

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 March 2019

Public Authority: UK Research and Innovation
Address: Polaris House
Swindon
SN2 1FL

Decision (including any steps ordered)

1. The complainant has requested information about the submissions and case studies for the mid-term reviews of Centres for Doctoral Training (CDTs). UK Research and Innovation (UKRI) refused to provide the information, citing the exemption in section 41 of FOIA.
2. The Information Commissioner's decision is that the requested information is exempt from disclosure by virtue of section 41 of the FOIA. The Commissioner does not require any steps to be taken.

Background

3. This complaint follows a previous request for information (dated 15 August 2017 (UKRI reference PSU-FOI-EP-369) on mid-term reviews of 46 CDTs including the scores awarded and the feedback provided. This was considered in the decision notice FS50707186 dated 7 September 2018.
4. The request was made to the Engineering and Physical Sciences Research Council (EPSRC) but from 1 April 2018 the seven UK Research Councils (including the EPSRC) became part of UK Research and Innovation.
5. The decision notice stated that the complaint was correctly considered under FOIA rather than the Environmental Information Regulations 2004(EIR). See FS50707186 paragraphs 12-21:
<https://ico.org.uk/media/action-weve-taken/decision-notice/2018/2259758/fs50707186.pdf>

6. The decision notice concluded that the scores should be disclosed but the feedback provided to the CDT was correctly withheld under section 36. The complainant has appealed to the First-tier Tribunal (Information Rights) and the decision is still pending.

Request and response

7. On 15 May 2018 the complainant requested the following information:

'In 2013, the EPSRC funded a number of CDT's under certain environmental priority areas. For the purposes of this request, these areas are:

<https://epsrc.ukri.org/skills/students/centres/2013cdtexercise/priorityareas/caca/>

<https://epsrc.ukri.org/skills/students/centres/2013cdtexercise/priorityareas/enduse/>

<https://epsrc.ukri.org/skills/students/centres/2013cdtexercise/priorityareas/enesto/>

<https://epsrc.ukri.org/skills/students/centres/2013cdtexercise/priorityareas/hydrofuel/>

<https://epsrc.ukri.org/skills/students/centres/2013cdtexercise/priorityareas/mathsciences/>

<https://epsrc.ukri.org/skills/students/centres/2013cdtexercise/priorityareas/nuclear/>

<https://epsrc.ukri.org/skills/students/centres/2013cdtexercise/priorityareas/solar/>

<https://epsrc.ukri.org/skills/students/centres/2013cdtexercise/priorityareas/sustbuilt/>

<https://epsrc.ukri.org/skills/students/centres/2013cdtexercise/priorityareas/water/>

For CDT's funded under these priority areas, I ask for the following:

- *The submission to the Mid-term review on behalf of the CDT.*
- *Any submitted case studies.*
- *The feedback provided in response.'*

8. On 12 July UKRI refused to disclose the information under the exemptions at sections 36 and 41.
9. The complainant requested an internal review on 13 July 2018.
10. On 13 August UKRI withdrew its reliance on the exemption at section 36 and upheld the application of section 41 to the withheld information.
11. UKRI also stated that this request for 9 specific environmental priority areas of CDTs (UKRI – 2018/0046) could have been considered as vexatious under section 14 as it sought a repeat of details of a number

of the CDTs already included within the scope of the previous request for 46 CDTs. (PSU-FOI-EP-369)

Scope of the case

12. On 4 September 2018 the complainant wrote to the Commissioner to complain about the way his request for information had been handled.
13. On 31 October UKRI informed the Commissioner that the scoring information had now been disclosed following the decision notice on the previous case.(FS50707186)
14. On 6 November the Commissioner contacted the complainant seeking an informal resolution as the requested information had apparently been disclosed.
15. On 6 November the complainant stated that the information had not been disclosed. Not all of the information in this request is the same as in the previous request. He has not received any of the requested information as the feedback was withheld under section 36 in the previous decision notice:

'In particular, in addition to the feedback from EPSRC, I asked for (with attached examples sent to the UKRI):

- *The submission to the Mid-term review on behalf of the CDT.*
- *Any submitted case studies.*

Whilst the Commissioner refused the feedback (a decision which is under appeal to the First-tier Tribunal by me), the above items were never initially requested from the EPSRC (as it then was)'

16. UKRI also confirmed to the Commissioner that the feedback was common to both requests. *'The feedback provided to each institution or centre from this exercise'* from the previous decision on the 46 CDTs was withheld under section 36 and is subject to appeal to the First-tier Tribunal (Information Rights). In this request for 9 areas of those 46 CDTs *'The feedback provided in response'* is the same withheld information and UKRI argue that this information has already been considered by the Commissioner as correctly withheld under section 36.
17. From the information provided by both the complainant and the public authority it is clear to the Commissioner that the part of the request for *'the feedback provided in response'* is a repeated request. The request for feedback of the 9 areas of CDTs was included in the request for feedback of the 46 CDTs. As the application of section 36 has already been upheld by the Commissioner and appealed to the First-tier Tribunal

(Information Rights) by the complainant it would be inappropriate to consider the feedback part of the request here as part of this decision notice.

18. The Commissioner therefore considers the focus of the investigation to be whether UKRI was entitled to rely upon the exemption at section 41 to withhold the remaining information: the '*submission to the Mid-term review on behalf of the CDT*' and '*any submitted case studies*'.

Reasons for decision

Section 41 – information provided in confidence

19. Section 41(1) of the FOIA states that:

"Information is exempt information if –

- a) it was obtained by the public authority from any other person (including another public authority), and*
- b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."*

Was the information obtained from another person?

20. UKRI stated that the submissions and case studies from the CDTs were provided to EPSRC for the 2017 mid-term review of the 2013 grants. It is third party information provided for the purposes of an evaluation of performance and under an expectation that this would be treated in confidence.
21. The Commissioner is satisfied that the requested information was provided to EPSRC (now UKRI) by another person.

Would disclosure constitute an actionable breach of confidence?

22. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:
- whether the information has the necessary quality of confidence;
 - whether the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider.

Does the information have the necessary quality of confidence?

23. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
24. UKRI provided some contextual information regarding the principle of confidentiality applied to the assessment of material submitted in all aspects of research funding including the mid-term review for continuation of funding:
- Information submitted by an individual/institution in support of the process to which it is subject, would all be subjected to the Peer Review Process, and managed in line with the UKRI Peer Review Framework (<https://www.ukri.org/files/legacy/documents/rcukpeerreviewframework-pdf/>).
 - The peer review process involves an assessment of a research proposal or report by other researchers or experts to judge the excellence of the proposal or the work undertaken, and whether or not public funds should be given to support, or continue to support, the work or the facility. In the case of the EPSRC mid-term reviews, CDT's were requested to submit information as set out in <http://epsrc.ukri.org/skills/students/centres/monitoringevaluation201617/> to assist EPSRC with its evaluation of performance each submission was subjected to peer review.
 - The principle of confidentiality within the peer review process extends not only to the comments of individual reviewers but also to the material on which the reviewers are asked to comment.
 - The effective operation of the peer review process relies therefore on the retaining the respect and trust of the community, not just within the UK but internationally. This credibility is also reliant on the fact that submitted information remains confidential, and is even more important when material circulated may contain for example potentially exploitable intellectual property owned by researchers or research organisations
25. The Commissioner notes that the scope of this request is for the CDT submissions and case studies to the EPSRC mid-term review. The peer review process is not within the scope of this request and decision notice as it is part of the evaluation by EPSRC. However, it identifies that the withheld information is not available to the general public.

26. The Commissioner also asked UKRI if any of the information had been published. UKRI stated that 2 of the submitted case studies have been published (EPSRC Centre for Doctoral Training in Future Infrastructure and Built Environment and EPSRC Centre for Doctoral Training in Engineering for the Water Sector) in the building skills for a prosperous nation brochure:
<https://epsrc.ukri.org/newsevents/pubs/cdtprosperousnation/>
27. Having regard to the above, the Commissioner would accept that the information, apart from the 2 case studies identified, cannot be said to be publicly available. The peer review process allows for a very limited sharing of the information for evaluation purposes only and as such it cannot be considered to be otherwise accessible.
28. The Commissioner has reviewed the withheld information and considers that the information cannot be said to be trivial as it constitutes detailed submissions and case studies for an evaluation of performance as part of the research funding.
29. The Commissioner is therefore satisfied that the information has the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

30. The test set out in *Coco v AN Clark (Engineers) Ltd [1969] RPC 41*, states:

"...if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence".
31. The complainant refers to the Higher Education and Research Act 2017 (HERA) and argues that there is no obligation of confidence: *'the statutory power under the Higher Education and Research Act (2017) to require all organisations to provide the information in question. Accordingly they cannot have a duty of confidentiality because they were entitled to obtain and then publish said information without any restrictions'*
32. UKRI stated that it was constituted under HERA and has responsibilities for regulating and funding research. It has a right to demand and publish material but noted that the *'material was gathered, prior to the creation of UKRI by EPSRC under the terms of its Royal Charter. Whilst the EPSRC CDT mid-term review submissions and case studies requested can now be deemed to be 'owned' by UKRI as the new legal entity, under the conditions outlined above, it would not wish to act*

outside of the principles of confidentiality within the peer review process adhered to by any previous legal entity.'

33. The Commissioner understands that the withheld information was provided by the CDTs as part of its mid-term review in order to enable UKRI to make an informed decision on the evaluation of performance. She accepts that there is both an implied and explicit obligation of confidence on the part of the UKRI that it will not share the information provided as part of this evaluation process to the public.

Would disclosure be of detriment to the confider?

34. UKRI stated that *'research is a global community and peer review is the dominant research assessment mechanism employed by the world's leading funding agencies'* and that its *'peer review system is regarded as a benchmark of excellence. Any undermining of this process could seriously impact on the UK's reputation in this respect.'*
35. UKRI also stated that *'the effective operation of the peer review process relies therefore on retaining the respect and trust of the community, not just within the UK but internationally. This credibility is also reliant on the fact that submitted information remains confidential, and is even more important when material circulated may contain for example potentially exploitable intellectual property owned by researchers or research organisations'*
36. The peer review process had a very limited circulation and purpose and relied on the respect and trust of the community. It cannot be assumed that there would be the same respect and trust in the wider general public and therefore the Commissioner accepts that disclosure of the withheld information to the general public under FOIA could be of detriment to the confiders as it could endanger the rights to intellectual property owned by the confiders.

Is there a public interest defence for disclosure?

37. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a *defence* to an action for breach of confidentiality. The Commissioner is therefore required to consider whether UKRI could successfully rely on such a public interest defence to an action for breach of confidence in this case.
38. The Commissioner accepts that there is a general public interest in public authorities being open and transparent on the ways in which research grants are awarded.

39. The complainant alleges that analysis of the feedback scores from the previous request '*showed serious wrongdoing on the part of the UKRI*' and '*especially in that poorly performing centres were being allowed to represent themselves as performing well in future competitions*'. He has provided the Commissioner with 17 pages of arguments in support of the public interest in disclosing the submissions and the case studies that led to the feedback from UKRI. The arguments were listed under the following 12 areas:

1. The original disclosure and press coverage.
2. The conduct of the UKRI.
3. A general problem - what does the information mean?
4. The serious (negative) implications of the CDT scheme and the likely utility of the information.
5. UKRI's inability to effectively manage public funds.
6. UKRI's general inability to take effective decisions.
7. Discrimination in academia.
8. Freedom of expression for scientists.
9. Student choice and effective operation of centres.
10. The UK's biggest charity?
11. Existing disclosure.
12. Totality and conduct.

40. The role of the Commissioner is to regulate access to recorded information under FOIA and it is not within the remit of the Commissioner to consider the conduct of UKRI or whether the CDT scheme is a gold standard or freedom of expression, student choices or allegations of discrimination. Her role is simply to consider if the public interest in disclosure outweighs the competing public interest in maintaining a confidence.

41. The Commissioner considers that the following arguments from the complainant could be factors to consider for the public interest to disclose the information:

- The production of propaganda is a serious risk with the organisation in question and aligns with their propensity to mark their own homework.
- Britain has a long tradition of being a leader in scientific thinking. We still produce world-leading discoveries in our Universities. However, the existence of occasional notable discoveries does not mean that British Scientific policy (and thus the policy position taken by the UKRI) is appropriate or successful. Accordingly, there is a profound public interest in being able to determine if the CDT scheme can be objectively justified and if it cannot be, the extent to which it would need to be remedied in order to be proportionate

and lawful. The same can be said for UKRI's wider agenda of consolidation.

- Moreover, there is the question of public interest in there being confidence and trust in publicly funded science.
 - Science is often used to make policy decisions in a political context.
 - Individual trust in science is also of great importance.
 - Similarly, without transparency in public funding, there is also a de facto risk that the underlying science has been influenced by that factor. This does not extend just to what research is done, but how it is done, and whether the results can be trusted. This is also of great public importance.
 - The present situation is that students know which Centres/Universities were poorly ranked. But they have to speculate as to why they were poorly ranked. The position was even worse before the scores were released.
42. As part of its submission to the Commission, UKRI referred to the withheld information as covering many organisations and releasing the submissions from the CDTs will breach the duty of confidence to all parties (the CDTs, the institutions, the individual research students and UKRI): *'there are numerous departments, institutions and partners, including private sector organisations, involved in the delivery of the CDT. In maintaining the principle of confidentiality embedded in the review mechanism EPSRC, in the first instance, and UKRI subsequently has to respect any agreements that exist between the delivery partners involved (contracts, MoUs, license agreements or other legally binding agreements) which may contain non-disclosure clauses. It is our view that it is resource intensive and disproportionate to identify and review all of the agreements in place, to advise the partners on proposals to release information and manage any resulting negotiations, which might occur.'*

43. The Commissioner refers to her own guidance on section 41 when addressing these points:

*'Individuals and organisations may be discouraged from confiding in public authorities if they don't have a degree of certainty that this trust will be respected.'*¹

44. The test assumes that the public interest in maintaining confidentiality will prevail unless the public interest in disclosure outweighs the public interest in maintaining the confidence.
45. The Commissioner recognises that any disclosure of confidential information will to some degree, undermine the principle of confidentiality and the relationship of trust between public authorities and confiders of information.
46. In this case UKRI relies on the free flow of confidential information from the CDTs to evaluate the mid-term progress and to carry out its functions. The Commissioner accepts that if UKRI was to breach this trust then the flow of information could diminish, making it more difficult for the organisation to carry out its functions effectively.
47. In weighing the above public interest arguments for and against disclosure, the Commissioner has been mindful of the wider public interest in preserving the principle of confidentiality. The Commissioner notes the extensive arguments for disclosure provided by the complainant but considers that they are insufficient to override the wider public interest in preserving the principle of confidentiality.
48. Therefore, having considered all the circumstances of this case, and the withheld information, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information. The Commissioner finds that the information was correctly withheld under section 41 of the FOIA.

¹ <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

Right of appeal

49. 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

50. 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.

51. 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
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF