

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 September 2019

Public Authority: The University Council
Address: University College London
Gower Street
London
WC1E 6BT

Decision (including any steps ordered)

1. The complainant has requested the HERA score for a particular job role in the University College London (the university). Initially the request was refused under section 36(2)(c) of the FOIA but during the Commissioner's investigation a late reliance on section 43 was also claimed.
2. The Commissioner's decision is that the university is not entitled to rely on section 43 of the FOIA for the non-disclosure of the requested information. In terms of section 36(2)(c), while the Commissioner accepted the exemption is engaged, she has decided that the public interest in favour of maintaining the exemption is outweighed by the public interest in favour of disclosure.
3. The Commissioner requires the university to take the following steps to ensure compliance with the legislation:
 - The university should disclose the requested information to the complainant.
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.

Request and response

5. On 28 September 2018, the complainant wrote to the university and requested information in the following terms:

"... for my HERA score in relation to the Senior Student Immigration Officer Position."

(Initially, the complainant submitted this as a subject access request under the Data Protection Act. The complainant was informed that the HERA score relates to the role and is therefore not his personal data. He was advised to make the request under the FOIA).

6. The university wrote to the complainant on 25 October 2018 and advised him that it needed further time to consider the request and determine the balance of the public interest test.
7. The university responded on 16 November 2018. It refused to disclose the requested information citing section 36(2)(c) of the FOIA.
8. The complainant requested an internal review on 16 November 2018.
9. The university carried out an internal review and notified the complainant of its findings on 20 February 2019. It upheld the application of section 36(2)(c) of the FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 5 March 2019 to complain about the way his request for information had been handled.
11. During the Commissioner's investigation the university decided to apply a further exemption; section 43 of the FOIA in addition to section 36(2)(c).
12. The Commissioner considers the scope of her investigation to be to determine whether the requested information is exempt from disclosure in accordance with the exemptions cited. She will consider section 43 first and will only go on to consider section 36(2)(c) if she finds that the requested information is not exempt under section 43.

Reasons for decision

Section 43 – commercial interests

13. Section 43 of the FOIA states that a public authority is entitled to refuse to disclose the requested information if disclosure would or would be likely to prejudice its own commercial interests or the commercial interests of a third party.
14. This is a qualified exemption. So, in addition to demonstrating that the exemption is engaged, a public authority needs to consider the public interest arguments for and against disclosure and demonstrate that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.
15. The university confirmed that disclosure of the requested information would be likely to prejudice the commercial interests of the university. It explained that the HERA system is an important HR tool for the university and around half of all other higher education institutions use it. All professional services jobs in the university are graded in accordance with the HERA guidance. It is designed to ensure objectivity and consistency in the way that jobs are evaluated and rewarded. It said that jobs are graded by trained role analysts from accessing the duties and responsibilities of each job, as detailed in a job description, and then given a numerical score on a scale. This can be done by analysis of the job description. While some parts of the HERA system are transparent, for example overall job grading, other parts remain confidential. The scoresheet is treated by HR as confidential.
16. It explained that while the same system is used across approximately half of the higher education sector, each institution does its own grading and analysis. There are jobs across the sector common or fairly similar to all institutions but each institution decides the HERA score. The university confirmed that the score may differ between institutions and in some cases even the grade. For example, it explained that a role in the university may require the post holder to look after staff – say 3. However, the same role somewhere else may expect them to oversee 4 or 5. This additional responsibility may mean it is given a higher grade, if the HERA score for the post with less responsibility is already towards the top of previous grade.
17. The university confirmed that its main concern is that disclosure would be likely to negatively impact on recruitment and the retention of staff. It explained that HERA scores are used at the university for professional services staff and this is a very competitive environment, particularly in London with many universities within a relatively small area. Therefore

the university has to work very hard to recruit and retain staff members with appropriate skills to complete the roles. It stated that the university's leading reputation (a top 10 global university) means it is aware that at all times other institutions (in London and beyond) may be looking to recruit staff from the university.

18. It argued that if another organisation knew that they could obtain the scores of skills deemed required to perform a specific role, they would know which roles have scores that are very close to the next higher grade's score boundaries. The distinction between a role that scores at the top end of one grade (in terms of duties etc) and the bottom of the next grade can be small. Therefore, disclosure of this information could help competitors identify staff who may be more suited to a higher graded role in the institution with a respective higher banded salary. For example, a grade 8 member of staff whose role is 3 points off a grade 9 boundary could quite easily be identified as someone ready for the step up to a grade 9 position at another institution.
19. The university believes that FOIA requests for this type of HERA scoresheet breakdown could be used quite easily in this matter to give another university a competitive advantage for recruiting staff. This would be particularly of assistance where the specific scoresheet relates to positions held only by one person.
20. It also went on to say that it does not believe disclosure of this information is market practice and therefore disclosure in the absence of market practice could give other institutions an unfair competitive advantage. It believes disclosure represents a real and significant risk of prejudice.
21. The Commissioner understands that the HERA system is used widely across the higher education sector and is used to evaluate job roles and decide via a series of scores against indicators where they fit on the institution's grading structure. That grade then governs the pay band for the role. The university has said that while there are common jobs across the sector and some that are very similar, each institution decides the HERA score for their positions. It seems reasonable to say that some will be assessed similarly and be given very similar scores. But equally some roles (although similar) will have different responsibilities and could be assessed differently and end up with scores that differ enough to then mean that they are graded differently. The question is whether the HERA score in this case (and therefore this type of information for other roles) would be likely to have the effects described and be likely to prejudice the commercial interests of the university. Despite giving the university ample opportunity to present its position, the Commissioner remained unconvinced.

22. She accepts that the university operates in a highly competitive market and the close proximity of it (being in London) to other universities/higher education institutions could in theory make it easier for staff to move around. However, the Commissioner is not wholly convinced that the HERA score the university has awarded a job position would be likely to assist other universities in targeting its staff and certainly not to the extent claimed. The Commissioner considers this is more likely to happen via networking or knowing of a particular individual as a result of their expertise in a particular field and the work they have produced rather than from a HERA score a particular institution has awarded a role. There are also more obvious and useful sources like LinkedIn, which are designed for professionals to advertise themselves and be aware of vacancies in their field, assuming they are at that point thinking of a change or promotion. There is also the issue of personal choice. Even if an individual is approached this does not automatically mean that they are interested, wish to move employment or are looking for promotion at that given time. There is also the strict rules and regulations governing recruitment. Even if an individual is encouraged to apply for another post, they still have to go through a strict and governed selection process and assessed against other candidates before any firm offer of alternative employment can be made. There is also the natural turnover of staff – individuals naturally wishing to change roles, employers and/or seek promotion.
23. The Commissioner considers the likelihood of the HERA score given to a role being likely to damage the university's ability to retain staff and recruit those that it requires to be too remote. Therefore, she has decided in this case that section 43 of the FOIA is not engaged. As the exemption is not engaged there is no need to go on to consider the public interest test.

Section 36 – prejudice to the effective conduct of public affairs

24. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, disclosure of the information –
- (b) would, or would be likely to, prejudice-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

25. The university confirmed that the qualified person for the purposes of section 36 of the FOIA is the Provost. It stated that his opinion was requested on 25 October 2018 and obtained on 29 October 2018. The opinion given that section 36(2)(c) of the FOIA applies was based on the Provost considering a briefing note presented to him outlining the request, the concerns over disclosure and the consideration of the public interest test.
26. The Commissioner must first 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.
27. The university confirmed that the qualified person's opinion was given based on the same arguments presented above under section 43 of the FOIA. In addition the qualified person stated that there is a concern that disclosure of the HERA scoresheet could enable job role holders to play the system and tailor their responses to inflate their scoring against the desired score boundaries, which could undermine the process of appropriately evaluating candidates' ability to perform roles. This could lead to vacancies being filled by persons with a skillset not appropriate to the required tasks. Disclosure of HERA scoresheets to the wider public may affect the university's ability to maintain a fair and consistent job evaluation scheme, which over the long term would adversely affect its ability to effectively conduct its public affairs.
28. The Commissioner considers this is a reasonable opinion to hold i.e. it is not absurd and this is sufficient to engage this exemption. She will now go on to consider the public interest test.
29. The Commissioner considers the public interest test considerations under section 36 of the FOIA require her to consider the extent, severity and frequency of the inhibitions claimed by the public authority.
30. The university confirmed that it acknowledged there is a public interest in openness and public authorities being clear as to the reasons behind their assessment of relevant roles. However, it is of the view that there is a public interest in maintaining the confidentiality of this information in order to protect the university's ability to maintain a fair and consistent job evaluation scheme. It stated that it felt the balance of the public interest fell on keeping the information confidential.

31. The Commissioner recognises the public interest arguments in favour of transparency and accountability and in members of the public understanding more clearly how decisions are made by public authorities and, in this case, how the university assesses and justifies the particular grade awarded to a particular job role. There is a public interest in knowing where public money is spent and ensuring this is fair and transparent. Additionally there is a public interest argument in scrutinising how particular job roles are evaluated and ensuring that there is a fair and consistent process in place to ensure that they are graded appropriately and fairly and remuneration reflects the seniority and responsibility of a particular position.
32. With regards to the arguments presented by the university against disclosure, the Commissioner considers these are fairly weak. She does not accept that disclosure would be likely to prejudice the effective conduct of public affairs to the extent, frequency or severity claimed. In her opinion the likelihood is too remote. Some of the arguments presented are more fitting to section 43 and therefore not relevant to the consideration of section 36. The remaining arguments concern the ability of employees being in a position to 'game' the system if they have access to the HERA score for their role. Considering the requested information itself and the process in place for having a particular role reassessed (the evidence that would be required and the scrutiny such an application would receive) the Commissioner considers such a consequence is unlikely to occur and certainly not to the extent and severity claimed. The Commissioner cannot envisage how the HERA score for the role would be likely to assist those wishing to have their job role reassessed and ultimately lead to the university being unable to conduct its public affairs appropriately and effectively. The Commissioner understands that some form of business case would need to be put together to demonstrate how a particular role justifies a higher HERA score and potentially grade and this would need to be supported by the relevant evidence. The requested information cannot assist with that. She would also expect the reassessment of a role to be subject to various checks and internal scrutiny; a process that should only allow genuine and supported applications being successful and justified.
33. In the Commissioner's opinion the arguments in favour of maintaining this exemption appear weak on the basis that the likelihood of disclosure having the effects described and, to the extent and severity claimed, being too remote and unsupported. There are therefore more compelling public interest arguments justifying disclosure in this case.

Procedural matters

34. As the university failed to response to the complainant's request within 20 working days of receipt, the Commisioner has found the university in breach of section 10 of the FOIA.

Other matters

35. The section 45 code of practice recommends that public authorities carry out requests for internal reviews promptly and in 20 working days of receipt. In those particularly voluminous or complex cases a maximum of 40 working days is permitted but this is not one of those requests. The request for internal review was received on 16 November 2018 but the process was not completed until 3 months later on 20 February 2019. Such delays are unacceptable and are not in accordance with the code of practice. The Commissioner expects the university to consider how this request was handled and ensure in the future that all future requests and internal review requests are processed promptly and in accordance with FOIA or the code.

Right of appeal

36. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

37. 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.
38. 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

Samantha Coward
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