

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 November 2017

Public Authority: University of Kent

Address: Canterbury
Kent
CT2 7NZ

Decision (including any steps ordered)

1. The complainant has requested information from the University of Kent ("the University") regarding communications in relation to an online article about reptile mortality rates. The University refused to disclose that information ("the withheld information") citing sections 36(2)(b)(ii), 40(2) and 41 of the FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that the University has correctly applied section 36(2)(b)(ii) to the withheld information. As she considers that this applies to all of the withheld information, she has not considered the University's application of sections 40(2) and 41 of the FOIA to the withheld information.

Background to request

The Durrell Institute of Conservation and Ecology (DICE) is a research centre based at the University. PLOS One is a peer-reviewed open access scientific journal published by the Public Library of Science (PLOS) since 2006. The journal covers primary research from any discipline within science and medicine. In November 2015 PLOS One published an article, written by representative of DICE, entitled '*Captive reptile mortality rates in the home and implications for the wildlife trade.*' The requested information is communications between DICE, the University and the PLOS One editorial team in relation to online comments made and matters arising regarding the content of the article.

Request and response

3. On 31 March 2016, the complainant wrote to the University and requested information in the following terms:

"Pursuant to the Freedom of Information Act 2000, we would like to request copies of all communications (including letters, emails and telephone attendance notes) since 6 December 2015 between any representative of DICE (including the article authors) or of the University of Kent and the PLOS One editorial team in relation to the article entitled, '*Captive reptile mortality rates in the home and implications for the wildlife trade.*'

4. The University responded on 28 April 2016. It stated that it held the requested information, however it refused to disclose it to the complainant, citing sections 22, 36, 38, and 40 of the FOIA as a basis for non-disclosure.
5. Following an internal review the University wrote to the complainant on 24 June 2016. It stated that it had decided that sections 22 and 38 of the FOIA were no longer applicable to the requested information, however it upheld the original decision to apply sections 36 and 40 as a basis for non-disclosure. It also stated that it now considered that the exemption set out in section 41 of the FOIA was also applicable to part of the requested information.

Scope of the case

6. The complainant contacted the Commissioner on 17 August 2016 to complain about the way her request for information had been handled.
7. The Commissioner has considered the University's application of the above exemptions to the withheld information.

Reasons for decision

9. Section 36(2)(b)(ii) of the FOIA states 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-

(2)(b) -would, or would be likely to, inhibit

(ii) the free and frank exchange of views for the purposes of deliberation,

The University considers that section 36(2)(b)(ii) is engaged in relation

to the withheld information. The Commissioner has viewed the withheld information, which consists of e-mails and attachments to e-mails.

10. Section 36(2)(b)(ii) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, its disclosure would, or would be likely to inhibit the free and frank exchange of views for the *purposes of deliberation*.
11. In determining whether any of these limbs of the exemption has been correctly engaged, the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed that opinion. Therefore the Commissioner must:
 - Ascertain who the qualified person is,
 - Establish that they gave an opinion,
 - Ascertain when the opinion was given, and
 - Consider whether the opinion was reasonable.
12. The University has explained that for the purposes of section 36 its qualified person is its Vice-Chancellor, by virtue of section 36(5)(o)(iii). In this case the opinion was provided by the University's Vice-Chancellor on 19 April 2016, 9 days prior to the date upon which it issued its response to the complainant's request. The Commissioner is satisfied that this was the qualified person at the time the request was made. The University has explained that the qualified person was not provided with all of the withheld information, however she was provided with a sample of that information.
13. The qualified person may apply the exemption on the basis that the prejudice to the relevant interests protected by section 36(2)(b) either 'would' occur or 'would be likely' to occur. This means that there are two possible limbs upon which the exemption can be engaged.
14. The term 'likely' to inhibit is interpreted as meaning that the chance of any inhibition or prejudice should be more than a hypothetical possibility; there must be a real and significant risk. The alternative limb of 'would' inhibit is interpreted as meaning that the qualified person considers it is more likely than not that the inhibition or prejudice would occur.
15. The qualified person has not stated explicitly whether her opinion is that the prejudice 'would' occur or 'would be likely' to occur, however in its response to the Commissioner the University has indicated that it considers that prejudice 'would' occur. It is on this basis that the

Commissioner will consider whether the qualified person's opinion is reasonable.

16. When considering whether the opinion is reasonable the Commissioner is not required to determine whether it is the only reasonable opinion that can be held on the subject, or even the most reasonable one. It is quite possible for two people to hold differing views on the same issue, both of which are reasonable. It is also not necessary that the Commissioner agrees with the qualified person's opinion, simply that she finds it to be a reasonable opinion.

Section 36(2)(b)(ii)

17. The University has argued that disclosure of the withheld information would inhibit the free and frank exchange of views for the purposes of deliberation. It argued that the withheld information consists of concerns put forward by individuals to PLOS ONE regarding the content of the article and/or subsequent comments. It argues that those individuals would have an expectation of privacy and anonymity in respect of those concerns.
18. The University further argued that disclosure of the withheld information would take away the 'safe space' in which individuals feel that they can make open and honest contributions to the decision-making process. If the opinions of the individuals are inhibited, this will inhibit the quality of decision-making.
19. The University has also argued that taking away such a 'safe space,' would create a 'chilling effect' which would lead to only inhibited views being shared in writing in future, thereby prejudicing future decision making.
20. The Commissioner recognises that disclosure of the withheld information could make individuals less free and frank in the expression of their views if they believed that their comments and concerns would not be kept confidential. She has considered this in the context and purpose of the article, the online comments and the concerns raised about these.
21. As such, the Commissioner is satisfied that section 36(2)(b)(ii) is engaged, that the qualified person's opinion that the disclosure would inhibit the free and frank exchange of views for the purposes of deliberation is a reasonable one.

Public interest arguments in favour of maintaining the exemption

22. The Commissioner has perused the withheld information, which consists of e-mails relating to comments made regarding the specified article. However, for some deliberations, there needs to be a safe space to allow open and honest contributions. If these opinions are inhibited then the quality of the decision may be impaired. The reason why people may be inhibited is because reptile mortality is a controversial subject and a disagreement can provoke opinions that may upset or cause stress to any of the participants. The article has been published online on a website that allows comments to be made, therefore, a certain amount of public scrutiny should be expected, whereas, concerns raised with PLOS ONE about the content of the article or the subsequent comments have an inherent expectation of privacy and anonymity. If this confidentiality was not maintained then it would prejudice whether people or organisations contacted PLOS ONE in the future when they have a concern that any published information is incorrect.
23. The University argues that the public interest in maintaining this "safe space" in order to express such concerns is greater than the public interest in transparency and accountability with regard to its decision-making processes. It states that, if the University is inhibited when participating in a decision-making process, this would be likely to damage the quality of outcome. It argues that the preservation of such a safe space is necessary for the purposes of deliberating the sensitive issues involved.

Public interest arguments in favour of disclosure

24. The complainant argues that it is in the public interest for the University to be open and transparent about the issues involved. The University acknowledges there is a general public interest in it being open and accountable with regard to its decision-making processes. This would help further the public's understanding of the way in which the University operates and makes decisions.

Balance of the public interest arguments

25. Having perused the withheld information, which consists of e-mails relating to and discussing concerns about comments made regarding the specified article, the Commissioner must consider where the balance of the public interest lies. In doing so, she has taken into account the opinion of the qualified person that disclosure would cause the inhibition described. This carries a certain amount of weight through to the public interest test.

26. However, the exact weight that should be given to maintaining the exemption depends on the particular circumstances of the case. This means that, whilst the Commissioner accepts that the opinion of the qualified person that inhibition would occur is reasonable, she will go on to consider the severity, extent and frequency of that inhibition to determine where the balance of the public interest lies.
27. The Commissioner notes there is a public interest inherent in section 36(2)(b), being a prejudice-based exemption, in avoiding harm to the decision-making process. She has taken into account that there is automatically some public interest in maintaining this exemption to avoid such harm.
28. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding the basis on how public authorities make their decisions and carry out their functions, and in turn fosters trust in public authorities. It may also allow greater participation by the public in the University's decision making process.
29. However, the Commissioner accepts that, for some deliberations, there needs to be a safe space to allow open and honest contributions. If these opinions are inhibited then the quality of the decision may be impaired. The University has informed the Commissioner that the reason why people may be inhibited is because reptile mortality is a controversial subject and a disagreement can provoke opinions that may upset or cause stress to any of the participants. The fear that these may be disclosed into the public domain would inhibited the proferring of free and frank deliberations on the issues.
30. When considering the balance of the public interest arguments, the starting point as always should be the content of the disputed information itself including its sensitivity or otherwise. Factors such as the age of the disputed information as well as the timing of the request are also relevant in determining where the balance of the public interest lies. The Commissioner has taken into account all of these factors when reaching a decision including a review of the withheld information which shows a free, frank and robust exchange of views on a controversial issue.
31. The Commissioner considers that one of the factors to consider is whether the matter subject to the request was live at the time the request was made. The University has stated that the matter was live at the time of the request as the article in question was published on 10 November 2015 and was part of an ongoing research programme. The article and the comments made, also the withheld information

itself, all serve to feed into and inform future research. The Commissioner therefore considers that the impact of the inhibition to the individuals involved in discussing and deliberating the concerns about the comments made about the article is more severe than if the matter was not live at the time of the request.

32. The Commissioner considers that there would be some public interest in viewing the withheld information. The main arguments advanced by the University relate to the concepts of a 'safe space' and a 'chilling effect'. The 'safe space' argument is as outlined in paragraphs 23 and 29 above.
33. The Commissioner accepts that the review was a live issue at the time of the request and that the e-mails concerned, i.e. the withheld information, discussed and exchanged views and concerns about some of the online comments made about the article. The University argues that a safe thinking space was required and is still required in order for the individuals involved to exchange their views without inhibition or fear that those views would be disclosed into the public domain.
34. The chilling effect argument is that disclosure of information would inhibit free and frank discussions in the future and that the loss of frankness and candour would damage the quality of deliberations and lead to poorer decision making. The University argues that the views and opinions of the individuals concerned were provided in the expectation that these would remain confidential. Therefore disclosure of these would lead to a future reticence to express such views and opinions as the fear would be that these may be eventually disclosed into the public domain.
35. However, both the Commissioner and the Information Tribunal have frequently been unconvinced of a wide-ranging chilling effect as alleged by public authorities, expressing scepticism that the disclosure of information on one issue or policy would affect the frankness of exchange of views on another unrelated issue or policy. For example, in *Friends of the Earth v Information Commissioner and Export Credits Guarantee Department*¹ (para 61), the Tribunal commented:

"It is not enough in this Tribunal's view to fall back on a plea that revelation of all information otherwise thought to be inviolate would have some sort of 'chilling effect'.

¹ EA/2006/0073

36. The Commissioner's guidance on section 36 (2) states that:

"Chilling effect arguments operate at various levels. If the issue in question is still live, arguments about a chilling effect on those ongoing discussions are likely to be most convincing. Arguments about the effect on closely related live issues may also be relevant. However, once the decision in question is finalised, chilling effect arguments become more and more speculative as time passes. It will be more difficult to make reasonable arguments about a generalised chilling effect on all future discussions."

37. However, when considering the public interest, the Commissioner should give such 'chilling effect' arguments appropriate weight according to the circumstances of the case and the information in question.

38. In this case, the article was published a few months before the request and the withheld information was first created shortly after publication of the article. The University has informed the Commissioner that the article was part of an ongoing review into the issue of reptile mortality rates and that the online comments and concerns expressed all formed part of that review. Therefore, the Commissioner is satisfied that the issues were live at the time of the request.

39. Although the Commissioner considers that academics should be robust and confident in exchanging their views, she does accept that the particular issues involved in the withheld information are sensitive and that fear of disclosure of the individuals' deliberations into the public domain may cause them to be less free and frank with their views on future sensitive issues.

40. The Commissioner has considered the public interest arguments presented in this case and has given due weight to the opinion of the qualified person and has considered the likely extent, frequency and severity of any impact of disclosure on the free and frank exchange of views for the purposes of deliberation in the context of preparing for an external review.

41. The Commissioner has concluded that in the circumstances of this case the public interest in maintaining the exemption outweighs the public interest in disclosure of the withheld information and therefore the exemption at section 36(2)(b)(ii) has been correctly applied. As the Commissioner considers that this exemption applies to the entirety of the withheld information, she has not gone on to consider the University's application of the exemptions as set out in sections 40(2) and 41 of the FOIA.

Right of appeal

42. 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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

43. 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.
44. 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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