

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 22 June 2021

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested information from Innovate UK ("IUK"), part of UK Research and Innovation ("UKRI") about the Catapult organisations<sup>1</sup> sponsored by IUK.
2. The Commissioner's decision is that UKRI has appropriately withheld the requested minutes in reliance of section 41(1).
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

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<sup>1</sup> <https://catapult.org.uk/> Catapults are a network of technology and innovation centres established by Innovate UK.

## Background

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4. IUK is part of UKRI which is the national funding agency investing in science and research in the UK. Operating across the whole of the UK with a combined budget of more than £6 billion, UKRI brings together the 7 Research Councils, Innovate UK and Research England. UKRI is an executive non-departmental public body, sponsored by the Department for Business, Energy and Industrial Strategy ("BEIS").
5. The Government established a network of technology centres ('Catapults') to commercialise new and emerging technologies in areas where large global market opportunities exist. The Catapults were set up as independent research and technology organisations, established and overseen by IUK, though structured to operate as private sector organisations.
6. The Catapult Network website<sup>2</sup> describes the network as follows:  
  
"The Catapult Network brings together nine leading technology and innovation centres spanning over 40 locations across the UK. We are independent not-for-profit private organisations transforming the UK's capability for innovation in sectors of strength."

## Request and response

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7. On 2 March 2020 the complainant wrote to Innovate UK ("IUK") and requested information in the following terms:
8. "1) Please provide a copy of all communications between the
  - a) Executive Chair
  - b) Chief Investment Officer

Of Innovate UK and Rob Bryan concerning delayed progress and value for money issues within the Catapult Network from July 1st 2018 to date.

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<sup>2</sup> <https://catapult.org.uk/about-us/why-the-catapult-network/>

- 2) Please provide a copy of all board, risk committee, remuneration committee and audit committee minute papers for Catapult Networks funded by Innovate UK from July 1<sup>st</sup> 2018 to date. Please note even if any redactions are required, the remaining information must be disclosed.
  - 3) Please provide the anonymised salary figures for all current board members of Catapults funded by Innovate UK.
  - 4) Please provide the anonymised current diversity figures for all Catapults funded by Innovate UK. This should include gender and ethnicity.
  - 5) Please state the total number and value of NDA settlement agreements between Catapults and staff of these catapults in each of the last three financial years, and the current financial year to date."
9. UKRI responded on 27 March 2020. It refused point 1 of the request in reliance of section 12 FOIA – Cost of compliance; point 2 was refused without citing an exemption but stated that the information was shared as confidential information and points 3, 4 and 5 were refused stating that the information was not held.
  10. In requesting an internal review, on 21 April 2020, the complainant refined his request as follows:  
  
"For question 1, I am happy to reduce my request to emails containing the following key phrases (and any similar forms of the same words)  
  
-"Funding model"  
  
-"Value for money"  
  
-"One third" (in the context of the 1/3 1/3 1/3 funding model)  
  
-"Non-disclosure agreement"  
  
-"Salary/ies (in the context of Catapult board members)  
  
I would like to retain the same time period."
  11. The complainant explained his views on the confidentiality of the point 2 request and also expressed surprise that no information is held in respect of points 3, 4 and 5.
  12. Following an internal review UKRI wrote to the complainant on 26 June 2020. It determined that no information was held in the scope of points 1, 3, 4 and 5, however, the information held in respect of point 2 of the

request was withheld in reliance of section 41 – Information provided in confidence and section 43 – Commercial interests.

## Scope of the case

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13. The complainant contacted the Commissioner on 1 July 2020 to complain about the way his request for information had been handled. The complainant explained:

14. "I am limiting my appeal to question 2, the minutes which Innovate UK holds of Catapult Network board meetings.

Firstly, the exemptions have been applied to the Catapult board papers in a blanket manner, without considering whether some of the information could be provided. I will set out public interest reasons below, but I note the response of the agency states in its response that: "The duty of confidence between Innovate UK and Catapults is outlined in each Grant Funding Agreement and papers are provided to Innovate UK under explicit conditions of confidentiality."

However, the response does not set out exactly what these contractual obligations are, what information they cover, and whether the board papers contain information not covered by these contractual terms. As such, it seems highly likely that some, and possibly most of the information in the board papers are not in fact subject to an obligation of confidence, and could be disclosed in redacted form. This argument also applies to material exempted under section 43.

Secondly, both these exemptions are in practice qualified exemptions, and the public interest in disclosure outweighs the public interest in withholding this information. I note that Innovate UK has raised the risk of legal action should this information be disclosed, as an argument against disclosure. On a practical level, it seems very unlikely that a Catapult would take such legal action against the organisation that provides nearly all of its funding, given the disruption this would cause to their operations."

15. The Commissioner considers the scope of her investigation to be UKRI's application of sections 41(1) and 43(2) FOIA. In providing its submissions to the Commissioner IUK also relied on the exemption at section 40 – Personal information, to withhold information.

## Reasons for decision

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### 16. **Section 41– Information provided in confidence**

Section 41 of FOIA states:

“(1) 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.”<sup>3</sup>

17. In order for this exemption to be engaged both parts (a) and (b) must be met. Part (a) requires that the requested information must have been given to the public authority by another person. In this context the term ‘person’ means ‘legal person’, an individual, company, another public authority or any other type of legal entity.

#### **Was the information obtained from any other person?**

18. UKRI explained that it holds 85 sets of minutes relating to seven IUK funded Catapults, which are independent organisations as set out above in paragraph 5. The minutes comprise Catapult Board, Risk Committees, Remuneration Committees and Audit Committees. The documents were provided to IUK by the individual Catapults:

“...in confidence as part of Board meeting papers for strategic and assurance purposes.”

19. The Commissioner is satisfied that the withheld information was obtained by IUK from the Catapults and therefore the requirement of section 41(1)(a) is met.

#### **Would disclosure constitute an actionable breach of confidence?**

20. For section 41 to apply, the public authority must also be able to demonstrate that disclosure of the information could lead to an actionable breach of confidence. This means that not only must

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<sup>3</sup> [information-provided-in-confidence-section-41.pdf \(ico.org.uk\)](https://ico.org.uk/information-provided-in-confidence-section-41.pdf)

disclosure lead to a breach of a duty of confidence, but it must also be an *actionable* breach.

21. The test for a breach of confidence was first set out in the High Court case of *Coco v A N Clark (Engineers) Limited [1968] FSR 415*. The Court considered that, in order to bring an action for a breach of confidence, three elements would need to be established:
  - the information must have the necessary quality of confidence,
  - it must have been imparted in circumstances importing an obligation of confidence, and
  - there must have been an unauthorised use of the information to the detriment of the confider.
22. Information will have the necessary quality of confidence if it is more than trivial, and is not otherwise accessible.
23. UKRI explained that whilst some information relating to the Catapults' strategies, projects and partnerships is in the public domain on their websites and in published reports and case studies, the level of detail contained in the minutes and the breadth of issues addressed would disclose significant information not in the public domain.
24. UKRI explained that access to the minutes is restricted to specific IUK employees and is managed in line with the Grant Funding Agreements in place between IUK and each Catapult. The Grant Funding Agreement at clause 18.3 states:

“all information disclosed deliberately or otherwise by the Catapult is to be assumed to be Confidential Information and commercially sensitive as exempted under FOIA or any related regime, unless marked otherwise or otherwise agreed in writing.”
25. The Commissioner notes that the specific information forming the content of the minutes is not in the public domain. She also notes that the Catapults ensure that the minutes are not accessible to anyone other than those who attended the meetings. The agreement in place regarding the treatment of these minutes dictates that the information contained there is not accessible to the public.
26. UKRI explained that the minutes support IUK's considerations on how Catapult activities align with the UK Industrial Strategy and relevant sector needs, to support IUK's participation in board strategy discussions and to ensure Catapult boards are operating effectively.

27. The Commissioner has considered the withheld information and accepts that the information contained in the minutes covers the Catapults' strategies, projects, business planning, governance and financial planning, amongst other matters. She is satisfied that the information is not trivial and the specific content is not otherwise accessible to the public. The information has the necessary quality of confidence.
28. At the time of the internal review, and again before providing its submissions to the Commissioner, UKRI consulted with each of the seven Catapults. Each Catapult confirmed its position that the information was provided to IUK in confidence with expectations that the duty of confidence be maintained to protect the confidential and commercially sensitive information contained in the minutes.
29. Solicitors acting on behalf of six of the Catapults provided a formal response to UKRI which states that the Catapults consider that any disclosure of the minutes by IUK would constitute an actionable breach of confidence and contract, adding in the case of disclosure:

"the relevant Catapults will apply to the Courts for injunctive relief, such would be the gravity of the breach."
30. The Commissioner is satisfied that the information was imparted in circumstances importing an obligation of confidence. The obligation is explicitly stated in the Grant Funding Agreement, the minutes are marked as confidential and the Catapults, in response to the request in this case, have confirmed that the minutes are confidential.
31. In consideration of the third criterion, UKRI explained that:

"Disclosure would reveal information damaging to Catapults' competitive positions as leading technology, innovation and research centres across their respective sectors and would assist their competitors, and the competitors of partners and clients."
32. The Catapults advised:

"...the impact of disclosing the minutes would impact not only the relevant Catapults' relationships with IUK, but also their relationships with organisations that they represent and engage with when discharging their corporate functions....the relevant Catapults occupy positions in their respective markets where their partners and customers trust the relevant Catapults with highly sensitive, proprietary and valuable information.....It would also make private companies less inclined to work as closely with the relevant Catapults....jeopardising the relevant Catapults' positions as market facilitators and introducing impediments..."

33. The Commissioner accepts the potential for detriment to the Catapults' commercial interests as described above. She notes that the timeframe of the request is very recent which arguably gives further weight to the likely detriment. She also accepts that disclosure of confidential information will, to some degree, undermine the relationship of trust between a public authority and a confider of information.
34. The Commissioner notes the complainant's view that some of the information contained in the minutes is not subject to an obligation of confidence and could be disclosed in a redacted form. The Commissioner understands his position, on the other hand, UKRI considers that the minutes in their entirety are subject to an obligation of confidence. It explained that while the disclosure of the "sensitive" information contained in the minutes would cause particular, or the most damage to the Catapults, all of the minutes meet the section 41 tests because of the wider detrimental impact on the relationships between IUK, the Catapults and their commercial partners.
35. The final element for engaging section 41 is whether an action for breach of confidence is likely to succeed. Section 41 is an absolute exemption and therefore not subject to the conventional public interest test under section 2 of the FOIA. However, a public authority must carry out a test to determine whether it would have a public interest defence for the breach of confidence. Case law on the common law of confidence suggests that a breach of confidence will not succeed, and therefore will not be actionable, in circumstances where a public authority can rely on a public interest defence.
36. Therefore the Commissioner has considered whether there would be a public interest defence available if IUK disclosed the requested information.
37. The Commissioner is mindful of the wider public interest in preserving the principle of confidentiality and the need to protect the relationship of trust between confider and confidant. However, she is also aware of the public interest in transparency and disclosure of confidential information where there is an overriding public interest which provides a defence to an action for breach of confidentiality.
38. Consequently the Commissioner must now consider whether there is a public interest in disclosure which overrides the competing public interest in maintaining the duty of confidence.
39. This test does not function in the same way as the public interest test for qualified exemptions, where the public interest operates in favour of disclosure unless outweighed by the public interest in maintaining the exemption. Rather, the reverse is the case. The test assumes that the

public interest in maintaining confidentiality will prevail unless the public interest in disclosure (in respect of any defence in that regard) outweighs the public interest in maintaining the confidence.

### **Public interest defence arguments**

40. The complainant explained the following:

“There is a very strong public interest in transparency around the work of Catapults. A BEIS report published in 2017 has already raised concerns about how the Catapult network operated, finding:

- That there were private and public sector culture clashes, e.g., when Catapults are asked to deliver for government, report on performance or comply with government accounting rules.
- That implementation of the Catapult concept has been inconsistent and could have had a significantly greater impact in delivering innovation, economic benefits and value for money.
- IUK governance has not been sufficiently robust, particularly around financial and performance management, with limited evidence of timely intervention where Catapults’ performance targets and wider objectives have not been met.
- That catapults have not achieved their funding model expectations as per their envisioned operating models and they remain overwhelmingly reliant on public funding.
- That there has been a lack of consistency in the performance data reported, lack of transparency in the flow of funds, some lack of clarity on the use of funds and non-timely availability of this data.
- That as of 2017, the Catapults still received the majority of its funding from the taxpayer (60%), despite the stated aim of the projects for this figure to be a third, with the other thirds coming from commercial contracting and private r & d.

These are serious concerns, and the report made a number of recommendations as to how the network needed to improve. Given that the network has received nearly £1bn since 2010, and secured a further £1.1bn in government in 2018 according to the Innovate UK annual report, there is a strong public interest in transparency about how these bodies have continued to function and whether the report's recommendations have been fulfilled, to allow proper accountability and to allow the public to determine whether they provide proper value for public money.”

41. The Commissioner notes the report<sup>4</sup> referenced by the complainant which was commissioned by BEIS and completed by Ernst and Young LLP ('EY') in November 2017 . The report was written following work with BEIS, IUK and the Catapults and provides a detailed review into the operation and performance of the Catapults.
42. UKRI acknowledged that disclosure of the minutes may support transparency in public understanding and debate regarding the use of IUK funding, the work of the Catapults and the contribution to IUK and sector strategies.

### **Arguments in favour of maintaining the confidence**

43. UKRI explained that throughout its consultation with the Catapults, in addition to points already covered, they have expressed concern around how disclosure of the minutes would impact records of future board meetings with potential changes to how discussions and decisions are raised or recorded. UKRI also advised the Commissioner that the Catapults are likely to become more cautious in sharing information with IUK in other contexts, inhibiting IUK in assessing the effectiveness of Catapult Boards and committees. In addition UKRI considers that disclosure may undermine trust in IUK and its role in supporting and engaging with the Catapult network and its wider relationships with other commercial partners. UKRI advised that IUK is currently negotiating revised governance arrangements with each Catapult and the impact of disclosure would be detrimental to these ongoing discussions.
44. UKRI pointed out that there are no allegations or evidence of misconduct, wrongdoing or misuse of IUK funding, nor any issues relating to public safety that would be revealed by the disclosure of the minutes. It stated that previously recognised public interest defences demonstrated that the breach of confidence revealed iniquity or fraud or necessity to protect individuals from harm.

### **The Commissioner's view**

45. When considering the public interest in favour of maintaining the confidence, the Commissioner has had regard to:

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<sup>4</sup> <https://www.gov.uk/government/publications/catapult-network-review-2017-independent-report-from-ernst-and-young>

- the wider public interest in preserving the principle of confidentiality, and
  - the impact of disclosure on the interests of the confider.
46. The Commissioner must determine whether any public interest which may be satisfied by disclosure would be sufficiently compelling to constitute a defence against any action taken for breach of confidence.
47. The Commissioner considers that some weight should always be afforded to the general public interest in ensuring that public authorities remain transparent, accountable and open to scrutiny, for example where disclosure would:
- further public understanding of, and participation in the debate of issues of the day;
  - enable individuals to understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions; or
  - facilitate accountability and transparency in the spending of public money.
48. The Commissioner notes that there is a considerable amount of information available in the public domain to allow for scrutiny of the Catapults<sup>5</sup> work, including the Ernst and Young report referenced in paragraph 41 and considerable information found on the individual Catapults' websites.
49. The Commissioner notes the relevance, in favour of disclosure, of the complainant's points regarding the investment of public money and the issues raised in the 2017 report referenced above. However, the Commissioner notes that whilst the Catapults are funded in part by IUK, they are nevertheless private companies. The Catapults pointed out that in order to meet their statutory obligations under the Companies Act it is important that board, and other meetings, can be used by directors and attendees for full and frank discussion with minutes accurately recording the discussion taking place. Disclosure of the minutes could "inhibit free and frank advice and discussion at board level for private companies".

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<sup>5</sup> <https://catapult.org.uk/about-us/key-documents/>

50. In considering whether an ensuing action for breach of confidence could be defended with success the Commissioner notes that in addition to the points listed in paragraph 47, previously recognised defences demonstrated that the breach of confidence revealed iniquity or fraud, was necessary to protect individuals from harm.
51. In the circumstances of this case the Commissioner has not identified any examples of misconduct which would be revealed in disclosure of the information. This considerably reduces any defence in this case.
52. The Commissioner notes that the complainant states:

“...it seems very unlikely that a Catapult would take such legal action against the organisation that provides nearly all of its funding, given the disruption this would cause to their operations.

Moreover, it appears the defence of public interest would be strong enough to defeat any such claim.”
53. The Commissioner cannot agree with the complainant as she has been provided with explicit statements to the opposite view, as cited above in paragraph 29. If such action would lead to the disruption mentioned by the complainant the Commissioner considers this to be a highly undesirable outcome.
54. The Commissioner has had the benefit of seeing the withheld information and she has concluded that the minutes in isolation would not necessarily facilitate an assessment of the serious concerns set out by the complainant.
55. In the Commissioner’s view, disclosure of the information, which she considers to be confidential, would provide some insight into the positions of the Catapults. However, given the strength of the public interest in maintaining confidences, and taking into account the specific circumstances of this case, the Commissioner is not persuaded that there is a public interest defence to the disclosure of this information should IUK be subject to such an action for breach of confidence. She therefore concludes that the public interest in maintaining confidentiality should prevail.
56. As the Commissioner has determined that the withheld information is exempt in reliance of section 41 she has not considered the exemptions at section 43 or 40 FOIA.

## Right of appeal

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57. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

58. 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.
59. 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 .....**

**Susan Hughes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**