

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 July 2018

Public Authority: University of Nottingham
Address: University Park
Nottingham
Nottinghamshire
NG7 2RD

Decision (including any steps ordered)

1. The complainant requested two pension valuation consultations. The University of Nottingham (the University) refused the request under section 36(2)(b)(ii) – prejudice to the free and frank exchange of views for the purpose of deliberation.
2. The Commissioner is satisfied that section 36(2)(b)(ii) is engaged but the public interest only favours maintaining the exemption for one part of the request - the copy of the University's response to the 2017 UUK USS valuation consultation.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - To disclose the copy of the University's response to the 2014 UUK USS valuation consultation.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. The Universities UK (UUK) is a representative organisation for a large number of universities. It works closely with its members collectively and individually to help them to achieve their aims and objectives and to shape higher-education policy. It also represents the sector in disputes.
6. The Universities Superannuation Scheme (USS) is a national pension scheme of almost 400,000 members. It undertakes a valuation every three years to establish whether the assets held by the scheme are sufficient to cover the benefits promised to members and to determine the level of contributions required from employers and members to meet future benefits and clear any past service deficit.

Request and response

7. On 24 October 2017 the complainant requested the following information:

'Please provide copies of your University's responses to the 2017 and 2014 UUK USS valuation consultations.'
8. On 21 November 2017 the University refused to provide the information citing section 43 (commercial interests) for both the 2014 and 2017 responses.
9. The complainant requested an internal review on 22 November 2017. The University sent the outcome of its internal review on 21 December 2017 upholding the decision.

Scope of the case

10. On 2 January 2018 the complainant wrote to the Commissioner to complain about the way his request for information had been handled. He argued:

'I do not believe that any of these exemptions meet the public interest test for withholding this information. I have requested internal reviews from all the institutions that refused to send these documents of behalf of 160 signatories. Thus there is a very strong public interest in the publication of these documents. In addition these negotiations and the proposed changes to the pension scheme have received widespread attention in the press. Thus there is a strong public interest in publishing these documents.'

11. During the course of the Commissioner's investigation, the University informed the Commissioner on 13 March 2018 that it wished to cite an additional exemption - section 36, conduct of public affairs. It also concluded that *'it will be appropriate to release the information to the requester once the current industrial dispute has come to an end and the upcoming consultation on the change to a defined benefit scheme has concluded.'*
12. On 16 April 2018 the Commissioner asked the University to reconsider and disclose the withheld information to the complainant as she understood that the strike had ended in the previous week. The University stated that it considered the dispute to be *'suspended rather than at an end'* and was not yet prepared to release the information.
13. On 3 May 2018 the University informed the complainant of the additional exemption and that the withheld information would be disclosed when the USS/UCU joint committee has published its report in the autumn.
14. The Commissioner asked the complainant if he wished to continue with the complaint given the University's position of the time limited nature of the exemptions and that this was the final case from the original 19 complaints. On 15 May 2018, the complainant confirmed that he wished to continue with the complaint.
15. The Commissioner confirmed the revised scope of the complaint to both parties and sought the full and final arguments in support of the University's revised position.
16. On 20 June 2018 the University withdrew its reliance on section 43 *'given that the industrial dispute and its associated press coverage is over'* and stated that its final position *'to disclose the information ... prior to the outcome of the joint UUK/UCU Committee would be likely to prejudice the effective conduct of public affairs'*.
17. Although the Commissioner notes the intention of the University to provide the withheld information in the autumn of 2018, the Commissioner's investigation must consider whether the University handled the request in accordance with the FOIA at the time of the request (24 October 2017).
18. The University has withdrawn its reliance on section 43. Therefore, the Commissioner will determine if the University was entitled to rely upon the exemptions at section 36 as a basis for refusing to provide the withheld information from 2014 and 2017 at the time of the request.

Reasons for decision

Section 36 – prejudice to the conduct of public affairs

19. Section 36(2) of FOIA states that information is exempt if in the reasonable opinion of a qualified person, disclosure of the information –
- (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 purpose of deliberation, or
- (c) would otherwise prejudice, or would be likely to otherwise prejudice the effective conduct of public affairs.
20. During the investigation, the University applied section 36(2)(b)(ii) – the free and frank exchange of views for the purpose of deliberation.
21. Section 36 is unique in that its application depends on the opinion of the qualified person that the inhibition envisaged would, or would be likely to occur. To determine whether the exemption was correctly engaged by the University, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the 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.
22. The qualified person for the University is Professor Shearer West, Vice-Chancellor. The University advised the Commissioner that the qualified person's opinion was sought on 7 March 2018 at the time of the revised position. She was shown a copy of the withheld information and a copy of the draft response to the complaint. She gave her opinion on 8 March 2018. The Commissioner has seen the completed form and the email trail between the Vice-Chancellor, the Registrar and the Senior Information Governance Manager to confirm the date of this opinion.
23. The Commissioner is therefore satisfied that the qualified person did provide her opinion that the information in question was exempt under section 36(2)(b)(ii).

24. The exemption can be engaged on the basis that the prejudice to public affairs either 'would' or would be 'likely' to occur. In this case, the University has applied the exemption on the basis that disclosing the information in question would be 'likely' to prejudice the free and frank discussions. This is taken to mean that the qualified person considers the likelihood of the inhibition occurring to be more than a hypothetical possibility; that there is a real and significant risk, even if that risk is less than 50%.
25. The Commissioner now needs to consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy herself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold. The qualified person's opinion can only be considered unreasonable if it is one that no reasonable person could hold.
26. The University explained that the relationship between the UUK and the University frequently necessitates the free flow of information so important issues can be considered and a policy position developed.
27. The information in both the 2017 and 2014 UUK USS valuation consultations reflected the *'financially unsustainable position of the pension fund and the necessary impact this was likely to have on benefits of pension fund members in order that the deficit of the fund could be lessened. It would be easy for this information to be interpreted negatively by members of the pension fund whose benefits would be affected. At the time the request was made, there was significant press interest in this matter which increased the likelihood of negative publicity about the University had the information been released.'*
28. The University considers the information in the survey returns to be 'live' until the USS/UCU joint committee publishes its report in the autumn of 2018.
29. Having viewed the withheld information, the Commissioner is satisfied that it is reasonable for the qualified person to have concerns over the release of this information.
30. For these reasons, the Commissioner finds that the exemption provided by section 36(2)(b)(ii) is engaged in respect of all the information to which it has been applied.

Public interest test

31. Section 36 is subject to the public interest test as set out in section 2 of the Act. This means that although the exemption is engaged, the information can only be withheld if in all the circumstances of the case the harm that disclosing the information would cause is greater than the public interest in its disclosure.
32. The Commissioner's approach to the competing public interest arguments in this case draws heavily upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)¹. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion the Commissioner must give weight to that opinion as an important piece of evidence in her assessment of the balance of the public interest.
33. Although the Commissioner has accepted the qualified person's opinion to be a reasonable one in respect of the withheld information, and will therefore give some weight to that opinion, she will reach her own view on the severity, extent and frequency of that inhibition to the decision making process occurring.

Public interest arguments in favour of disclosure

34. The complainant argued that:

'The current discussion around the USS valuation and potential changes to the scheme are being widely discussed by many individuals, both in the press and privately in university campuses across the UK. The opinion of employers is an extremely pertinent factor in this discussion. Employees need to know and understand their employer's position about what is reasonable for employer contributions to the USS and future benefit structure of the scheme. In addition, Exeter and Lancaster universities have published their responses in full. This suggests that they do not believe that publishing their responses would inhibit a free and frank exchange of views. This suggests that publishing the response is unlikely to severely prejudice your institution's ability to conduct a free and frank exchange of views.'

35. The University acknowledges that there is a public interest in transparency relating to pension scheme developments: *'that interest is met through the publication of official updates, which are available through the University's website, and to which the requester was directed in the University's response to the initial request.'*

¹ EA/2006/0011; EA/2006/0013

36. From her own research, the Commissioner is aware that other Universities have disclosed the requested information for both the 2014 and 2017 UUK USS valuation consultations.
37. The Commissioner accepts that there are public interest arguments in favour of disclosure. There is a public interest in openness and transparency and in understanding the development of pension decisions.

Public interest arguments in favour of maintaining the exemption

38. The University stated that

'There is a strong public interest in ensuring that public sector pension schemes represent the most financially viable option for employers and employees. Such an outcome can only be reached if advice can be given frankly, especially if that advice indicates that there may need to be an impact on the benefit level received by pension fund members, as is the case here. The University feels that those giving their professional advice would be likely to be inhibited from expressing negative viewpoints if they feel that the advice that they are giving on a contentious issue will be publicised while that issue is still live.'

39. The Commissioner is satisfied that there are public interest arguments in favour of maintaining the exemption.

Balancing the public interest arguments

40. The University has stated that in its opinion *'the public interest is best served by ensuring the best possible outcome of the USS consultation. Achieving this outcome can only be reached by frank discussion which includes putting forward suggestions and viewpoints that may at times be considered unpalatable by some parties. Frankness within discussions of this nature needs to be protected in order to ensure that those contributing expert advice do not feel inhibited from doing so. This frankness of discussion will be what results in the best possible outcome for pension scheme members and therefore on balance maintaining the exemption necessary to facilitate discussion of this nature outweighs the public interest in openness around pension scheme developments.'*
41. The University also stated that it is prepared to release the information when the joint Expert Committee reports its findings.
42. The Commissioner has considered both the complainant's and the University's public interest arguments.
43. The Commissioner understands that there will be a variety of opinions in any consultation about the funding of a pension scheme. She also notes

that there have been official updates by this and other Universities and other organisations including the UUK.

44. The Commissioner is sympathetic to the University's arguments that confidentiality is important for the consultation to be an opportunity to provide honest and frank views for the 2017 USS survey but the Commissioner is not convinced that the severity or extent of the prejudice would be significant on the 2014 survey at the time of the request in October 2017. The information is 3 years old, there have been official updates and the debate and considerations have evolved since 2014.
45. The Commissioner also notes that it is conceivable that the University may need to continue to provide candid views to the joint Expert Committee. Therefore, to disclose the information from the 2017 survey withheld under section 36 at the time of the request could have had a chilling effect on the University's willingness to do so.
46. In light of the above, the Commissioner considers that the withheld information should be considered as 2 parts:
 - The copy of the University's response to the 2014 UUK USS valuation consultation should be disclosed as the Commissioner considers that the public interest arguments in favour of maintaining the exemption are insufficient.
 - The copy of the University's response to the 2017 UUK USS valuation consultation should not be disclosed as the Commissioner considers that the public interest arguments in favour of maintaining the exemption at the time of the request are sufficient.
47. For the above reasons, the Commissioner is satisfied that section 36(2)(b)(ii) of the FOIA is engaged and that the public interest in this case only favours maintaining this exemption for the 2017 UUK USS valuation consultation part of the request.

Right of appeal

48. 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

49. 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.

50. 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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SK9 5AF**