

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 February 2021

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

Decision (including any steps ordered)

1. The complainant requested information from Research England, part of UK Research and Innovation ("UKRI"), about a successful application for funding for a University Enterprise Zone. UKRI disclosed part of the application, but withheld some information under the following exemptions of the FOIA: section 41(1) – information provided in confidence, section 43(1) – trade secrets, and/or section 43(2) – prejudicial to commercial interests. It also withheld other, discrete information under section 40(2) – third party personal data.
2. The Commissioner's decision is that the information was correctly withheld under section 41(1) and section 40(2) respectively. It has not been necessary for her to consider section 43(1) or section 43(2).
3. The Commissioner does not require UKRI to take any steps.

Request and response

4. On 16 October 2019, the complainant wrote to Research England and requested information in the following terms:

"We are interested in taking a look at the recent UEZ application made by Lancaster University which they recently won [link provided to article]. Is this something that is in the public domain or would be available via a FOI request?"

5. Research England confirmed that the information was not in the public domain, and transferred the request to UKRI, the relevant public authority, to respond under the FOIA. On 12 November 2019, UKRI responded. It confirmed that it held the requested information, but withheld it in its entirety, citing the exemptions at section 41(1) of the FOIA (information provided in confidence) and/or section 43(2) of the FOIA (prejudicial to commercial interests).
6. The complainant requested an internal review. Following an internal review, UKRI revised its position and determined that part of the relevant application could be disclosed. However, it redacted some information under the sections previously cited: section 41(1) and/or section 43(2).

Background to the case

7. The request relates to an application ("the application") made by Lancaster University ("the university") to Research England for funding for the creation of a University Enterprise Zone ("UEZ").
8. The application comprises 21 pages; specifically, a 16-page document and five pages of accompanying letters, which the Commissioner will refer to as pages 17-21.
9. Research England is one of several research councils which make up UKRI, a non-departmental public body of the UK government.
10. It was reported in September 2019 that funding had been approved for the UEZ at the university.

Scope of the case

11. The complainant contacted the Commissioner on 29 February 2020 to complain about the way his request for information had been handled. He considered that an unredacted copy of the application could be disclosed.
12. During the course of her investigation, the Commissioner wrote to UKRI asking for a detailed explanation of its position and its application of the exemptions.
13. Following this, UKRI further revised its position. It wrote to the complainant on 15 January 2021 and provided a revised copy of the application, redacting less information than before.

14. It explained to the Commissioner (and the complainant) that it still considered that the redacted parts were exempt from disclosure under sections 41(1) and/or section 43(2), as previously cited.
15. UKRI also considered that further exemptions were applicable. Specifically, it confirmed that some names and contact details had been withheld under section 40(2) of the FOIA – third party personal data. It also considered that some of the parts of the application redacted under section 41(1) and/or section 43(2) were also covered by section 43(1) – trade secrets.
16. This decision notice covers whether the information redacted from pages 2-3, 4-7 and 10-11 of the application respectively is exempt from disclosure under the following sections of the FOIA:
 - section 41(1) – information provided in confidence; and/or
 - section 43(2) – prejudicial to commercial interests.
17. The Commissioner notes that UKRI considers that part of this information is also exempt under section 43(1) – trade secrets. She will consider this if she finds that section 41(1) and/or section 43(2) do not apply.
18. The notice also covers, separately, whether the redacted names and contact details are exempt from disclosure under section 40(2) of the FOIA.

Reasons for decision

Section 41(1) – information provided in confidence

19. This part of the notice covers the withheld information on pages 2-3, 4-7 and 10-11 of the application.
20. Section 41(1) of the FOIA states that information is exempt from disclosure under the FOIA 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?

21. In this case, the information withheld under this exemption comprises part of the university's application for funding submitted to Research England, which, as previously explained, forms part of the relevant public authority, UKRI. The application was prepared by the university and submitted to UKRI for consideration.
22. The Commissioner is satisfied that UKRI obtained this information from another person.

Would disclosure constitute an actionable breach of confidence?

23. In considering whether disclosure of information constitutes an actionable breach of confidence, the Commissioner will consider the following three matters:
 - 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?

24. Information will have the necessary quality of confidence if it is more than trivial, and is not otherwise accessible.
25. In this case, the Commissioner has reviewed the withheld information. She notes that the information relates to details of the university's business plan and how the funding would be spent in developing the UEZ.
26. Regarding its accessibility, UKRI has explained that the information is not otherwise in the public domain.
27. The Commissioner is satisfied that the withheld information is not trivial and was not, to her knowledge, accessible elsewhere. It therefore has the necessary quality of confidence.

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

28. UKRI has explained that applications like the one under consideration here are considered in confidence and are not routinely published in full. It argues that, in particular, there is an implied understanding that any potentially commercially sensitive information is treated in confidence.

In applying for Research England funding, applicants are advised that they can specifically elect to highlight any commercially sensitive information.

29. UKRI argued that whilst, as a public authority, third parties are aware that information may be requested from it under the FOIA, it is also known that this does not oblige it to release commercially sensitive information.
30. The Commissioner accepts that UKRI's arguments demonstrate that there is a strong implication that at least parts of a funding application will be treated in confidence.
31. Furthermore, during the course of the Commissioner's investigation, UKRI liaised with the university (the confider) to obtain its views as to the sensitivity of the information, and to ascertain whether it was the university's belief that some or all of the application had been provided in confidence. UKRI took the university's views into account when making the further disclosure to the complainant on 15 January 2021.
32. The university confirmed that it believed that parts of the application were sensitive and had been submitted in confidence.
33. The Commissioner agrees that the information was provided to UKRI in circumstances that imported an obligation of confidence.

Would disclosure be an unauthorised use of the information to the detriment of the confider?

34. In this case, UKRI argued that disclosure of the information would be unauthorised, for the reasons explained above relating to the obligation of confidence.
35. The university had commented on why it considered disclosure would be detrimental, and UKRI included these concerns in its explanations to the Commissioner.
36. The university explained to UKRI that it had formulated and presented research activities in the application in a unique way. It considered that the information could be used by competitors to help them to formulate their own research proposals, and thereafter to compete with the university. It considered that there would be a detriment from other higher education providers being able to replicate its model, by enabling them to plan and develop competing strategies and apply to secure further research funding opportunities.
37. UKRI agreed with this view, and confirmed that funding was still available for future projects.

38. UKRI went on to say that it also considered that disclosure would be a detriment to the university since any replication of its proposed model may affect the university's research status with some of its key partners and investors.
39. The Commissioner understands that the university advised UKRI that it wished to protect the details of its business plan, including its unique proposals and vision of how the UEZ would operate and what it would offer. UKRI, supported by its consultation with the university, envisaged detriment being caused to the university from the unauthorised disclosure of the information, since that disclosure could benefit the university's competitors and affect the university's aim to lead in the relevant field, and attract students and investors accordingly.
40. The Commissioner is satisfied that there was a risk of detriment to the university from the disclosure of the information.
41. The Commissioner has therefore determined that the criteria at section 41(1)(a) and (b) of the FOIA are met in this case, and the withheld information was provided in confidence.

The common law duty of confidence and the public interest

42. While section 41(1) of the FOIA is an absolute exemption, and therefore not subject to the public interest test at section 2 of the FOIA, the common law duty of confidence contains an inherent public interest test.
43. The test assumes that the information should be withheld, unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence. Whether any public interest is sufficient to outweigh the duty of confidence, will depend on the circumstances of the case.
44. The Commissioner considers that there is always some public interest in a public authority (UKRI) conducting its business in a transparent manner and being accountable for its spending. In this case, she acknowledges that there is some public interest in which applications for Research England funding are approved, including in this case.
45. The Commissioner is not aware that the complainant has any particular concerns over funding having been approved for the UEZ at the university. However, she acknowledges that there is some public interest in being able to scrutinise details of the application, whether to judge its merit or just from general interest.
46. She has therefore considered whether the public interest factors in favour of disclosure are sufficient to outweigh the assumption that information provided in confidence should not be disclosed.

UKRI's view

47. UKRI has explained that there is already a large amount of information about Research England Development funding, such as was approved in this case, in the public domain. The Research England website has a dedicated page¹ setting out details about funding, the types of project that are supported and the panel. Links from that page provide guidance on submitting applications and a list of approved projects, including the amount of funding that has been allocated to each project and a summary of the projects' scope.
48. UKRI considers that this meets the public interest in transparency as regards Research England Development funding in general.
49. With regard to the specific case, it argued that, in response to the FOI request, it has now disclosed the majority of the application. It explained that *"to provide public confidence that the appropriate checks and measures have been implemented into the project design to safeguard the use of public of funds"* it has disclosed information relating to:
 - inputs, outputs and outcomes,
 - total project costs and funding per year,
 - project risks and mitigations, and
 - accountability and governance.
50. It explains that it has also disclosed relevant letters in order *"to assist the public's understanding of how funding decisions are made"* and disclosed *"the true cost"* of the project. It has disclosed the map outlining the proposed location of Lancaster Campus UEZ and Lancaster Secure Digitalisation Accelerator Programme to assist public understanding of *"the aims of the project and [to] facilitate debate around it"*.
51. It has also disclosed information relating to the project description and rationale for funding part of the application, except where this relates to what the university explained is a confidential matter.
52. UKRI has explained that what has been withheld primarily comprises the detail of the proposed UEZ research activities. It has withheld, as information provided in confidence, *"the core of the proposal, describing*

¹ <https://re.ukri.org/funding/our-funds-overview/research-england-development-red-fund/>

in detail the proposed research activities undertaken by Lancaster University for creating a new University Enterprise Zone for Lancaster". UKRI has explained that the university considers that the way in which it formulated and presented these activities is unique, and provides detail as to how the Secure Digitalisation Enterprise Zone project would deliver a Secure Digitalisation Accelerator Programme "to support new and existing companies in adopting industrial digital technologies".

53. UKRI has also withheld a small amount of information relating to a separate, related issue which the university provided to it in confidence.
54. UKRI considers that it has disclosed sufficient information into the public domain about this specific application, that the public interest in it has been met. It considers that to disclose any more would be contrary to the public interest, for the following reasons.
55. UKRI has explained that the relevant project is still "live" since its completion has been delayed by the Covid outbreak. It therefore considers it is important to preserve trust between itself and the university. It argues: *"As the project is still underway, it is important that nothing happens to damage that relationship and/or the successful project roll out".*
56. UKRI considers that maintaining trust with higher education providers ("HEPs") such as the university is in the public interest.
57. It explains that *"this duty of confidence is fundamental to UKRI's funding system. Disclosure of this confidential information would to some degree, undermine the implied principle of confidentiality and the relationship of trust between Research England and Lancaster University. If this relationship is undermined then, HEPs, like Lancaster, may be discouraged from applying for research funding, if they don't have a degree of certainty that this trust will be respected. This would be likely to impact negatively on RE's ability to attract future proposals by lowering the number of applications made".*

The Commissioner's decision (section 41(1))

58. The Commissioner has weighed up the public interest in the disclosure of the withheld information, against the public interest in maintaining the inherent duty of confidentiality which exists when information has been provided in confidence.
59. She notes that there is considerable information in the public domain about the application, both published online and following the further disclosure on 15 January 2021.

60. The Commissioner has considered whether there is sufficient public interest in the withheld parts of the application to outweigh the obligation of confidence. She has considered the withheld information and the information that is in the public domain.
61. In her view, she considers that the withheld details are not of compelling public interest. She is satisfied that the public is able to scrutinise enough about the aims and proposed delivery of the project to obtain a fairly detailed understanding, and to understand why funding has been approved. She considers that UKRI has been transparent about the application while also respecting the confidentiality of some of the detail. While the withheld parts of the application may be of interest to persons in a similar field of research, she does not consider that it is a matter of compelling public interest, such as would overturn the inherent principle of confidentiality, to be able to scrutinise them. Neither does she consider that the related confidential matter is a matter of compelling public interest.
62. Having considered the withheld information in this case, she is not persuaded that there exists sufficient public interest in its disclosure as to outweigh the duty of confidence.
63. The Commissioner is satisfied that the information described in paragraph 19 of this notice was correctly withheld under section 41(1) of the FOIA. It has, therefore, not been necessary for her to consider whether that information is also exempt under either section 43(1) or section 43(2) of the FOIA.

Section 40(2) – third party personal data

64. This part of this decision notice covers the withheld information on pages 1, 17, 18, 19 and 21 of the application. No other exemption has been applied to this particular information, and the Commissioner is able to consider it discretely.
65. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
66. In this case, the relevant condition is contained in section 40(3A)(a)². This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the

² As amended by Schedule 19 Paragraph 58(3) DPA.

processing of personal data ("the DP principles"), which are set out in Article 5 of the General Data Protection Regulation ("GDPR").

67. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ("DPA"). If it is not personal data, then section 40 of the FOIA cannot apply.
68. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

69. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

70. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
71. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, or an online identifier, or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
72. Information will "relate to" a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
73. In this case, the information redacted under this exemption comprises specific names and/or email addresses and/or direct telephone numbers of individuals at the university and an individual at Research England.
74. The Commissioner is satisfied that the information relates to and identifies individuals. The information therefore falls within the definition of personal data in section 3(2) of the DPA.
75. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
76. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

77. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

78. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

79. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Would the processing be lawful?

80. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that:

"processing shall be lawful only if and to the extent that at least one of the" lawful bases for processing listed in the Article applies".

81. The Commissioner considers that the lawful basis most applicable is set out at Article 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"³.

³ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

82. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is, therefore, necessary to consider the following three-part test:-

(i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;

(ii) Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;

(iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

83. The Commissioner considers that the test of necessity under stage (ii) must be met before the balancing test under stage (iii) is applied. However, she has first considered whether there is a legitimate interest in the disclosure of the information withheld under section 40(2).

Legitimate interests

84. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

85. In this case, the redacted details are names and/or telephone numbers and/or email addresses which relate to individuals at the university, and in one case, to an individual at Research England. In some cases, names and contact details have been redacted, and in other cases, names have been disclosed but the relevant contact details redacted. The latter appears to have been the case where the individuals are senior post-holders at the university; specifically, the Director of Research, Enterprise and Innovation and the Vice Chancellor: these individuals' names have been disclosed but their contact details have not.

86. Where names and contact details have both been redacted, the Commissioner considers that it is, nevertheless, clear from the information that has been disclosed (such as job title) which organisation, and in some cases department or faculty, each individual belongs to.

87. The Commissioner is unaware of any specific interests in the withheld details. She has not been made aware of any concerns relating to any individual's role in the progress of the application. She has therefore considered whether there is any more general interest in this information for the purposes of accountability and transparency.
88. The Commissioner considers that, while there is a legitimate interest in transparency over the details and progress of the application, since the university was successful in securing funding (the public interest in transparency having already been explored in this notice) the information redacted under section 40(2) has a negligible, if any, impact on this. Put simply, the redacted names and contact details do not shed any light on the details and progress of the application.
89. In the circumstances of this case, the Commissioner considers that there is no legitimate interest in the disclosure of the information withheld under section 40(2). Disclosure of the redacted names and contact details on pages 1, 17, 18, 19 and 21 would, therefore, not be lawful, and would be in breach of principle (a).
90. Given the above conclusion that disclosure would be unlawful, the Commissioner does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's decision (section 40(2))

91. The Commissioner has therefore decided that UKRI was entitled to withhold this information under section 40(2), by way of section 40(3A)(a).

Right of appeal

92. 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

93. 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.
94. 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

Phillip Angell
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