

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 September 2012

Public Authority: Queen's University Belfast
Address: Belfast
BT7 1NN

Decision (including any steps ordered)

The complainant requested information relating to the decision-making behind severance and early retirement offers made to staff in the University's School of Nursing and Midwifery. The University disclosed some information to the complainant, however it refused to disclose the remainder, citing sections 36(2)(b)(ii), 36(2)(c) and 40(2) of FOIA as a basis for non-disclosure. The Commissioner's decision is that section 36(2)(b)(ii) applies to the entirety of the withheld information and that the public interest in maintaining the exemption as set out in that section outweighs the public interest in disclosure of the withheld information. Therefore the Commissioner orders no steps to be taken.

Background

1. In June 2009 a Premature Retirement/Voluntary Severance (PR/VS) scheme was introduced to be made available to a number of University staff, including those in the School of Nursing and Midwifery. A Nursing and Midwifery Review Group (NMRG) was established to ensure the alignment of staff resources within the School in line with its contract with the Department of Health, Social Services and Public Safety for Northern Ireland (DHSSPSNI). Several criteria for being offered PR/VS were developed by the NWRG and used to select candidates from the School for inclusion in the scheme.

Request and response

2. On 19 April 2011 the complainant wrote to the University and requested information in the following terms:

"I request all information pertaining to meetings, criteria and discussions surrounding the severance and early retirement offers given to staff in the School of Nursing last June. This includes minutes, e-mails, letters and any relevant documents."

3. The University responded to the complainant's request on 30 May 2011. It disclosed some of the information under the provisions of the Data Protection Act 1998, as it was the complainant's own personal information, however it stated that it was applying sections 36(2)(b)(ii), 36(2)(c) and 40(2) of FOIA to the remaining requested information ("the withheld information").
4. Following an internal review the University wrote to the complainant on 8 November 2011. The reviewer upheld the original decision.

Scope of the case

5. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
6. The University has applied sections 36(2)(b)(ii), 36(2)(c) and 40(2) of FOIA to the withheld information. The Commissioner has considered the University's application of these exemptions.

Reasons for decision

Exemptions

7. The University has applied sections 36(2)(b)(ii), 36(2)(c) and 40(2) of FOIA as a basis for withholding the outstanding requested information. The Commissioner has considered the application of these exemptions.

The relevant parts of section 36(2) state 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-

[...]

(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."

8. This is a qualified exemption, and is therefore subject to the public interest test.
9. The Commissioner has first considered the application of section 36(2)(b)(ii) to the withheld information.
10. Information can only be exempt under section 36 if, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, lead to the adverse consequences described in that part of the exemption – in this case the inhibition of the free and frank exchange of views for the purposes of deliberation.
11. In order to consider the application of these exemptions the Commissioner will first consider whether the opinion was obtained from a qualified person, and the manner in which this opinion was obtained. He will then consider whether the opinion of the qualified person was reasonable.
12. To establish whether section 36 has been applied correctly the Commissioner considers it necessary to:
 - ascertain who is the qualified person for the public authority;
 - establish that an opinion was given;
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.
13. The University has informed the Commissioner that the qualified person in this case was Mr James O’Kane, the Registrar and Chief Operating Officer of the University. The Commissioner is satisfied that Mr O’Kane was a qualified person for the University.
14. The University has also provided the Commissioner with a copy of the submission provided to Mr O’Kane in order to seek his opinion as to whether this exemption was engaged.
15. In deciding whether an opinion is reasonable the Commissioner will consider the plain meaning of that word, that is, not irrational or absurd. If it is an opinion that a reasonable person could hold, then it is reasonable. This is not the same as saying that it is the *only* reasonable opinion that could be held on the subject. The qualified person’s opinion is not rendered unreasonable simply because other

people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that *no* reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the *most* reasonable opinion that could be held; it only has to be *a* reasonable opinion.

16. The Commissioner has also been guided by the Information Tribunal's comments in *Guardian Newspapers & Brooke v Information Commissioner & BBC1*¹ (paragraph 91), in which it indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus, *'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'*.
17. Therefore, in the Commissioner's opinion this means that when assessing the reasonableness of an opinion, the Commissioner is restricted to focusing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure.
18. The Commissioner considers that the withheld information relates to discussions surrounding the implementation of the PR/VS scheme and the process of the wider review/restructuring of the School of Nursing and Midwifery. The opinion of the qualified person is that disclosure of the withheld information would be likely to prejudice the free and frank exchange of views for the purposes of deliberation as, if the withheld information were disclosed it would be likely to cause those involved to be less free and frank in their exchange of views and deliberations. Whilst the Commissioner does not accept that individuals would be completely put off being involved in these discussions, it is not unreasonable for the qualified person to conclude that the frankness and candidness of the deliberations would be likely to be affected which would have a damaging impact on the on-going decision-making process regarding the review/restructuring of the School.
19. The Commissioner has been provided with a copy of the submissions given to the qualified person at refusal notice stage. These included copies of the withheld information, as well as information supporting a recommendation. The opinion of the qualified person was provided verbally, however the University has provided a form

¹ EA/2006/0011 & EA/2006/0013

recording that opinion and signed by the qualified person, as per the Commissioner's guidance. Having considered the submissions and the withheld information, the Commissioner considers that the opinion of the qualified person is reasonable. The Commissioner is also satisfied that section 36(2)(b) (ii) applies to the whole of the withheld information and therefore he has not considered the application of section 36(2)(c) in this decision notice.

Public interest test

20. Section 36(2)(b)(ii) is subject to a public interest test. As such, the information can only be withheld if the public interest in maintaining these exemptions outweighs the public interest in disclosure. The Commissioner has first considered the public interest in disclosure.
21. The University recognises that there is a public interest in increasing openness, transparency and accountability in the decision-making processes of any public sector organisation. The Commissioner agrees that this is the case.
22. The University also recognises that there is a strong public interest in understanding the review and restructuring of the School of Nursing and Midwifery and being assured that this is being carried out in line with the DHSSPSNI contract. Disclosure of the withheld information would allow the public to better understand and to have a more informed debate on the review process and the operation of the PR/VS scheme. The Commissioner has gone on to consider the public interest in maintaining the exemptions.
23. In favour of maintaining the exemption as set out in section 36(2)(b)(ii) the Commissioner notes that when considering the public interest consideration should be given to protecting what is inherent in these exemptions – in this instance, the avoidance of unwarranted inhibition to the free and frank exchange of views for the purposes of deliberation.
24. The University has argued that there is a very strong public interest in ensuring that the University is able to continue with the ongoing review of the School of Nursing and Midwifery without interference. There is a public interest in preserving a protected space for the School and the Senior Management of the University to have open and uninhibited discussions on the relevant issues which were ongoing at the time of the request and are still current.

25. The University has also argued that there is a significant public interest in the 'rightsizing' of the school, in line with DHSSPSNI requirements and cuts in funding.

Balance of the public interest arguments

26. In finding that the above exemption is engaged, the Commissioner has already accepted that the disclosure of this information is likely to result in the inhibition set out in these exemptions. However, in considering the balance of the public interest, the Commissioner takes into account the severity, frequency, or extent of any inhibition that would or might occur. In order to determine this, the Commissioner has considered both the nature of the withheld information and the timing of the request.
27. The withheld information consists of documents relating to discussions surrounding the review and re-structuring process taking place in the School of Nursing and the implementation of the PR/VS Scheme.
28. The Commissioner understands that the review and re-structuring of the School is an ongoing process and was obviously ongoing at the time of the request. Therefore it was and still remains a live issue and those involved need time and space for free and frank discussions regarding the best and most appropriate way to carry out the process in line with the University's contractual obligations.
29. The Commissioner considers that there is a strong public interest in openness, transparency and accountability of the decision-making processes of public authorities. He also considers that there is a strong public interest in allowing the public to be better-informed about the review process and the operation of the PR/VS scheme.
30. The Commissioner considers that all of the above factors in favour of disclosure carry significant weight.
31. The Commissioner has considered the factors in favour of maintaining the exemption. The Commissioner understands that the 'rightsizing' of the School is being carried out in line with a DHSSPSNI contract. Contractual obligations need to be fulfilled regardless of whether or not information about discussions surrounding them is disclosed. Therefore, the Commissioner does not accord any weight to this factor.
32. However, given the nature of the withheld information and the timing of the request, the Commissioner considers that significant prejudice would be likely to occur if the withheld information were to be

disclosed. As stated above, the review and re-structuring of the School is an ongoing process. Therefore it is a live issue and those involved need time and space for free and frank discussions regarding the best and most appropriate way to carry out the process in line with the University's contractual obligations.

33. The University has informed the Commissioner that, in advance of any final proposals being released, those involved need to be able to feel free to discuss the implications of any proposed actions and to carry out assessments to ensure that these actions are robust and 'fit-for-purpose.'
34. The University maintains that this would not happen if the withheld information were to be disclosed. This would be likely to inhibit the effectiveness of the discussions which could result in poorer decision-making and perhaps inhibit some individuals from participating in the discussion process altogether. The Commissioner accepts that such inhibition would be a likely effect of disclosure and would be likely to disrupt to a large extent the effectiveness of the ongoing process. Therefore, the Commissioner's conclusion is that, in all the circumstances of the case, the public interest in maintaining the exemption set out in section 36(2)(b)(ii) of FOI outweighs that in disclosure of the withheld information.

The Section 40(2) exemption

35. The University considered that some of the withheld information was personal data of third parties and was therefore exempt under section 40(2) of FOIA. Since the Commissioner considers that section 36(2)(b)(ii) applies to the entirety of the withheld information, he has not considered the University's application of section 40(2) in this instance.

Right of appeal

36. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

37. 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.
38. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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