

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 February 2012

Public Authority: The University of Manchester ('UoM')

Address: John Owens Building
Oxford Road
Manchester
M13 9PL

Decision (including any steps ordered)

1. The complainant has requested all information held by the University of Manchester ['UoM'] (and its subsidiaries) about him and his company.
2. UoM replied that its subsidiaries handled requests themselves and advised him to make a new request (which he did). For UoM, it asked that the complainant specified the individuals with which he had contact with. A series of phone calls occurred and the complainant refined his request to cover ten named individuals.
3. UoM responded that it held only the communications from the complainant and no further relevant recorded information in relation to those ten individuals. The case was referred to the Commissioner and the Commissioner finds that the UoM was wrong in what it said, because it did hold relevant recorded information for the complainant's request.
4. However, he finds that the only information UoM holds is exempt by virtue of section 21 [reasonably accessible to the complainant through other means], section 40(1) [first party personal data] and section 42(1) [legal professional privilege].
5. He also finds that UoM breached sections 10(1) and 17(1) in failing to identify relevant recorded information or issuing a compliant refusal notice for the information that is exempt.
6. He requires no further remedial steps to be taken in this case because it is not possible to remedy the procedural breaches that he has noted.

Request and response

7. On 13 June 2011 (received on 15 June 2011) the complainant requested the following from UoM:

*'I would like all areas of University records (including that of UMIP and UMIC Limited and Faculty of Engineering & Physical Sciences) that utilise/mention my Christian name – [Individual redacted – two iterations stated] – and that of my founder CEO company – [company redacted] in meetings/discussions undertaking themselves [sic] at either the North or South campuses of the University since 01/01/2011. If any meetings include the attendance of UMIP's Enterperneur [sic *entrepreneur]–In-Residence with (in)direct mention on to [company redacted] then I would like to be further notified'*

8. On 15 June 2011 UoM wrote to the complainant. It explained that the subsidiaries that he had identified were separate organisations and that the complainant should request the information they hold from them. With regard to the UoM's information, it explained that it reasonably required further information to identify the information requested and asked him to clarify the individuals within it who he considered may have held relevant recorded information.
9. A number of phone conversations occurred after this date. Ten named individuals were identified by the complainant and UoM searched its records for those individuals.
10. UoM wrote to the complainant on 8 July 2011 to confirm that it held no relevant information for those ten individuals that had not been sent by the complainant to them. The complainant did not indicate he wanted the information he had sent to UoM himself and requested that he was returned the £10 fee and this was done on 19 July 2011.
11. Given the complexity of this case and its nature, the Commissioner decided to use his discretion to consider this case without an internal review being undertaken.

Scope of the case

12. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
13. On 14 October 2011 the complainant agreed that the Commissioner would consider whether further relevant recorded information was held for this request, if there was such information whether it was suitable

for disclosure to the public at large and any procedural issues in compliance.

14. There are also five preliminary matters that must now be addressed. Firstly, it must be noted that a substantial part of the request being considered was asking for the complainant's own personal data. The Commissioner has considered the complainant's own personal data in a separate assessment made under section 42 of the DPA, which will be provided in a separate cover to the complainant and the data controller under reference **RFA0435371**. This is a separate legal process from his duty under section 50 of FOIA and this will not be considered further in this Notice.
15. Secondly, it must also be noted that the complainant made a subsequent request to UMIP, a company that was fully owned by UoM, and this request was considered separately in decision notice **FS50408810**¹.
16. Thirdly, it must be noted that UMIP is a separate public authority for the purposes of FOIA and has its own obligations. UoM has no responsibility for the information held by UMIP and the information held by UMIP is not also held for UoM for the purposes of FOIA. The handling of the two requests has caused some confusion for the complainant and it is hoped that the UoM will review its coordination for similar future cases.
17. Fourthly, it is also helpful to explain UMIP [now UMI]'s role. It is a company that has been set up to deal with the commercialisation of intellectual property arising from UoM. There is a dispute between UoM and the complainant about intellectual property ownership and UMIP's role was to try and find a negotiated solution to it.
18. Finally, the complainant has many concerns about the conduct of the public authority. For the avoidance of doubt, the Commissioner only has jurisdiction to consider information access matters and the public authority's compliance with FOIA is the **only** thing that can be addressed in a Decision Notice issued under section 50 of FOIA.

¹ http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fs_50408810.ashx

Reasons for decision

19. While these reasons do not refer to every document in the case file, it must be noted that the Commissioner has considered all the information before him and has chosen only to mention the points that are necessary for his decision in this section.

Was further relevant recorded information held by UoM?

20. 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,

(b) if that is the case, to have that information communicated to him”

21. It should be noted at this stage that FOIA only offers the complainant the right to recorded information that is held at the date of the request (dated 13 June 2011).

22. UoM confirmed that it held information that the complainant provided it himself, and so in this part of this notice, the Commissioner is considering whether there is further relevant recorded information that had not already been located by UoM on 14 October 2011. For completeness, he will consider the operation of the exemptions to the information that was already found in a later part of this notice.

23. In determining whether UoM holds further relevant recorded information, the Commissioner considers the standard of proof to apply is the civil standard of the balance of probabilities.

24. In deciding where the balance lies in cases such as this one, where the complainant has asked him to consider the public authority's response with regard to whether or not the requested information is held, the Commissioner considers:

- the interpretation of the request;
- the scope, quality, thoroughness and results of any searches undertaken by the UoM; and
- any other explanations offered as to why the information is not held.

25. The interpretation of the request is fairly obvious in this case. In summary, it asks for all recorded information held by UoM about him and his company that was generated between 1 January 2011 and the date of the request (13 June 2011) that was held by ten individuals the complainant identified himself.
26. The Commissioner is satisfied that UoM read the request correctly and conducted its searches on the only objective interpretation of this request. UoM have evidenced this is so by explaining what the request asked for in its own words and processing the request accordingly.
27. UoM then explained how it did its searches and explained the searches it carried out. It said that it contacted the ten named individuals and enquired whether they had relevant recorded information. It asked those individuals to ensure that they checked their electronic and paper records.
28. UoM received emails back from some of the staff and provided their emails to the Commissioner. UoM telephoned the other individuals and provided the Commissioner with the evidence to support this.
29. The Commissioner considered the emails and came to the conclusion that UoM made an error in processing the request.
30. The emails revealed that UoM did actually hold two sets of information that fell within the scope of the request, which were:
 - A set of communications about providing the complainant's thesis to him after his request for it; and
 - Information concerning the UoM's defence of an industrial health complaint made by the complainant.
31. The first set of information was then disclosed to the complainant in February 2012 under the DPA and the Commissioner has considered the operation of section 40(1) [first party personal data] to that information.
32. The second set of information was not disclosed to the complainant, because the UoM considered that the exemptions found in section 40(1) [first party personal data] and section 42(1) [legal professional privilege] applied to it. The Commissioner has considered the operation of section 42(1) to that information below.
33. The Commissioner must firstly determine whether he considers even more relevant recorded information was held by the UoM in this case. To do so, he has considered the further arguments UoM have provided him with.

34. UMIP confirmed to the Commissioner that it had checked with the individual whose meetings were a particular focus of the request (the **entrepreneur in residence*). It had checked with that individual both on its own and on UoM's behalf and he confirmed that he had no recorded information that was relevant to the request for information.
35. UoM also explained how it dealt with the complainant's large number of emails to people who were not directly involved with the dispute. UoM explained that there were two potential outcomes for these emails. Some would be forwarded to the people who dealt with the main issues and the others would be deleted. The ones that were forwarded would be kept on file if they were not irrelevant or duplicates and these had been found (and was information that the complainant did not want). The others would be deleted because it had to ensure that the right people dealt with the issues. The complainant was told of the correct channels of communication.
36. To enable the UoM to function, it notified all individuals who weren't involved with the complainant's complaint to delete those emails without responding to them as this was a proportionate approach. The Commissioner considers that this approach offers further support for it being credible that the individuals the complainant identified did not hold any further recorded information about him.
37. The complainant has not offered the Commissioner any convincing arguments about why he considers that further relevant recorded information is held. The Commissioner understands that the complainant has real concerns about UoM's conduct and would perhaps expect further relevant recorded information to be held to support whatever suspicions he may have.
38. Despite its mistakes noted above, the Commissioner considers that on the balance of probabilities no further relevant information is held beyond the two categories of information that he has identified above. This is because the searches that were done by UoM were proportionate and would have unearthed any further relevant recorded information held by the relevant individuals identified by the complainant.
39. As noted above some information was located by the UoM and exemptions may apply to that information. The remainder of this decision notice focuses on the application of the exemptions:

Section 42(1) – legal professional privilege

40. Section 42(1) of FOIA is a qualified exemption and is worded as follows:

"Information in respect of which a claim to legal professional privilege ...could be maintained in legal proceedings is exempt information"

41. The Commissioner has therefore considered firstly whether the exemption was engaged and then gone onto explain why the public interest favoured the maintenance of the exemption.

Is the exemption engaged?

42. There are two categories of legal professional privilege: advice privilege where no litigation is contemplated or pending and litigation privilege where litigation is contemplated or pending.

43. At the time of the request, there was potential litigation pending and although that was subsequently withdrawn, the UoM considers that there is potential for it to be resurrected again. It is therefore relying on litigation privilege.

44. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation.

45. In this case, UoM contemplated that the complainant was likely to take it to court and its lawyers generated confidential communications in order to defend itself against this contemplated litigation. It explained that it considers the withheld information is subject to litigation privilege and release of the withheld information would adversely affect the course of justice.

46. UoM further illustrated that the information was created for the dominant purpose of conducting or giving advice in relation to litigation. The UoM has argued that disclosure would prejudice the prospect of successfully defending any subsequent litigation about its handling of the complainant's case.

47. The Commissioner is content that the information withheld under section 42(1) can all be correctly said to be confidential communications and that they were generated and held to enable it to consider and defend its position under litigation. He is content that the information has maintained its confidentiality and that the exemption has been correctly engaged by UoM.

The public interest test

48. Section 42(1) is a qualified exemption and therefore subject to the public interest test under 2(2)(b) of FOIA. Section 2(2) states that for the information not to be disclosed all the circumstances of the case must be considered and the public interest in maintaining the exemption must outweigh the public interest in disclosing the information. The Commissioner is only able to consider factors that are relevant to and inherent in the exemption being claimed when considering the

maintenance of the exemption. However, he can consider all public interest factors that relate to the disputed information when weighing the public interest factors that favour disclosure. It is important to note that FOIA is a public disclosure regime and therefore the Commissioner is only able to consider whether the information can be disclosed to the whole world and not just the complainant by themselves.

49. It is also important to note from the outset that FOIA's default position favours disclosure. Therefore in the event that the public interest factors are of equal weight the information should be communicated. However, it is clear that just because some members of the public may be interested in the information, does not necessarily mean that the release of the information would be in the public interest. The "public interest" signifies something that is in the interests of the public as distinct from matters which are of interest to the public².

▪ ***Public interest arguments in favour of maintaining the exemption***

50. The UoM understands that legal professional privilege is a fundamental and established convention in the legal system. Courts do not distinguish between private litigants and public authorities in the context of legal professional privilege. Just as there is a public interest in individuals being able to consult their lawyers, there is also a public interest in public authorities being able to do so. Therefore the need to be able to share information fully and frankly with legal advisers for the purposes of defending its legal position applies to the UoM.
51. The UoM also maintained that as a University it requires high quality, comprehensive legal advice for the effective conduct of their business. This advice needs to be given in context and with the full appreciation of the facts. It explained that this was particularly important that its legal staff were able to consult relevant lawyers in confidence to ensure that UoM receives necessary advice and guidance in a forum which is conducive to a free exchange of views. Legal advice and guidance provided may well include arguments in support of the final conclusion as well as counter arguments. As a consequence legal advice and guidance may well set out the perceived weaknesses of the UoM's position. Without such comprehensive advice, the quality of the UoM's decision making process would be reduced because it would not be fully informed and this is contrary to the public interest.

² *Department of Trade and Industry v Information Commissioner* (EA/2006/0007) at paragraph 50.

52. The UoM explained that the disclosure of legal advice would be likely to have a significant prejudice to its ability to defend its legal interests, both directly by unfairly exposing its legal position to challenge and indirectly by reducing the reliance it can place on future advice having been fully considered and presented without fear or favour. Neither of these scenarios is in the public interest. The former could result in serious consequential loss or at least a waste of resources in defending unnecessary challenges. The latter may result in poorer decision-making because the decisions themselves may not be taken on a fully informed basis.
53. The UoM concluded that although section 42(1) is a qualified exemption, given the very substantial public interest in maintaining confidentiality of legal professional privileged material, there are no public interest factors of sufficient weight adequate to compel disclosure in this case.
54. The Commissioner acknowledges the strength of the arguments advanced by the UoM in relation to this point. Indeed, there is a significant body of case law to support the view that there is a strong element of public interest built into section 42(1). For example, the Information Tribunal in *Bellamy v The Information Commissioner (The Secretary of State for Trade and Industry)* [EA/2005/0023] stated (at paragraph 35):

'there is a strong public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest. It may well be that, in certain cases ...for example, where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight.'

▪ **Public interest arguments in favour of disclosing the requested information**

55. However, it is important to remember that the factors outlined above must be balanced against the arguments in favour of disclosing the legal advice which forms the requested information; Parliament did not intend the exemption contained at section 42(1) of FOIA to be used absolutely.
56. Indeed the Tribunal's decision in the case of *Mersey Travel* [EA/2007/0052] underlines this point. In this case the Tribunal concluded that the public interest favoured disclosing legal advice received by Mersey Travel. It placed weight on the fact that the legal advice related to an issue which affected a substantial number of people. The complainant has made the argument that how the UoM conducted itself in relation to his litigation may be of significant public interest should it prove that UoM have acted illegally, unlawful, with bad

intent or in any other negative manner and this could be said to affect a substantial number of people. The Commissioner appreciates that the circumstances are of considerable importance to the complainant. However, his view, having considered the withheld information is that it relates solely to his own case and there is nothing within it which would go beyond his private interest in it.

57. The UoM is aware that there are public interest factors in favour of disclosure in this case. It has explained that there is an obvious public interest factor that favours transparency and accountability in relation to its actions and decisions that it has taken. The Commissioner agrees with both parties that transparency and accountability are key principles underlying the application of FOIA.
58. Furthermore, the Commissioner also accepts that disclosure of the privileged material would enable the public to consider whether the decisions have been made on the basis of good quality legal advice and thus increase public confidence in the UoM's position.
59. However, the Commissioner does note that the use of information requests to circumvent acquiring legal advice (and/or litigation) has been declared as being a weak one by the Information Tribunal – paragraph 30 of FCO [EA/2007/0092]³.

Balance of the public interest arguments

60. The Information Tribunal in *Calland v Financial Services Authority* [EA/2007/0136] (*'Calland'*)⁴ explained its approach when considering the balance of the public interest in this exemption [at paragraph 37]:

'What is quite plain, from a series of decisions beginning with Bellamy v IC EA/2005/0023 , is that some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential.'

³ This decision can be found at: http://www.informationtribunal.gov.uk/Documents/decisions/FCO_vICDecision_amendedWebsite_290408.pdf

⁴ This decision can be found at: http://www.informationtribunal.gov.uk/Documents/decisions/JCallandvsICO_0136_webdecision_080808.pdf

61. This approach has been developed subsequently and the current approach was confirmed by the High Court in *DBERR v O'Brien & Information Commissioner* [2009] EWHC 164 ('*DBERR*'). In *Thornton* [EA/2009/0071], the Tribunal usefully distilled the High Court's approach into six principles:
1. there is a strong element of public interest inbuilt into the exemption;
 2. there need to be equally strong countervailing factors for the public interest to favour disclosure;
 3. these countervailing factors do not need to be exceptional, just as or more weighty than those in favour of maintaining the exemption;
 4. as a general rule the public interest in maintaining an exemption diminishes over time but the fact that the advice is still 'live' is an important factor in the determination of the strength of the inbuilt public interest in the exemption;
 5. there may be an argument in favour of disclosure where the subject matter of the requested information would affect a significant group of people; and
 6. the most obvious cases where the public interest is likely to undermine LPP is where there is reason to believe that the public authority is misrepresenting the advice which it has received where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained.
62. In the Commissioner's opinion there is a strong public interest in understanding the reasons for decisions made by public authorities – in this case, the review that was undertaken of the complainant's complaint by the UoM and the position it was to take in the associated litigation. Disclosure of the privileged material may therefore assist the public's understanding of the legality of its current position and the reasons why it has taken these actions.
63. Moreover, the Commissioner accepts that there is a public interest in disclosure of information which aids the public understanding and participation in debates on issues of public importance, although the withheld information in this case is unlikely to enhance the quality of public debate in this case.
64. However, the Commissioner accepts that the established public interest arguments in protecting legal professional privilege must be given due

weight. There will always be an initial weighting in favour of maintaining the exemption due to the importance of the concept behind LPP, namely, safeguarding the right of any person (or public authority) to obtain free and frank legal advice which goes to serve the wider administration of justice. This is enhanced by the material and the legal advice remained live at the time of the request which intensifies the strength of protection that is to be expected.

65. The Commissioner has carefully considered all the legally privileged material and does not consider that its contents have been misrepresented by the UoM. It is noted that the material (whatever its content) is merely the legal opinion of a set number of individuals.
66. In considering where the public interest lies the Commissioner has taken into account the nature and sensitivity of the advice provided which, in his view, leads him to conclude that the inbuilt weight of legal professional privilege in relation to this information was still very strong at the date of the request. The Commissioner has also noted what is in the public domain and that the advice remains 'live' in terms of the issues to which it relates and therefore at the time of the request the potential for harm to the privilege holder was significant. Countering this, the Commissioner has attached some weight to the fact that disclosure of the advice would enable the public to further understand, challenge and debate the reasoning behind the UoM's position on this issue.
67. Taking all these factors into account: the inbuilt weight of public interest in the concept of privilege; the nature and sensitivity of the advice; transparency and accountability; its 'live' nature and the possible harm resulting from the release of the information itself, the Commissioner has however concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information under section 42(1).
68. For all the reasons above, he therefore determines that the exemption found in section 42(1) has been applied correctly and upholds UoM's position in this regard.

Section 40(1)

69. The information that related to the complainant requesting his own thesis and some of the information contained in the legal correspondence about the complainant's industrial injury case could also be withheld under section 40(1).
70. Section 40(1) of FOIA states that:

'Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.'

71. What constitutes personal data is defined by section 1(1) of the DPA. This information does relate to the complainant who is an identifiable living individual and does constitute his own personal data.
72. This exemption is absolute. Its purpose is to ensure that an individual receives their own personal data privately through the DPA, so that they can choose whether or not they publicise it as they see fit. He also notes that he has received the information about his thesis under the DPA in February 2012.
73. The Commissioner considers that this information is absolutely exempt by virtue of section 40(1) of FOIA.

Section 21(1)

74. As noted above, the UoM offered to send the emails back that the complainant sent to it, the complainant did not appear to want them and asked for his money back.
75. For the avoidance of doubt, the Commissioner considers that these emails would have been withheld correctly by virtue of section 21(1) of FOIA.
76. Section 21 states that a public authority does not need to provide information under section 1 of the Act if that information is reasonably accessible to the applicant by other means.
77. The Commissioner considers that the correspondence from the complainant was reasonably accessible to him and understands that the complainant did not dispute that this was so with UoM. It follows that those emails could be withheld by virtue of section 21(1) and need not be provided to the public.

Other matters

78. While not a requirement of the legislation, the Commissioner wants to note two further matters of concern. The first is that in this case, the request was refined on the telephone, but what was agreed was not confirmed in writing by the UoM. The Commissioner considers that for evidential reasons it is best practice to confirm the scope of a refined request in writing in these circumstances.

79. Secondly, it would also have been helpful for UoM to have clearly explained the nature of its relationship with UMIP to the complainant and why it doesn't hold the information that UMIP does.

Right of appeal

80. 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

81. 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.

82. 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

Pamela Clements
Group Manager – Complaints Resolution
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF