

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 31 March 2009

Public Authority: Higher Education Funding Council for England
Address: Northavon House
Coldharbour Lane
Bristol
BS16 1QD

Summary

The complainant made a request for a number of pieces of information to the Higher Education Funding Council for England (the "HEFCE"). These requests related to the state of buildings on Universities' estates; their functional suitability; the cost of reconditioning these buildings; and the size of each University's estate. The HEFCE stated that it believed that this information was exempt from disclosure under section 41. After investigating the case the Commissioner decided that section 41 was not engaged, and the information should be disclosed. In failing to provide the information within 20 working days the HEFCE also acted in breach of section 10(1).

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. In an email dated 21 September 2007 the complainant requested the following information under the Act:
 - "...the proportion of each University's gross internal area (which I understand includes halls of residences, lecture theatres and libraries) in (1) condition A, (2) condition B, (3) condition C, (4) condition D."
 - "...how much it would cost each University to upgrade their buildings so that every building was in category B."
 - "...for each University, what proportion of their gross internal area is in functional suitability (1) grade 1, (2) grade 2, (3) grade 3, and (4) grade 4."

- "...the size of each University's estate and their institutional income."
3. The HEFCE responded to this request in an email dated 27 September 2007. It confirmed that it held this information as part of the Estate Management Statistics project (EMS). This information was provided by higher education institutions (HEI's) in the expectation that it would be treated in confidence. It informed the complainant that therefore most of the information she had requested was exempt from disclosure under section 41 of the Act. It also informed the complainant that the information relating to institutional income was exempt under section 21, as this information was published by the Higher Education Statistics Agency, and told her how she could obtain this information. Finally it informed the complainant of her right to request an internal review.
 4. The complainant requested an internal review on 16 October 2007. She stated that she believed that the HEFCE had misinterpreted section 41 as she did not believe that Universities would take the HEFCE to court over the disclosure of this information. She stated that she did not believe that this was a realistic prospect. She also provided further arguments as to why she believed that there was an overriding public interest in the information being disclosed. She did not refer to the information the HEFCE had withheld under section 21, or its use of this exemption.
 5. The HEFCE carried out an internal review, and responded in an email dated 30 November 2007. It informed the complainant that it had decided to uphold its previous decision to apply section 41 to withhold the information in question.

The Investigation

Scope of the case

6. The complainant contacted the Commissioner on 7 January 2008 to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider whether the HEFCE was correct to withhold the information in question under section 41. The complainant did not make any reference to the use of section 21, and therefore the Commissioner has not considered the HEFCE's use of this exemption to withhold information about the institutional income of the Universities any further.
7. Although not referred to by the complainant the Commissioner has also considered whether the HEFCE complied with the requirements of section 17.

Chronology

8. The Commissioner wrote to the HEFCE on 14 October 2008 and asked it to provide him with a copy of the withheld information. He also asked the HEFCE to provide further submissions to support its use of section 41. He asked it to provide him with a response within twenty working days.

9. In an email dated 17 November 2008 the HEFCE contacted the Commissioner and informed him that it would not be able to meet this deadline. It informed him that it hoped to be able to provide a substantive response by 28 November 2008.
10. The HEFCE wrote to the Commissioner in a letter dated 27 November 2008 and provided him with a copy of the withheld information. It also provided further arguments to support its use of section 41.
11. On 6 January 2009 the Commissioner wrote back to the HEFCE and asked it to provide further arguments to support its use of section 41. He informed it that after reading through its previous submissions he was not persuaded that the disclosure of the withheld information would have a detrimental effect on the confider. Therefore he asked it to provide any further submissions it wished to make to support its arguments. He asked for a response within ten working days of receipt of the letter.
12. The HEFCE emailed the Commissioner on 12 January 2009 and acknowledged his request for further submissions. It informed him that it would not be able to meet the deadline he had set and anticipated that it would be in a position to respond by 26 January 2009.
13. The Commissioner wrote to the HEFCE on 29 January 2009 and noted that he had not yet received a response. He informed the HEFCE that unless he received a substantive response by no later than 13 February 2009 he would consider issuing an Information Notice under section 51 of the Act.
14. The HEFCE responded in a letter dated 13 February 2009 and provided further arguments to support its use of section 41.
15. On 13 March 2009 the Commissioner contacted the HEFCE again and asked for some further information. The HEFCE provided this information in an email dated 20 March 2009.
16. On 23 March 2009 the Commissioner emailed the complainant and asked her for clarification on the scope of the 4th part of her request. Specifically he asked whether the part of her request for “the size of each universities’ estate” was in reference to the internal area of each HEI (as it had been interpreted by the HEFCE), or to the internal and the external area. The complainant responded on the same day and confirmed that she had only been referring to the internal area. Therefore the Commissioner has considered this part of her request in this way.

Findings of fact

17. The Estate Management Statistics (EMS) database was established in 1999 to provide the higher education sector with standardized, reliable and useful property information to help managers understand current performance, promote sharing of best practice and drive improvements.¹

¹ <http://www.opdems.ac.uk/aboutus.asp>

Analysis

Exemption

Section 41

18. Section 41(1) provides that information is exempt from disclosure if:

- (a) it was obtained by the public authority from any other person; and
- (b) the disclosure of the information to the public by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

The full text of section 41 can be found in the Legal Annex at the end of this Notice.

19. The Commissioner's has adopted the approach to confidentiality taken by the court in *Coco v A N Clark (Engineers) Limited [1968] FSR 415*. In that case Megarry J decided that disclosure would constitute an actionable breach of confidence if:

- the information has the necessary quality of confidence;
- the information was imparted in circumstances importing an obligation of confidence; and
- disclosure would be an unauthorised use of the information and to the detriment of the confider.

If these parts of the test are satisfied, the Commissioner believes that he should then consider whether there would be a defence to a claim for breach of confidence based on the public interest in disclosure of the information.

20. The Commissioner has first considered whether the information was obtained from a third party.

Was the information obtained from a third party?

21. The HEFCE has confirmed that the information was provided to it by HEI's. Therefore the Commissioner is satisfied that the first element of the section 41 exemption has been met as this information was obtained from another person. The Commissioner wishes to stress that in this context "person" includes both natural persons and legal entities such as HEI's.

22. The Commissioner has gone on to consider whether the disclosure of this information would constitute an actionable breach of confidence. In order to reach a view on this he has first considered whether the information has the necessary quality of confidence.

Necessary quality of confidence

23. In considering whether the withheld information has the necessary quality of confidence the Commissioner has considered whether it is otherwise accessible, and whether it is more than trivial.
24. The HEFCE has argued that the withheld information is not otherwise accessible to the applicant. In its letter to the Commissioner dated 27 November 2008 it stated that the information in the EMS database had been provided to it by HEI's. Although that database was available to the HEI's, it was not accessible more widely. Access is further restricted through conditions of use which place restrictions on sharing the EMS database by, and between, HEI's. In addition to this the HEFCE argued that the withheld information is more than trivial.
25. In regard to whether the information is otherwise accessible the Commissioner has considered the nature of the withheld information. The complainant has requested information regarding the following:
 - the condition of Universities' estates,
 - the cost of upgrading these estates,
 - the functional suitability of these estates, and
 - the size of each University's estate.

(As noted at paragraph 6 above the Commissioner has not considered the aspect of the request which refers to the institutional income of Universities in this case.)

26. The Commissioner is satisfied that the withheld information was not likely to be widely accessible at the time of the request nor has he been presented with evidence to suggest that this is the case. Furthermore he is satisfied that this information is not in itself trivial.

Obligation of confidence

27. The Commissioner has gone onto consider whether the information was imparted in circumstances giving rise to an obligation of confidence.
28. In its refusal notice the HEFCE informed the complainant that, "there is a code of conduct restricting circulation of the information, which institutions must sign up to in order to access the [EMS] database."
29. During the investigation of this case the HEFCE provided the Commissioner with a copy of its confidentiality statement, which contains this code of conduct. It also informed the Commissioner that this statement is publicly available.² After considering this statement the Commissioner is satisfied that the withheld information was provided to the HEFCE in circumstances that imported an obligation of confidence. In particular he noted the following passage in the statement, "the Funding Council treat all information they receive from individual institutions as confidential unless it is collected specifically for publication".

² <http://www.opdems.ac.uk/files/ConfidentialityStatement2003.doc>

Detriment to the confider

30. The third element of the test of confidence involves the likely detriment to the confider if the confidence is breached. In some cases, for example involving the personal information of individuals acting in their private capacities, there is no need to prove the element of detriment. Indeed the Information Tribunal has taken the view that the loss of privacy is a sufficient detriment in itself.³
31. However in this case the withheld information is not personal information. In such cases the Commissioner considers that there would have to be a detrimental impact to the interests of the confider for the breach of confidence to be actionable, and therefore for section 41 to be engaged.
32. In its letter to the Commissioner dated 27 November 2008 the HEFCE argued that the disclosure of the withheld information would have the following detrimental effects to the confiders:
 - The viability and value of the EMS database may be compromised if institutions no longer submit information on the basis that it may be released.
 - Institutions may suffer damage to their reputation arising from publication of data on the condition and functional suitability of their estate. Potentially this could affect their ability to recruit staff and students.
 - Institutions may suffer vexatious approaches from suppliers offering services that address the condition of the estate.
 - Data on floor area may provide useful information for those seeking to object to proposed developments at a given institution; for example using floor area data to make comparisons of space provision at other institutions.

It went on to state that disclosure of the withheld information would affect the confiders in different ways and these examples were not intended to be an exhaustive list.

33. During the investigation the Commissioner wrote to the HEFCE and informed it that he did not find these arguments convincing. In particular he was not persuaded that they showed that disclosure of the withheld information would cause detriment to the interests of the confiders. He invited the HEFCE to provide further submissions in order to support its arguments.
34. The HEFCE provided further submissions in its letter of 13 February 2009. It stated that its overarching argument was that disclosure may lead to lower submission rates from HEI's. This would be detrimental to the confiders who make use of the EMS database, as the database improves estate management performance through facilitating access to relevant information. Without this resource the ability of the confiders to improve their estate management would be limited.

³ See *Bluck v ICO and Epsom & St Hellier University NHS Trust* [EA/2006/0090].

35. The Commissioner is not persuaded by this argument. He is particularly mindful that in cases such as this, for a breach of confidence to be actionable there would have to be a detrimental impact to the interests of the confider of that information. In this instance he finds the argument that the disclosure of this information might discourage some HEI's from providing such information in the future, in turn potentially compromising the viability and value of the EMS database, in turn potentially preventing the confider (i.e. the HEI that provided that information) from being able to improve its estate management, thereby causing detriment to its interests, tenuous. He does not believe that this argument provides persuasive evidence of a causal link between the disclosure of the withheld information and any potential detriment to the interests of the confider of that information in this way.
36. The HEFCE also argued that a drop in the willingness of HEI's to provide it with this information would potentially adversely impact on its own functions, and its ability to secure government support for the development of higher education nationally. However, as the HEFCE is not the confider of this information the Commissioner does not believe that this is a relevant argument when considering the question of whether disclosure of this information would be actionable.
37. In regard to the argument that the viability and value of the EMS database would be compromised by disclosure of the withheld information the HEFCE argued that this could potentially lead to the "cumulative breakdown" of the database. This would, in turn,

“...limit institutions' ability to undertake strategic planning, set targets and priorities and to benchmark with others leading to less efficient use of resources and reducing the social, economic and environmental contribution to the country of higher education.”

The Commissioner believes that this is broadly the same argument as set out at paragraph 34 above, and for the reasons set out at paragraph 35 above he is not persuaded by this argument.

38. In regard to the argument that disclosure would potentially damage the reputation of the confider the HEFCE added that,

“Disclosure of this information may link infrastructure quality with the quality of teaching and research or the student experience. Damaging press articles could erode the reputation of individual institutions or indeed of higher education in the UK.

Universities believe that comparison of data by the less well informed, by institution, could be 'extremely damaging' for institutions, for their relationships with local authorities and other partners/funders.”

Again, the Commissioner is not persuaded by this argument. He again refers back to this element of the test of confidence, that for a breach of confidence to be actionable an unauthorised disclosure of the information would have to be detrimental to the confider of that information. The HEFCE has not provided any

further arguments as to how relationships with local authorities and other partners would be damaged by the disclosure of the withheld information, nor how this would be to the detriment of the confider of that information. Whilst the Commissioner acknowledges that it is arguable that damage to a HEI's reputation might lead to a potential prejudicial effect on its ability to recruit staff and/or students, he believes that this would be a complex process including many other factors, such as academic reputation, research success, availability of funding, courses on offer, and the location of the HEI. The withheld information is high level statistical data, which the Commissioner believes is too high level for an inference to be drawn which would prejudice the university's ability to recruit staff and students. Therefore from the evidence provided the Commissioner is not persuaded that the disclosure of this information would have this effect. Therefore he is not persuaded by this argument.

39. In regard to its argument that HEI's may suffer vexatious approaches from suppliers the HEFCE added,

“The data-set contains information on the costs of cleaning, grounds maintenance, utilities and other facilities and services. The full context of how this information links to the estate is only truly known by the institution providing that data. This information is highly likely to be used by contractors and consultants to approach institutions offering unsolicited cost saving and consultancy proposals.”

The HEFCE accepted that HEI's might possibly benefit from some approaches. However having to deal with many more unsolicited approaches would be, “unhelpful, time consuming and expensive...” Finally it also argued that disclosure might also hinder effective tendering arrangements – although it did not provide any further arguments as to how this would happen.

40. In considering this argument the Commissioner has first noted the nature of the withheld information. It is high level statistical information listing the cost of upgrading HEI's buildings, the condition of buildings, and the functional suitability of those buildings. He is not convinced that this information would, in itself, increase the number of approaches from suppliers. Furthermore, he is not persuaded that approaches from suppliers would have a detrimental impact on the confiders of that information.
41. Finally, in relation to its argument that data on floor area may provide useful information for those seeking to object to proposed developments at a given institution, the HEFCE added that,

“One could envisage those objecting to developments analysing the data in order to form an argument about the justification for the proposed development. Such arguments could be based on real data but data that would be taken out of context and therefore subject to misuse. If this happened it would make the planning process more arduous and expensive for universities than for other applicants. In such cases, individuals would be free to approach an institution for such information directly, in which case the institution would be able to contextualise it.”

42. In considering this argument the Commissioner has noted the high level nature of the information requested in this case, i.e. the size of each University's estate, together with information about the condition and functional suitability of that estate. He is not persuaded that this information could be used by parties in order to object to proposed developments. As such he is not persuaded that the disclosure of the withheld information would have a detrimental impact on the interests of the confiders in this way.
43. Therefore after considering the arguments and evidence presented by the HEFCE the Commissioner does not believe that the disclosure of the information requested in this case would have a detrimental impact on the interests of the confiders. As such he is not persuaded that the disclosure of this information would result in an actionable breach of confidence. For that reason he does not believe that section 41 is engaged.
44. As he has found that section 41 is not engaged the Commissioner has not gone on to consider whether there would be a defence to a claim for breach of confidence based on the public interest in disclosure of the information.

The Decision

45. The Commissioner's decision is that the HEFCE did not deal with the request for information in accordance with section 1(1)(b) of the Act in that it inappropriately relied upon section 41(1) to withhold the requested information.

In failing to provide the information within 20 working days the HEFCE also acted in breach of section 10(1).

Steps Required

46. The Commissioner requires the HEFCE 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 the date of this notice.

Other matters

47. When considering exemptions the Commissioner must consider the circumstances as they stood at the time of the request. However if matters come to light during his investigation that have not previously been considered, they can also be taken into account, provided that they were relevant at the time of the request.

48. The Commissioner is aware that on 18 February 2009 data relating to the internal area of each institution was published on the EMS website. This is part of the disputed information in this case and it can be viewed at the following link, <http://www.opdems.ac.uk/files/Green%20&%20HESA%20Data%20EMS%20Website003.xls>. He understands that this followed discussion by the EMS Steering Group and that the data was not originally collected specifically for publication. As there does not appear to have been an intention to publish the material at the time of the request, the decision to do so constitutes a change in circumstances and not additional information that has come to light but which was relevant at the time of the request. Therefore the Commissioner has not taken the publication into account when reaching his decision about the applicability of section 41 in this case. However he has decided that it is appropriate to note the publication of the information.

Failure to comply

49. 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

50. 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

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.

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 31st day of March 2009

Signed

**Jo Pedder
Senior Policy Manager**

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

Legal Annex

Section 17

(1) A public authority which, in relation to any request for information, 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.

(2) Where—

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- (4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.
- (5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
- (6) Subsection (5) does not apply where –
 - (a) the public authority is relying on a claim that section 14 applies,
 - (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
 - (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.
- (7) A notice under section (1), (3) or (5) must –
 - (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
 - (b) contain particulars of the right conferred by section 50.

Section 41

- (1) 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.
- (2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.