

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 December 2012

Public Authority: The Governing Body of University of East Anglia
Address: Norwich Research Park
Norwich
NR4 7TJ

Decision (including any steps ordered)

1. The complainant has requested information relating to a project they worked on.
2. The Commissioner's decision is that the University of East Anglia (UEA) has correctly applied section 43(2) and complied with section 1(1)(a) of the FOIA.
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 28 December 2011, the complainant wrote to the UEA and requested all documents related to the following statements reportedly made by a named academic employed by the University:
 - a) [named individual] insistence that work from EPSRC (Engineering and Physical Sciences Research Council) postdocs should be vetted by [named company] prior to publication.
 - b) I believe I clearly stated that [named individual] was covered by the agreement and [named individual] did not query this (I need to check but I am confident this is the case).
 - c) Thirdly, the issue of contribution from UEA staff and postdocs was addressed and settled amicably (I can forward emails to this effect).
 - d) There is no established link between the EPSRC funded project and

patent as far as I am aware...

e) [named company] are willing to supply the equipment whenever we want – I am happy to activate that whenever you feel is appropriate

5. The UEA responded on 21 February 2012. It provided a number of documents containing redactions due to the exemptions it had applied.
6. Following an internal review the UEA wrote to the complainant on 3 April 2012. It explained the section 41(1) and section 43(2) exemptions it had applied and that a further search had been undertaken regarding point d) above.
7. The UEA applied the following exemptions to points a) – d) above
 - a) sections 43(2); 41(1)
 - b) sections 40(2);41(1);43(2)
 - c) sections 40(2); 41(1);43(2)
 - d) sections 41(1); 43(2)
8. In addition, the UEA stated that in relation to point d) it did not hold any recorded information relevant to the lack of an established link between the EPSRC funding and patent.
9. In its internal review response the UEA stated that in relation to point d) a further search had been undertaken but no further information falling into the ambit of this request was located. Therefore it considered that it had complied with section 1(1)(a).

Scope of the case

10. The complainant contacted the Commissioner to complain about the way their request for information had been handled. The Commissioner received the complaint on 4 May 2012.
11. The request concerns information surrounding the filing of a patent by the named company, arising out of research undertaken at the UEA, which was partially funded by the EPSRC.
12. In their complaint they stated that the UEA claimed it has no recorded information relevant to a lack of an established link between EPSRC funding and a patent.
13. They further challenged the use of redactions and stated it was their belief that some of these redactions referred to possible links between

ESPRC funded work and a named company's patent application and/or the absence of such links.

14. The complainant stated that they wished to challenge the UEA's stance that release of the information would constitute 'an actionable breach of confidence'.
15. The Commissioner considers the scope of this case to be to determine if the UEA has correctly applied the exemptions it has cited to the relevant parts of the information requested and to consider whether it holds all the requested information.

Reasons for decision

Section 43(2) – Prejudice to commercial interests

16. Section 43(2) provides that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person.

Engagement of section 43

17. The Commissioner initially considered whether the relevant criteria for the engagement of section 43(2) were satisfied.

(i) Applicable interest within the exemption

18. The Commissioner considered whether the prejudice claimed by the UEA is relevant to section 43(2). The UEA has argued that disclosure of the information withheld under section 43(2) would be likely to prejudice the commercial interests of the named company and UEA itself.
19. The UEA is of the opinion that the ability of the named company to claim the patent to the technology it is marketing is very much a commercial interest; indeed it would be difficult to envisage a more central commercial interest than the right to sell the goods one is marketing. As for the UEA, the ability to cooperate with private industry to develop intellectual property is an essential commercial activity within the research community as it impacts significantly on the University's ability to attract research funding.
20. The Commissioner accepts that the disclosure of the withheld information could lead to debate over the ownership of the patent and therefore restrict its ability to market its goods. This would clearly be prejudicial to its commercial interests. In addition, the Commissioner considers disclosure of the withheld information would be likely to affect its ability to attract funding, which would restrict the amount of research

it could carry out. The Commissioner is therefore satisfied that the potential prejudice that has been identified by the UEA relates to the commercial interests of the named company and the University.

21. The information that was withheld was correspondence with the named company; the complainant and the UEA which contained their views on various aspects of the research, including intellectual property rights, individuals working on the research and the effects on the UEA's reputation.

(ii) The nature of the prejudice

22. The Commissioner next went on to consider whether the prejudice being claimed was "real, actual or of substance" ie not trivial and whether there was a causal link between disclosure and the prejudice claimed. With regard to the first element, the Commissioner is satisfied that the prejudice being claimed is not trivial or insignificant.
23. With regard to the second element, the public authority needs to be able to establish that the disclosure of the information would be likely to lead to the harmful consequences claimed. The Commissioner, having examined the information withheld under this section, notes that it is part of an exchange of views between the complainant, the UEA and the named company as to the progress being made with the research. The Commissioner obviously cannot discuss this information in detail as to do so would reveal information that the UEA believes is exempt from disclosure.

(iii) The likelihood of prejudice

24. The UEA has argued that the disclosure of the withheld information would be likely to prejudice the commercial interests of the named company and the University. In the case of *John Connor Press Associates Limited v The Information Commissioner* the Tribunal confirmed that, when determining whether prejudice would be likely to occur, the test to apply is that "*the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.*" (para 15). In other words, the risk of prejudice need not be more likely than not, but must be substantially more than remote.
25. The Commissioner accepts, after reviewing the withheld information, that its disclosure would result in a real and significant risk that the UEA would face an increased risk of negative publicity, possible litigation and potential damage to its reputation. This would clearly be harmful to its commercial interests.

26. The Commissioner, in consequence of the above, accepts that section 43(2) is engaged. As it is a qualified exemption, he went on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest test

Public interest arguments in favour of disclosing the information

27. The Commissioner recognises that there a general public interest in accountability and transparency in relation to the activities of public authorities. This is particularly the case where the public body obtains funding for research purposes from the tax payer.

Whilst the FOIA is intended to be applicant and purpose blind there is evidence that this request for information is related to a personal dispute between the complainant, the UEA and the named company rather than a genuine public interest. Therefore the arguments in favour of disclosure are limited.

28. The Commissioner also acknowledges that there is a public interest in transparency in a general sense however he has seen nothing to suggest that there is a compelling need for more transparency in this particular case.
29. The UEA accepts that there is a public interest in the accountability of public spending. It further accepts that there is a public interest in the proper handling of research funding by any academic institution.

The UEA argued that the interest in the release of this information is primarily individual and relates to an on-going dispute between the complainant; the named company and the University.

Public interest arguments in favour of maintaining the exemption

30. The UEA argued that damaging the commercial interests of the named company and the University would not be in the public interest, and that there was little public interest in the release of the requested information to override the public interest in maintaining the commercial position of the UEA and the named company.
31. It further stated that there is considerable public value in the work at issue. Maintaining on-going relationships with the named company is very much in the public interest as this enables the continuing development of technology with a substantial research input from a UK based university.

32. The UEA stated that disclosure of this information would certainly damage, if not irreparably terminate this relationship and the work associated with it at UEA.
33. In addition, the UEA argued that competition for research funding is fierce within the Higher Education sector and the ability to fund quality research leading to quality outputs is a critical building block in the effort to secure overall government funding for the University.
34. The UEA explained that the processes provided by the existing EPSRC funding regime provide a significant amount of information regarding projects funded by the EPSRC. For example, one can view information describing projects that the complainant has conducted for which he received EPSRC support.
35. Furthermore, there is an established process by which information relating to patent either in the UK or elsewhere is distributed to the public.

Balance of public interest arguments

36. The Commissioner acknowledges that there is a public interest in disclosure of research funding.
37. The UEA has argued that processes are already in place to address the public interest in accountability for research funding.
38. The Commissioner does accept that disclosure would be likely to prejudice the commercial interests of the named company and the UEA. There is clearly a significant public interest in not disclosing information which may have an adverse effect on the commercial interests of any organisation.
39. In addition, the Commissioner accepts that the disclosure of the associated parties frank exchanges over this issue would very likely lead not only to the named company being more reluctant to enter into funding research, but would be likely to lead to other organisations also being less willing to do so.
40. The Commissioner considers that there is a significant public interest in the UEA being able to procure research funding in the highly competitive Higher Education sector within the UK.
41. After weighing the public interest arguments, the Commissioner has determined that the public interest factors in not prejudicing the commercial interests of the named company and the UEA, outweigh the public interest factors in favour of disclosure. Consequently, he has

decided that the UEA correctly applied section 43(2) to the information that it withheld.

Conclusion

42. Having reviewed the withheld information it is the Commissioner's view that the exemption claimed under section 43(2) has been correctly applied to all the information. He has therefore not considered the application of section 41 or section 40.

Section 1

43. Section 1 of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request, and if that is the case to have that information communicated to him.
44. The standard of proof that the Commissioner has applied in determining whether the UEA does hold information relevant to the complainant's request is the civil standard of the balance of probabilities.
45. Where the UEA has correctly stated that it does not hold information falling within the scope of the request, the Commissioner will conclude that the authority has complied with the requirements of section 1(1)(a).
46. The complainant considered that in order to make a judgement as to whether there is a link or not between EPSRC funded work and the patent, would require an expert. The complainant is unaware of any individual that would be able to do this. Therefore he believes that this would not be able to be provided without producing any documentation.
47. The Commissioner asked the UEA for its views on this matter.
48. The UEA explained that during the internal review, it took into consideration the further clarification and information provided by the complainant in his letter of 7 March 2012.
49. Despite the clarification, the UEA felt that the specific request contained within point d) remained ambiguous.
50. The UEA stated that the appropriate persons within the University were consulted both in the School of Pharmacy and the Research, Enterprise Services unit, and further searches were conducted.

51. The people concerned were heavily involved in the work conducted by the complainant during his time at the University and would be in a position to both be aware of the EPSRC funded work and any subsequent patents.
52. The UEA further stated that based upon its reading of the question, the searches revealed no recorded information that it felt to be relevant to the statement in an email from an individual at the University "*there is no established link between the EPSRC funded project and patent as far as I am aware..*". This arose from the interpretation of the meaning 'relevant' as meaning informing and therefore pre-dating the statement as made at the time.
53. The Commissioner asked the UEA what it had done to try and locate any relevant information.
54. The UEA explained that a detailed search was undertaken by two individuals, at the time of the request that had been involved in the work with the complainant. These searches included emails, digital material and print files. This search was repeated as part of the internal review. The two individuals had been identified as appropriate sources of information due to their roles within the University.
55. The UEA further explained that all digital information would have been held on networked resources and these were searched. In relation to the searches carried out by one of the individuals concerned, specific terms were searched for separately. This search yielded a large number of responses and these were manually checked. The University believes that any matter which is relevant to this issue would inevitably involve mention of one of the search terms used.
56. With regard to searches carried out by the second individual involved, it addressed the two key aspects of context, the EPSRC grant and the patent, both mentioned but not identified specifically. By searching the UEA grant database the second individual concluded that this must refer to EPSRC grant EP/D038448/1 (UEA ref R13779). From the context of the email exchange the patent in question is US patent application 20090249521.
57. The UEA stated that the search of electronic files relating to this issue concentrated on mention of the individuals funded on grant R13779. The discussion over UEA involvement and inventorship in the patent revolves around one individual's possible contribution. This individual is not mentioned in the grant file R13779 as a co-investigator, recognised researcher, was not appointed to work on the grant, has no expenditure allocated to them under the EPSRC Resources Required for Project, and is not listed as receiving any payments including expenses. The

individual is mentioned in the final report as co-author on two articles in preparation, but with no information on whether his contribution had been supported by the EPSRC.

58. Additionally, the UEA stated that a search of email files and email folders relating to the named company, which had previously been created specifically in relation to prior requests by the complainant was also carried out. These additional files also contained emails from a previous member of university staff who was originally dealing with the associated issues.
59. After conducting the above-noted searches, no information was found linking EPSRC research grant R13779 with US Patent 20090249521 relating to an opinion expressed on 7 January 2010, as to whether the two are linked.
60. The UEA explained that in the case of one of the individual's concerned, it reported holding little hard documentary information regarding the complainant's employment as a whole and therefore the majority of the information would be held as electronic records.
61. The records held by the second individual would be held in both paper and electronic formats. In particular, the grant file relevant to this matter is maintained as a hard copy record and the individual reviewed this paper file. The file contains the original application, offer of funding, associated letters of appointment, timesheets for UEA technical staff whose time is being charged to the grant, financial records for all expenditure, requests for variations to the grant and associated internal discussions, and the final report.
62. The UEA stated that the two individuals concerned explicitly stated that they had not deleted, requested deletion or authorised deletion of relevant emails pertaining to this matter.
63. The UEA further explained that information regarding research grants is held as a record of the research activities of the University and as a record of the funding received to undertake such research. There have also been a series of requests dating back to 2010 relating to patents involving the complainant and the named company, and the material needed to be retained in accordance with the FOIA. However, there are no statutory requirements upon UEA to retain the requested information.
64. The Commissioner notes that it can be difficult for a public authority to "prove" that it does not hold any information on a particular subject. Having reviewed the evidence, the Commissioner is satisfied that the

UEA conducted a thorough and extensive search for the relevant information.

65. The Commissioner considers that, on the balance of probabilities, the requested information is not held by the UEA. Therefore the UEA have complied with section 1(1)(a) of the FOIA in advising that it did not hold the information.

Right of appeal

66. 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

67. 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.
68. 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
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