).
19. The full text of sections 10 and 17 can be found in the Legal Annex at the end of the Notice.

Exemptions cited

Section 36 (2)(ii)

20. Section 36 (2) provides an exemption from disclosure for information which (i) would, or would be likely to, inhibit the free and frank provision of advice or the free and frank exchange of views (36(2)(b)) or (ii) would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs (36(2)(c)). In this context, the risk of prejudice need not be more likely than not, but must be substantially more than remote. If the exemption is agreed (in this case 36 (2)(ii)), the Commissioner will then consider whether the public interest in maintaining the exemption is outweighed by the public interest in disclosing the information.

21. The full text of section 36 (2) (b) can be found in the Legal Annex at the end of this Notice.
22. Section 36 requires that the exemption be applied by a qualified person expressing a reasonable opinion. The Commissioner is satisfied that the person making the decision was the appropriate 'qualified person', in this case the University's Vice Chancellor. In this instance, the University has relied on a letter sent to the complainant in response to his appeal against the refusal notice as the certificate, that is to say, the letter notifying the complainant as to the outcome of the Internal Review.
23. The second test the Commissioner is required to make is whether the opinion is both reasonable in substance and reasonably arrived at. Guidance on this issue has been given by the Information Tribunal, specifically in the case of *Guardian & Brooke v The Information Commissioner & the BBC EA/2006/011 & 013*. The Tribunal proposed that the provision that Section 36 is only engaged when the qualified person is of a reasonable opinion is a protection, which, "relies on the good faith and proper exercise of judgement of that person." (para 64). It argued that this protection would be reduced if the qualified person wasn't required by law to give proper consideration to the formation of the opinion and therefore concluded that the qualified person should take into account relevant matters and ignore irrelevant matters. It further noted that if the process were not taken into account, the reasonableness of an opinion would very often be basically unchallengeable, because, by definition, the opinion is a judgement on what might happen in the future.
24. The Commissioner has to consider whether the opinion is reasonable on a case by case basis, deciding whether the level of prejudice shown is "would" rather than "would be likely to", the severity and scope of the prejudicial effect and whether the prejudicial effect is to a core function of the public authority. The University maintains that, in this case, any release of the information would have a prejudicial effect, but was not specific as to which level of prejudice the University was applying.
25. The judgement call in this case is a fine one. On one hand, it is clear that the co-operation of staff has been grudging and partial. The University asserts that the release of the information in this case would affect future relations with their staff, in that staff co-operation is likely to be less forthcoming. It was able to provide some evidence of the reluctance of some individuals to fully co-operate in ensuring the University has the full information to enable it to secure the appropriate level of funding. The Commissioner is conscious that one of the primary uses of the Return is to secure funding for the University. Thus, the lack of full co-operation by those completing TRAC returns will directly affect not only those who fail to provide that information, but possible colleagues as well. Having weighed the arguments, in this case, the Commissioner is persuaded that the threshold has been met. The exemption 36 (2)(ii) is therefore engaged.

Public Interest Test

26. Section 36 is not an absolute exemption, and, thus, the Commissioner has considered the public interest in the release of this information. In this he is guided by the case of *Guardian & Brooke v The Information Commissioner & the BBC*. In this case, the Information Tribunal acknowledged that the application of the public interest test to the s36 exemption, “involved a particular conundrum,” noting that although it is not for the Commissioner to form his own view on the likelihood of prejudice under this section (because this is given as a reasonable opinion by a qualified person), in considering the public interest, “it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice” (para 88)
27. In the Tribunal’s view, the reasonable opinion is limited to the *degree of likelihood* that inhibition or prejudice would occur, on the balance of probabilities. It therefore argued that the reasonable opinion, “does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant” (para 91)
28. This means that whilst the Commissioner should give due weight to the reasonable opinion of the qualified person when assessing the public interest, he can and should consider the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs etc.
29. In this case, the Commissioner maintains there is a strong public interest in understanding how public funds allocated for research are utilised. In addition, the release of this information will assist in raising public awareness of the balance between teaching and research at University level. He is not persuaded that the release of this information would have a sufficiently severe effect on the workings of the University, especially as the information is requested in an anonymised format and the University has confirmed that it would not be possible to identify individuals from that information.

Section 41 (1) (b)

30. Section 41 (1) (b) exempts information (obtained from any other person) if its disclosure would constitute a breach of confidence actionable by that or any other person.
31. The full text of section 41 (1) can be found in the Legal Annex at the end of this Notice.
32. Section 41 (1) (b) is not a stand alone exemption. It is conditional upon section 41 (1) (a) being satisfied first, specifically that the information was provided by ‘any other person’, that is to say by someone external to the University.
33. In this case, it is clear that the information requested was obtained by the authority from the University’s own staff. It is thus an internal communication and therefore section 41 cannot be applied to this information.

Section 43 (2)

34. Section 43 (2) exempts information the disclosure of which would, or would be likely to, prejudice the commercial interests of any person – including those of the public authority holding the information.
35. The full text of section 43 (2) can be found in the Legal Annex at the end of this Notice.
36. The University asserts that the release of the information in this case is likely to prejudice their future commercial relations. Before considering the merits of this line of reasoning, it is essential to consider whether securing funds from the Research Funding Council is a commercial activity.
37. The Commissioner's view is that the provision of higher education is not a commercial enterprise as defined by the Act. Nothing is being bought or sold and no trade secret is involved. Rather the circumstances of this case relate to an undertaking that is paid for out of the public purse.
38. In these circumstances, the Commissioner is not persuaded that the exemption contained within Section 43 (2) applies.

The Decision

39. The Commissioner's decision is that the University of East Anglia did not deal with the request for information in accordance with section 1 (1) (b) of the Act in that it while 36 (2) (i) was engaged, it inappropriately relied upon sections 41 (b) and 43 (2) to withhold the information.
40. The University also acted in breach of section 17 (1) (b) and (c) in that it sought to rely upon exemptions not correctly cited in its refusal notice.

Steps Required

41. The Commissioner requires the University of East Anglia to take the following steps to ensure compliance with the Act:

The requested information should be disclosed to the complainant within 35 calendar days of receipt of this Notice

Failure to comply

42. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

43. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 21st day of September 2009

Signed

**Gerrard Tracey
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 17(1) provides that -

“A public authority which ... is to any extent relying:

- on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or
- on a claim that information is exempt information

must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 36(2) provides that –

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Section 41(1) provides that –

“Information is exempt information 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.”

Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”