

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 June 2021

Public Authority: The Council of the University of Liverpool
Address: The Foundation Building
Liverpool
United Kingdom
L69 7ZX

Decision (including any steps ordered)

1. The complainant has requested a variety of information regarding the use of canine cadavers. The Council of the University of Liverpool ("the University") provided some of the information and relied on sections 43 (commercial interests) and 41 (breach of confidence) of the FOIA respectively to withhold some information. It also stated that it did not hold some of the requested information.
2. The Commissioner's decision is that the University is entitled to rely on sections 43(2) and 41(1) of the FOIA in the manner that it has done. She also considers that it holds no information within the scope of element [6] of the request.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 2 March 2020, the complainant wrote to the University and requested information. The original request was interspersed with arguments relating to public interest and arguments about what might already be in the public domain. For brevity, the Commissioner has therefore abbreviated the request to its salient components:

"Please can you provide me with the following information. Please note that this request is an amendment of my request dated 1st

March 2020, as I have sought to clarify the information requested at Question 7.

"[1] Please provide copies of all information held by the University relating to the supply of canine cadavers from 1st January 2013 to date.

If the cost of compliance with this request exceeds the statutory limit, please provide the relevant information from 1st January 2017 to date.

"[2] Please confirm specifically the number of canine cadavers received from local authorities, animal rescue centres, animal warden services or any individuals, companies or organisations dealing directly or indirectly with dogs, between 1st January 2018 and 31st December 2018. If more than one organisation or individual provided you with the cadavers, please provide a separate breakdown for each organisation and individual.

"[3] Please confirm specifically the total number of canine cadavers received from local authorities, animal rescue centres, animal warden services or any individuals, companies or organisations dealing directly or indirectly with dogs, between 1st January 2019 and 31st December 2019. If more than one organisation or individual provided you with the cadavers, please provide a separate breakdown for each organisation and individual.

"[4] In relation to questions (1), (2) and (3), please provide the names and contact details of any individuals or organisations from whom canine cadavers were received. Please provide a separate breakdown for each organisation or individual, and for each year.

...

"[5] In relation to questions (1), (2) and (3), please confirm what procedures were and are in place to ensure that each canine cadaver gifted had been euthanised due to illness or injury?

...

"[6] In relation to questions (1), (2) and (3), please confirm whether the dogs were euthanised by:

- i) any employee or former employee of the University (whether or not they were employed by the University, when they euthanised the dogs).*

- ii) any consultant to, or former consultant to the University (whether or not they were employed by the University, when they euthanised the dogs).*
- iii) any individual who provides, or has provided services to the University.*

Please also confirm whether any of the individuals in (i), (ii) or (iii) above subsequently used the cadavers in connection with their employment at the University or with the provision of services to the University.

"[7] In relation to questions (1), (2) and (3) please confirm the following.

- i) Has the University made any contribution towards the cost of euthanising the dogs, transporting the cadavers following euthanasia, or disposal of the cadavers.*
- ii) Has the University provided the services (paid or unpaid) of any veterinary surgeons or trainees or students or any other individuals to the individuals, organisations or companies which supply the cadavers.*
- iii) Has the University made any payments, directly or indirectly, to any individuals, organisations or companies, which collect, transport or deliver the cadavers.*
- iv) Has any individual or organisation made payments on the University's behalf for the collection, transport or delivery of the canine cadavers.*

If the cost of compliance with this request exceeds the statutory limit, please provide the relevant information from 1st January 2017 to date.

"[8] Please confirm whether, from 1st January 2013 to date, the University has made any monetary donations, or donations in kind (for example of goods or services) to, or carried out any fundraising activity for:

- i) [Organisation 1] or any of its employees or directors*
- ii) [Organisation 2] or any of its trustees, volunteers or employees*
- iii) Any other individual, organisation or company from which the University sources canine cadavers, or any employee,*

volunteer, director of, or contractor to those individuals or organisations

"In the event that any such donations were made or any such fundraising activity was carried out, please provide full details for each calendar year, including the nature of the donations and the amount of money raised for each organisation and / or individual.

"If the cost of compliance with this request exceeds the statutory limit, please provide the relevant information from 1st January 2017 to date.

"[9] Please provide full details of all ethics committee decisions since 1st January 2013 in relation to the supply of the cadavers. Please include details of any submissions or applications made to the relevant committees, copies of any correspondence held in relation to the submissions or applications, copies of any notes taken during committee meetings and copies of the decisions made.

"Please specifically confirm whether or not the ethics committees were made aware that the individual who euthanises the dogs is, or was, also employed by the University or engaged in the provision services to the University. Please also specifically confirm whether or not the supply of canine cadavers was approved on the basis that the dogs had been euthanised due to injury or ill health."

5. The University responded on 30 March 2020. It stated that it could only provide information from 2017 onwards as to go back farther would exceed the cost limit. In respect of elements [1], [2] and [3] it provided the information from 2017 onwards in pseudonymised form. In respect of element [4], it refused to identify the pseudonymised sources, relying on section 43(2) of the FOIA to do so. In respect of element [5], it provided some information. In respect of elements [6], [7] and [8] it denied holding any information. Finally, in respect of element [9], it refused to provide any information and relied on sections 41(1) and 38 of the FOIA to withhold the information.
6. Following an internal review the University wrote to the complainant on 11 May 2020 and again on 5 June 2020. It upheld its original response.

Scope of the case

7. The complainant contacted the Commissioner on 6 August 2020 to complain about the way his request for information had been handled.
8. The complainant provided a detailed submission setting out why he believed that the University had not responded correctly to elements [4], [6] and [9] of the request.
9. In its initial submission, the University identified that an organisation from which it received cadavers had not objected to being identified and that it would provide this information to the complainant. It also confirmed that it no longer wished to rely on section 38 to withhold information. However it maintained its stance in relation to sections 43(2) and 41(1) respectively. It also later clarified that, although its initial response only referred to elements [1] to [4], it was relying on section 12 of the FOIA to refuse to provide pre-2017 data in respect of all elements of the request.
10. The Commissioner explained to the complainant that the University had now confirmed that it was applying section 12 of the FOIA to all pre-2017 records. The complainant was unhappy that the University had, despite several opportunities to do so earlier, waited until so late to confirm that it had been relying on section 12 all along. He pointed out (not unreasonably) that this had prevented him from working with the University to refine this element of the request to bring it within the cost limit. Finally, he offered to restrict this element of the request.
11. Given that the Commissioner had concluded the remaining elements of her investigation and given that the complainant had not attempted to claim that the cost of retrieving all pre-2017 information would not exceed the cost limit, she has decided not to look at the University's application of section 12. If the complainant wishes to make a refined request, he is of course free to do so – although he may wish to have regard to the Commissioner's findings in relation to the information from 2017 onwards before doing so.
12. The Commissioner considers that the scope of her investigation is to determine whether the University is entitled to rely on sections 43 and 41 of the FOIA and whether it holds information within the scope of element [6].

Reasons for decision

Element [4] – section 43 of the FOIA

13. Section 43(2) of the FOIA states that

Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

14. The exemption can be engaged on the basis that disclosing the information either “would” prejudice commercial interests, or the lower threshold that disclosure only “would be likely” to prejudice those interests. For the Commissioner to be convinced that prejudice “would” occur, she must be satisfied that there is a greater chance of the prejudice occurring than not occurring. To meet the threshold of “would be likely to” occur, a public authority does not need to demonstrate that the chance of prejudice occurring is greater than 50%, but it must be more than a remote or hypothetical possibility. Whilst the higher threshold is more difficult to satisfy, it carries more weight in the public interest test.

15. The University has relied on this exemption to withhold the identities of the three sources from which it received cadavers in 2017, 2018 and 2019 – although it has disclosed the number attributable to each source.

The complainant’s position

16. The complainant provided the Commissioner with a well-researched 17-page submission setting out, amongst other things, why he believed section 43(2) would not apply to the withheld information.

17. In particular, the complainant provided evidence which, he argued, demonstrated that three particular organisations (including Organisations 1 and 2) either publicised their links with the University themselves or had their links with the University published in other documents. He pointed to several sources which, in his view, demonstrated that these organisations were involved in the supply of cadavers to the University.

18. The complainant also advised the Commissioner about complaints he had made to the Charity Commission regarding the relationship between Organisation 1 and Organisation 2.

19. In summary, the complainant was concerned that some of the organisations that he believed were supplying canine cadavers to the University were in fact euthanising healthy dogs.

The University's position

20. In response, the University strenuously denied that it encouraged any organisation or individual to euthanise healthy dogs. It noted that its involvement would only begin after the dog had already been destroyed.
21. The University explained that it did receive supplies of dog cadavers which were used by its veterinary students to enhance their skills and knowledge. It explained that dog cadavers were required by law to be treated as clinical waste and cannot be disposed of as general waste. Once each cadaver could no longer be used, the University would then, at its own expense, dispose of the cadaver appropriately.
22. In explaining why section 43 would apply, the University argued that disclosure would be likely to prejudice both its own commercial interests and the interests of two of the sources.
23. In support of that view, the University supplied a copy of a letter it had received from one of the organisations ["the Organisation"] that supplied it with cadavers.
24. The Organisation insisted that the only cadavers it had provided were dogs that had needed to be destroyed because they were unsuitable for re-homing because of injuries or illness. It rejected any suggestion that this was ever done at the behest of the University.
25. The Organisation then went on to explain that, given that these particular dogs would have had to be destroyed anyway, its relationship with the University was mutually beneficial. The University's students were able to benefit from having real cadavers to work with and the Organisation was spared the cost of disposing of the cadaver as clinical waste – enabling it to redirect its resources to helping more dogs.
26. Specifically in relation to its commercial interests, the Organisation commented that:

"we are already fighting against the misconception that [the Organisation] euthanises dogs as a matter of course at the end of day 7 when they become our property and the release of the information could add further confusion to this.

"If this information were to become publicly available, we would have to consider withdrawing from the arrangement in an attempt to limit any loss and protect our reputation."

27. If the withheld information were to be disclosed, the Organisation argued, it would be likely to have a significant and lasting impact on its income.
28. Whilst the University noted that one of the three organisations supplying cadavers had consented to its identity being disclosed, the other two had not and that it was bound to consider the negative impact on those two organisations.
29. As well as the impact on the Organisation, the University also explained that its own commercial interests would be harmed by disclosure of the withheld information.
30. The University noted that its veterinary school was one of a small number of schools that had been able to access a supply of cadavers. It was aware of several other schools that had attempted to replicate the relationship, but had been unable to do so because of the negative publicity such relationships attract. Because of the relationship, the University was able to offer dissection and the "hands on" teaching of anatomy as a unique selling point of its veterinary courses.
31. In its original refusal notice and its internal review, the University claimed that, if it failed to offer sufficient cadavers for students to dissect, it was at risk of being sued by its students – although it withdrew this line of argument during the investigation.
32. However, the University maintained that disclosure of the withheld information would be likely to result in it being unable to access cadavers and that would, in turn, undermine its ability to put forward a unique "offer" to its students. Without sufficient cadavers, the University would not be able to teach anatomy in the same way. In the competitive world of under- and post-graduate teaching courses, that could put the University at a disadvantage compared to other similar institutions.
33. The University pointed out that both it and the Organisation had been subject to a lot of negative (and, in its view, unjustified) criticism on social media because of their relationship. Attempts to explain the relationship had been unsuccessful and therefore any further disclosure was only likely to amplify the problem.

The Commissioner's view

34. The Commissioner is satisfied that the University has demonstrated that there is a likelihood of harm arising from disclosure.
35. Firstly, the Commissioner is satisfied that the identities of the two organisations who have not agreed to disclosure were not in the public domain. Although the Commissioner has examined the complainant's

submissions and supporting evidence closely, she does not consider that anything he has provided demonstrates conclusively which organisations were or were not supplying cadavers to the University during the period covered by the request. Disclosure would therefore release something new into the world.

36. On the question of harm, the University has applied the lower bar of "would be likely to" cause prejudice. This means it need not demonstrate that prejudice is more likely than not to occur, but it must demonstrate that the risk of prejudice is more than hypothetical.
37. In the Commissioner's view, the University has demonstrated that the commercial interests of the organisations may be harmed in the event that their identities were disclosed. The use of canine cadavers is clearly a highly emotive issue and the Commissioner recognises that there is potential for information to be misunderstood – causing reputational damage for both institutions.
38. Once information has been disclosed under the FOIA it is considered to be disclosed to the world at large and the University has no ability to limit the further dissemination of that information. It cannot prevent that information from getting into the hands of individuals who may wish, either through ignorance or design, to misuse that information and misuse it to the detriment of the institutions involved.
39. It is not a given that disclosure would result in the severing of the relationship between the organisations and the University. As has been pointed out, were the organisations to sever their ties, they would be faced with a significant bill for the disposal of clinical waste. It is difficult to predict with certainty that any loss of income would exceed the new costs the organisations would need to take on – but the Commissioner considers that this is still a realistic possibility and certainly one that is more than hypothetical.
40. In the event that the link was severed, the Commissioner also accepts that this would harm the University's ability to attract veterinary students.
41. Whilst, again, the Commissioner does not consider that the likelihood of harm is more probable than not (because the University will presumably have other selling points to advertise), she does accept that the particular teaching of anatomy that the University offers is something that not all institutions are able to offer and that, if the link is severed, that will affect its ability to attract students.
42. The Commissioner has therefore concluded that there is a realistic probability that disclosure of the withheld information may cause harm

to the organisations and, to a lesser extent, the University itself. She is therefore satisfied that section 43 is engaged.

Public interest test

43. In his submission, the complainant argued that there was a strong public interest in disclosure.
44. The complainant levelled a series of allegations at Organisations 1 and 2 – which he considered to be organisations supplying cadavers to the University. One of the organisations he accused of euthanising healthy dogs and he alleged that both these organisations had been accused of having serious governance issues. He therefore argued that there was a public interest in understanding what relationship the University had with those organisations.
45. In addition to those points, the Commissioner notes that there will always be a general public interest in transparency – particularly so when the information is connected to an issue of public concern.
46. On the other side, the University noted that there was a public interest in maintaining the exemption to prevent the commercial harm that would be likely to result from disclosure.
47. In the Commissioner's view, the public interest lies in favour of maintaining the exemption.
48. In the case of one of the organisations the complainant has concerns about, the University has already disclosed that it receives cadavers from this organisation. Even if the allegations against this particular organisation are true, the Commissioner does not consider that they add any weight to the public interest in disclosing the identities of the other organisations. As for the other allegations the complainant has made, the Commissioner is again satisfied that these are not relevant to the matters at hand.
49. Whilst the Commissioner appreciates that there is considerable public interest in this matter, she does not consider that this outweighs the very real harms that might result.
50. The University has argued that the organisations whose names it has withheld do not euthanise healthy dogs for the purpose of providing cadavers and nothing that the complainant has put forward would suggest otherwise.
51. In its submissions, the University has emphasised several times that the cadavers it receives are dogs that would have been destroyed whether the relationship existed or not. The relationship does not result in dogs

being destroyed unnecessarily, it merely spares the organisations from the cost of having to dispose of clinical waste whilst giving veterinary students the opportunity to hone their skills.

52. The Commissioner is therefore not sufficiently persuaded that the public interest factors favouring disclosure are sufficiently compelling as to outweigh or match those in favour of maintaining the exemption. She has therefore concluded that the balance of the public interest lies in maintaining the exemption.

Element [6] – Held/not held

53. In respect of element [6], the University originally responded to each limb with the answer “no.” The complainant disputed this as he was aware that an employee of one of the organisations mentioned in the request is (or, at least, was) a student at the University. He therefore argued that, either the information the University had was wrong, or it did not have information – in which case it should not have responded in the definitive manner that it did.
54. During the investigation, the Commissioner pointed out to the complainant that, when read in the context of its other answers, it seemed more likely that, instead of saying that the answer to all the limbs of this element was a definitive “no”, the University was in fact saying that it held no information to answer the question. However, the complainant argued firstly that the answer was ambiguous and secondly that the University did hold information about its former students. He therefore asked the Commissioner to investigate further.
55. The University subsequently confirmed to the Commissioner that it did not hold information that would enable it to answer this element of the request.
56. The University explained that it held no records showing definitively which dogs had been euthanised by which individual veterinarian. Whilst it was able to link each cadaver back to the organisation that had provided it, the dog could have been euthanised by anyone at that practice who was qualified to carry out such a procedure.
57. Whilst the University held records pertaining to its former students, it noted that, in order to provide the requested information, it would need to be able to link those records with the name of each individual that had euthanised any of the cadavers it received.
58. The Commissioner accepts that it is not sufficient for the University to know who its former students and employees are and where they work in order to answer this element of the request. The request demands a link between a particular individual and a particular cadaver. As the

University does not hold the information necessary for it to make that connection, the Commissioner is satisfied that, on the balance of probabilities, the University does not hold the information requested by this particular element.

Element [9] – section 41 of the FOIA

59. 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.*

60. The Commissioner's guidance on the exemption states that, in order for this particular exemption to apply, four criteria must be met:

- the authority must have obtained the information from another person,
- its disclosure must constitute a breach of confidence,
- a legal person must be able to bring an action for the breach of confidence to court, and
- that court action must be likely to succeed.

61. The information withheld in respect of this element comprises of nine applications made to the University's ethics board for approval. As these applications would have been made by students and researchers acting in a private capacity (ie. not as employees of the University), the Commissioner is satisfied that the University has received this information from another person.

62. The Commissioner is also satisfied that those persons would (at least in theory) be able to bring an action for a breach of confidence to court therefore the first and third criteria are met.

63. In determining whether a breach of confidence would occur, the Commissioner applies the three step test set out in 1968 by Judge Megarry in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415:

- 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.

64. In response to the Commissioner's enquiries, the University stated that the information it was withheld had the necessary quality of confidence and was not trivial:

"The University believes that this information is more than trivial in that projects and studies submitted for ethical approval are the culmination of a significant amount of work. In some cases, academics and students have dedicated years of time and effort to developing their projects, including time spent becoming subject matter experts in their specific fields.

"This information is not otherwise accessible. The University does not formally publish or reveal the extent, details or number of applications for ethical approval. The reason for this is the academic competition and, in some cases, expectation of secrecy around specific areas of research and development. Most of these projects become available in the public domain as and when they yield results, but at this point, all appropriate protections around Intellectual Property and rights are asserted. To reveal details of research and developments at the ethical approval stage would compromise the very nature of the studies themselves."

65. When asked why it believed that the information had been imparted in circumstances either requiring or implying a duty of confidence, the University noted that:

"The University believes that there is an implied duty of confidence in the ethical approval process. The process of ethical approval is internal and is conducted at an early stage in the research/project to shape and assess its viability in line with University's Code of Ethics and associated policies. This is a rigorous process and one that is expected to be conducted clearly, fairly and without the burden of public scrutiny. As such, there is an expectation of confidence from all applicants that the nature and detail of their research is not compromised."

66. Finally, the University noted that disclosing this information would cause detriment to those providing it. Putting details of research into the public domain might undermine its commercial viability or make the research easier to steal before it could be completed.

The Commissioner's view

67. The Commissioner is satisfied that the three step test set out in *Coco* is met in this particular case.
68. The information concerned has the necessary quality of confidence as each application represents a programme of work that could last months or even years before completion. Some of the research may eventually prove highly lucrative, some may lead to major breakthroughs in alleviating animal suffering. It is clearly far from trivial and it is not in the public domain.
69. Secondly, the Commissioner accepts that the process of ethics committee approval is one that implies a duty of confidence. By its very nature, the ethics committee is likely to have to consider research projects which may produce significant benefits but which are likely to be highly controversial. Researchers are encouraged to be open and honest with the ethics committee on the understanding that any details will normally be kept confidential until such times as the research is complete.
70. Finally, the Commissioner also recognises that disclosure of the withheld information would cause detriment to the researchers who had submitted research proposals. Having the project summary in the public domain before the research had been completed would allow others to manipulate, copy or even steal the work of the research teams. This could potentially leave those researchers open to breaches of contract themselves in respect of any commercial funding as well as preventing them from realising the full economic benefits of their work. In addition, the researchers would also suffer personal detriment and distress from having their work taken from under them.
71. The Commissioner is therefore satisfied that the University would leave itself open to an action for breach of confidence if it were to disclose the information otherwise than under the FOIA.

Would the breach be actionable?

72. The final criteria for section 41 to apply is that a breach of confidence must be an actionable breach. As Lord Falconer (the promoter of the FOIA as it was passing through Parliament) said during the debate on the FOIA

"... the word "actionable" does not mean arguable ... It means something that would be upheld by the courts; for example, an action that is taken and won. Plainly, it would not be enough to say, 'I have an arguable breach of confidence claim at common law and, therefore, that is enough to prevent disclosure'. That is not the

position. The word used in the Bill is "actionable" which means that one can take action and win."

73. The Commissioner therefore considers that it is not sufficient to merely claim that a breach of confidence might be brought. Any action must be likely to succeed.
74. To determine whether an action would be likely to succeed, the Commissioner must assess whether the public authority might be able to put forward a public interest defence.
75. Assessing the prospects of a public interest defence has some similarities to a public interest test but as the judgement in *HRH Prince of Wales V Associated Newspapers Limited* [2008] Ch 57 emphasised, the test is one of proportionality.
76. The complainant did not put forward any specific arguments to explain why he felt a public interest defence should succeed, but the Commissioner considers it reasonable to re-visit his earlier public interest arguments as these have some relevance.
77. However, in this case, the Commissioner is not persuaded that a public interest defence would be likely to success as disclosure of this information would not be a proportionate method.
78. Whilst the complainant has raised some legitimate concerns about the manner in which canine cadavers are sourced, having viewed the withheld information, the Commissioner has noted that the focus is on the way cadavers are used, not the way that they are sourced. Disclosure would therefore reveal very little about the issues with which the complainant is concerned, whilst leaving the researchers open to all the detriment which might result.
79. Whilst there is always a general public interest in transparency, once again the Commissioner does not consider that disclosure would be a proportionate method of achieving this aim. Other avenues are available to scrutinise the University's work.
80. Finally, the complainant argued that the requested information could be redacted. Having reviewed the withheld information, the Commissioner is not persuaded that this would be possible. Once the details of the research had been removed (so as to remove the prospect of breaching confidence) the residual information would be devoid of meaning.
81. As the Commissioner is satisfied that the University is unlikely to be able to rely on a public interest defence, it follows that a breach of confidence would be actionable and thus section 41 of the FOIA would be engaged.

Right of appeal

82. 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

83. 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.
84. 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