

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 September 2018

Public Authority: University of Worcester
Address: Henwick Grove
Worcester
WR2 6AJ

Decision (including any steps ordered)

1. The complainant has requested emails held by the Vice Chancellor that contain the word 'Brexit'.
2. The Commissioner's decision is that the University of Worcester has correctly applied section 36(2)(b) and 36(2)(c) to the withheld information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 24 October 2017, the complainant wrote to the university and requested information in the following terms:

"Please can I request all emails within the account of the Vice Chancellor, or anyone who provides him with administrative support, that contain the word "Brexit". I am happy to exclude from this search any personal emails of administrative staff, and in the interests of efficacy, to restrict the search to the last two years."
5. The university responded on 20 November 2017 and refused to provide the requested information citing sections 36, 40(2) and 12 as its basis for doing so.
6. Following an internal review the university wrote to the complainant on 19 December 2017 and upheld its original position. It further explained that it had identified two 'Information Sets'. It sought to rely on section

43 with regard to Information Set One. It also stated that a request for Information Set Two may be viewed as vexatious.

Scope of the case

7. The complainant contacted the Commissioner on 14 January 2018 to complain about the way his request for information had been handled.
8. After reviewing the documentation provided the Commissioner wrote to the complainant again. The university had identified two 'Information Sets'. A significant number of emails were identified which bear only a passing reference to the word Brexit and very little context to accompany the word. These include emails which refer to general uncertainty in the UK establishment (whether in higher education, financial institutions, Government policy etc) and used phrases akin to "post-Brexit uncertainty". These were referred to as "Information Set 1". It sought to rely on section 43 with regard to Information Set One.
9. A separate set of emails were identified which were more substantively concerned with Brexit ("Information Set Two"). This included emails relating to the media coverage of Mr Heaton-Harris' request for information concerning Brexit teaching, as well as emails between the Vice Chancellor and members of his staff team, members of the Board of Governors and third parties including Universities UK as well as emails from individuals who wrote to the Vice Chancellor directly following his comments about Mr Heaton-Harris' request.
10. The university also stated that a request for Information Set Two may be viewed as vexatious. It was the Commissioner's view that it had referred to the wrong information and should have referred to Information Set One as it finally stated that it did not consider that s12 or s14 would apply if the request was only for Information Set 2.
11. The Commissioner further explained that she considered the focus of her investigation would be limited to Information Set Two and the exemptions applied to it, namely section 36 and section 40.
12. On 5 May 2018 the complainant agreed that he was happy to exclude Information Set One from the investigation.

Background

13. The university explained that the request arose following an article in the Guardian newspaper in which the Vice Chancellor challenged the approach taken by Mr Heaton-Harris, MP, in writing to all Vice Chancellors asking them to provide him with a list of academics who

were teaching around the subject of Brexit, together with copies of the syllabus in each case and links to the course.

14. The Vice Chancellor made the argument that Mr Heaton-Harris' approach was challenging to the concept of freedom of speech and academic freedom, which is the cornerstone of the UK's University education system.
15. The article prompted a total of seven requests for information under the FOI, two of which (including this one) were refused.

Reasons for decision

Section 36 – Prejudice to the conduct of public affairs

16. The university considers that section 36 applies to all the withheld information therefore the Commissioner has considered this exemption first. With regard to section 36(2)(b)(ii) it stated that disclosure of this information would be likely to inhibit the provision of views in future and the Vice Chancellor would be inhibited in soliciting them. With regard to section 36(2)(c), the university considered that disclosure of this information would prejudice to the ability of the Vice Chancellor and other senior staff to make properly informed decisions.
17. Section 36(2)(b)(ii) and (c) 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,"

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
18. 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.
19. 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.
20. Section 36(2)(c) refers to the prejudice that may *otherwise* apply. Allowing that the prejudice must differ from the prejudice referred to at section 36(2)(b), differently constituted Information Tribunals have found that the exemption may potentially apply to situations where it is envisaged there is a real risk disclosure could disrupt a public authority's ability to offer an effective public service or to meet its wider objectives.
 21. For the purposes of section 36 the university's qualified person is its Vice Chancellor, by virtue of section 36(5)(o)(iii). In this case the opinion was provided on 20 November 2017, 1 day 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.
 22. The university has explained that the qualified person was aware of the contents of his own mailbox and the correspondence it contained. However, to assist him in considering the matter he was provided with a verbal summary of some of the correspondence.
 23. 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.
 24. 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.
 25. The university has confirmed that it considers that prejudice 'would be likely' to occur. It is on this basis that the Commissioner will consider whether the qualified person's opinion is reasonable.
 26. The university explained that in considering its response to the request consideration was given to the possible impact of the disclosure. The material requested, whilst wide-ranging given the broad nature of the request, could be generalised as internal discussions relating to responses to media requests, advice to members of staff from the EU,

and communications received by the Vice Chancellor as a result of the article.

27. It was the university's view that in disclosing the information requested, its ethos of being an open and inclusive organisation where free and frank discussion is encouraged, would be damaged irrevocably. Every year the Vice Chancellor invites all staff to contact him with any questions, concerns or suggestions that they may have in relation to the university and its running. In doing so, he advises that they can do this in confidence. Correspondence from staff is often highly personalised. Subjecting that correspondence to public scrutiny would impair the candour of such communications in the future and as a result the Vice Chancellor would be reluctant to solicit them. The potential for abuse is also a real concern. In addition, particularly challenging and politically sensitive issues, such as Brexit, need very careful handling. It is imperative that press officers and other staff have the freedom to explore tactics and options for dealing with the press and for responding to Brexit related and similar challenges in the future and are able to articulate those options without fear of interference from the public.
28. In addition, a proportion of the communication happened outside 'normal office hours'. This reflects the nature of a Chief Executive's role which often means working outside of office hours, away from the office, or when travelling overseas. Obviously this means that there are instances when the Vice chancellor is consulting with staff and is unable to do so face to face and therefore relies on consulting his staff by email. The prospect of publication would make those views much more cautious and risk averse in the future. That in turn would deprive the Vice Chancellor and other senior managers of the valuable insights and sources of information provided by correspondence such as that which falls within the broad ambit of the request. It therefore considered that disclosure of the requested information would be likely to prejudice the effective conduct of public affairs.
29. 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 and the current political climate.
30. The university considered that disclosure of the requested information would be likely to prejudice the effective conduct of public affairs. Having reviewed the withheld information the Commissioner considers that the qualified person's opinion that the disclosure would inhibit the free and frank exchange of views for the purposes of deliberation, and would be likely otherwise to prejudice, the effective conduct of public affairs is a reasonable one.

31. The Commissioner is therefore satisfied that the exemption at section 36(2)(b)(ii) and 36(2)(c) is engaged. As such, she has next gone on to consider the public interest test.

Public interest test

32. The test to be applied is whether the public interest in maintaining the exemption outweighs the public interest in disclosure. If the public interest is evenly balanced then the information should be released.
33. When considering where the balance of the public interest lies, the Commissioner considers that the qualified person's opinion should be afforded a degree of weight befitting his or her senior position. However, the Commissioner will make up her own mind on the severity, extent and frequency of that prejudice.

Arguments in favour of maintaining the exemption

34. The university argued that it considered it is in the public interest that staff and others should be able to communicate with the Vice Chancellor uninhibited by the fear of publication and that the Vice Chancellor should have access to free flowing ideas and to debates with his peers and colleagues to inform decision-making. It had also explained to the requestor that those decisions are ultimately held up to public scrutiny by means of information regularly put into the public domain by the university not only in its statutory returns but also in press releases and articles in relevant publications.
35. This view was upheld in the internal review, which commented that in addition to the argument already made, it would add that the *"febrile atmosphere continuing to surround public discourse on Brexit provides a sufficient public interest argument on the promotion of the free and frank exchange of views which outweighs the public interest in the disclosure of the set of information which shows how the Vice Chancellor and others working for the university or with an interest in universities generally are discussing the potential impact of the UK's withdrawal from the EU on British higher education, in the same way that leaders of any institution would wish would wish to discuss any set of major changes impacting on their operations"*.
36. The university stated that a significant proportion of the information relates to discussions about how to respond to various media requests over a period of approximately a year in relation to Brexit, the economy, and impact on EU students and in particular EU staff. The university has already put into the public domain a large volume of information regarding Brexit and routinely engages in public debate about matters of relevance to higher education.

37. When considering the public interest the university considered what benefit it would be to the public to have sight of the withheld information and concluded that given the substance of the material, containing as it does discussion about wording of press releases, information to staff and so on, there was little benefit to the public in viewing this additional information. As previously stated, the press releases and responses to the media all resulted in articles and interviews which are in the public domain or internal communications to large numbers of staff. Examples of press releases issued by the university are readily available on the university's website and cover a wide range of subjects and views:

<https://www.worc.ac.uk/discover/news-releases.html>

38. Public scrutiny of all levels of discourse within an institution is counterproductive, particularly when the university adopts a general commitment to transparency. Disclosure in this case would result ultimately in diminished, rather than greater, transparency.
39. It concluded therefore that the balance of the public interest test lies in preserving the rights of the individuals to correspond with the Vice Chancellor in a free and frank way and in ensuring that the Vice Chancellor has access to the full range of views and ideas (internally and externally) to inform his decision making.

Arguments in favour of disclosing the information

40. The public interest in disclosure will always attract some weight simply by virtue of the inherent importance of transparency and accountability.

The complainant's position

41. The complainant has argued that the university has relied on a blanket ruling, covering both his request, and one other at the same time. The ruling purports to cover all correspondence from the Vice Chancellor, on any subject. The ICO guidance on s.36 exemptions notes:

"Section 36 depends crucially on the qualified person's exercise of discretion in reaching their opinion. This means that they must consider the circumstances of the particular case before forming an opinion. ... An opinion formed purely on the basis of a 'blanket ruling' may not be reasonable if it does not take account of the circumstances at the time of the request."

42. The complainant further stated that the exemption has been applied to all data covered by the information request, with no consideration of whether it applies in each case.

43. *"The Vice Chancellor cites his concern that, should his correspondence be released, it would endanger the candour of his annual staff suggestions process. This is irrelevant to the majority of information that the request is likely to apply to. Were there to be specific information relating to staff suggestions, any concerns could be addressed via personal information redaction. Moreover, this illustrates clearly that there has been no consideration of the individual pieces of information covered by the request."*
44. *"There are a significant number of considerations in support of the public release of information. The complainant specifically cited a number of these in his request for internal review. However, despite many of these points being the very purpose for FOI, neither the Vice Chancellor nor the university counsel take any of those points into account, nor highlight any reasons for information release whatsoever. There is no apparent consideration of the public benefits that releasing information will provide."*
45. *"There is an inherent conflict of interest in a decision-maker ruling that their own communications ought to be exempt from release. The Vice Chancellor has not sought to address this, either through independent advice, or by documenting properly the reasons for his decision. The lack of oversight, means increases the prospect a decision could be taken for self-interested reasons, rather than on the terms specified in the act. In any event it must exacerbate the severity of other flaws in the decision-making process."*
46. In his request for internal review the complainant made the following points:
 - *"Transparency in decision-making – as your decision notice makes clear, the Vice Chancellor has deliberated upon, and subsequently reached a decision on, a matter of important public policy. It is manifestly in the public interest to demonstrate that the process by which that decision was reached was rational, cogent and not self-interested."*
 - *"Understanding of the role of the Vice Chancellor and the university in decision-making. There is a clear public interest in shedding light on the role of the Vice Chancellor, his influence and the extent of that influence."*
 - *"Use of public resources – as a high-profile public employee, there is a public interest in ensuring that the Vice Chancellor is not using public resources to support personal political campaigning."*
 - *"Indeed, the very importance of the issue in question, which the decision notice identifies as a reason for refusal is also a reason for the information to be released."*

Balance of the public interest

47. The Commissioner has considered the arguments presented to her. In its internal review response the university stated it had identified and reviewed 196 emails which upon further refinement produced 'Information Set Two'. This includes emails relating the media coverage of Mr Heaton-Harris' request for information concerning Brexit teaching, as well as emails between the Vice Chancellor and members of his staff team, members of the Board of Governors and third parties including Universities UK as well as emails from individuals who wrote to the Vice Chancellor directly following his comments about Mr Heaton-Harris' request.
48. The Commissioner has also reviewed the withheld information and is satisfied that the university has not applied a blanket exemption without considering the relevance of that exemption to withheld information.
49. Furthermore, it is the Commissioner's view that staff and other third parties, such as Universities UK must have the confidence that they can share views with one another and that there is an opportunity to understand and discuss, issues that may affect them.
50. If the university is required to put this information into the public domain, the Commissioner agrees that those views would be likely to be much more cautious and risk averse in the future and those concerned inhibited from providing a free and frank exchange of views for the purposes of deliberation. This in turn would have a negative impact on the university's ability to conduct public affairs effectively.
51. The Commissioner also agrees that this could impact on the insights and sources that correspondence provides and deprive the Vice Chancellor and other senior managers of the valuable free flow of ideas to inform decision making.
52. The Commissioner acknowledges the complainant's concern that a process of decision making on a matter of important public policy should be open to scrutiny. However, she is satisfied that this is addressed, with regard to the press releases by publication on the university's website. With regard to the remaining withheld information, the Commissioner is also satisfied that decisions taken in relation to policies and procedures are ultimately open to public scrutiny by means of the university's statutory returns, press releases and relevant publications.
53. In conclusion, the Commissioner is satisfied that the university has correctly applied section 36(2) to all the withheld information. Therefore she has not gone on to consider the application of section 40.

Other matters

54. The complainant has also raised concerns that there is a conflict of interest in respect of the Vice Chancellor being the qualified person. The qualified person is defined in the FOIA under section 36(5)(o)(iii), and it is not within the Commissioner's remit to appoint a public authority's qualified person. In addition, the Commissioner is satisfied that the university sought legal advice in conjunction with the qualified person and as such would negate any conflict of interest.
55. With regard to the complainant's concern that there is a public interest in ensuring that the Vice Chancellor is not using public resources to support personal political campaigning, having reviewed the withheld information the Commissioner has seen no evidence of this.

Right of appeal

56. 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

57. 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.
58. 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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