

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 September 2021

Public Authority: **Governing Body of the University of Sussex**
Address: **Sussex House**
Falmer
Brighton
BN1 9RH

Decision (including any steps ordered)

1. The complainant requested a copy of a response to the 2020 University Superannuation Scheme ("USS") Consultation. The Governing Body of the University of Sussex ("the University") refused to provide the information and relied on section 36 of the FOIA (prejudice to the effective conduct of public affairs) in order to do so.
2. The Commissioner's decision is that the University is entitled to rely on section 36(2)(b)(ii) of the FOIA to withhold the requested information and that the balance of the public interest favours maintaining the exemption.
3. The Commissioner does not require further steps.

Request and response

4. On 5 November 2020, the complainant requested information of the following description:

"Please send a copy of your response to the USS consultation on the 2020 valuation."

5. On 20 November 2020, the University responded. It refused to provide the requested information and relied on section 36 of the FOIA as its basis for doing so.
6. The complainant requested an internal review on 26 November 2020. The University sent the outcome of its internal review on 18 December 2020. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 16 February 2021 to complain about the way his request for information had been handled.
8. The Commissioner considers that the scope of her investigation is to determine whether or not section 36 of the FOIA has been correctly engaged and, if it has, where the balance of the public interest lies.

Reasons for decision

Section 36 – Prejudice to the Effective Conduct of Public Affairs

9. Section 36(1) states that this exemption can only apply to information to which section 35 does not apply.
10. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the Qualified Person, disclosure of the information:
 - (a) *would, or would be likely to, prejudice—*
 - (i) *the maintenance of the convention of the collective responsibility of Ministers of the Crown, or*
 - (ii) *the work of the Executive Committee of the Northern Ireland Assembly, or*
 - (iii) *the work of the Cabinet of the Welsh Assembly Government.*
 - (b) *would, or would be likely to, inhibit—*
 - (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.*

- (3) *The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).*
- (4) *In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".*
11. Section 36 is a unique exemption within the FOIA in that it relies on a particular individual within the public authority (the Qualified Person) giving an opinion on the likelihood of prejudice occurring. It is not for the Commissioner to stand in the shoes of that individual and provide her own opinion. The Commissioner's role is to: establish that an opinion has been provided by the Qualified Person; to assure herself that that opinion is "reasonable" and; to make a determination as to whether there are public interest considerations which might outweigh any prejudice.

Who is the Qualified Person and have they given an opinion?

12. The University's Qualified Person is Professor Adam Tickell, the Vice-Chancellor who is authorised to act in this capacity by virtue of the office he holds.
13. A Minister of the Crown has previously designated the holder of the vice-chancellorship of each university as the person authorised to act as the Qualified Person for the purposes of section 36 of the FOIA.
14. Professor Tickell was presented with a copy of the Commissioner's template form for recording the opinion of the qualified person, providing arguments for and against engaging the exemption and he signed the form on 17 November 2020.
15. The Commissioner therefore accepts that Professor Tickell is the appropriate Qualified Person and that he provided his opinion on 17 November 2020.

What was the opinion and was it reasonable?

16. The Qualified Person considered that two limbs of the section 36 exemption were engaged. He considered that disclosure would prejudice the free and frank exchange of views for the purpose of deliberation (section 36(2)(b)(ii)) and also otherwise prejudice the effective conduct of public affairs (section 36(2)(c)).

17. In explaining why disclosure would prejudice the free and frank exchange of views, the Qualified Person noted that:

"It is important that the University of Sussex is able to contribute effectively to such consultations and confidentiality is critical for the University to be able to provide honest and frank views. There needs to be a safe space to allow open and honest contributions, particularly to mitigate any potential impact on good industrial relations, especially against a background of significant industrial action affecting the University relating to pensions.

"The University is likely to be inhibited from expressing its views on contentious issues, in circumstances where those views were to be published.

"That is particularly so where the issue is ongoing and it is reasonable to expect that the University will need to continue to provide candid views. Such responses are also likely to be based on commercially sensitive information relating to the University's financial position. Disclosure of consultation responses would be likely to inhibit the University from making fully informed, detailed responses, or from responding to consultations at all."

18. In explaining why disclosure would "otherwise prejudice" the effective conduct of public affairs, the opinion explains that:

"[disclosure] could undermine the ability of the University to respond effectively and loss of frankness in the consultation process could lead to less well formulated outcomes and negotiations.

"Disclosure of consultation responses prior to the outcome of any ongoing negotiations would be likely to prejudice those negotiations and therefore the effective conduct of public affairs.

"The University of Sussex has provided updates to staff in relation to the ongoing USS pension dispute, including a communication from the Chair of Council. Whilst specific details are not generally disclosed, USS members will be broadly aware of the University's view and position in the ongoing pension discussions, including the 2020 valuation."

19. More broadly, the opinion noted that:

"Matters relating to the USS, including its valuation, have been the subject of industrial action by UCU members and others, and there has been participation in such action – including strike action – by employees of the University of Sussex. In the summer, the UCU's higher education committee agreed unanimously that the USS

dispute would remain live, although no industrial action would be taken at that time."

20. As noted above, it is not the Commissioner's role to substitute her own opinion for that of the Qualified Person. The opinion need only be reasonable. It does not have to be the most reasonable opinion available, it only has to fall within the spectrum of opinions that a reasonable person might hold.
21. The Commissioner is likely to find that an opinion is *unreasonable* if it fails to meet the technical requirements of the exemption or if the information is already in the public domain. Specifically in relation to section 36(2)(c), the Commissioner considers that an opinion will be unreasonable if it fails to identify prejudice that is not covered by any other limb of the exemption.
22. The Commissioner is not satisfied that the Qualified Person's opinion identifies any prejudice that is not envisaged by another limb of the exemption. The arguments identified trace their roots back to a need for a safe space in which to evaluate various options and agree on a way forward. They are therefore already envisaged by section 36(2)(b)(ii) of the FOIA and therefore disclosure would not "otherwise" prejudice the effective conduct of public affairs.
23. The Commissioner does not therefore consider that this aspect of the Qualified Person's opinion is reasonable and consequently this limb of the exemption is not engaged.
24. However, in respect of section 36(2)(b)(ii), the Commissioner is satisfied that the opinion is reasonable. The future of a pension scheme (and, in particular, the respective contribution of employers and employees to that scheme) is an issue likely to be contentious. It is not unreasonable to suggest that the University might wish to discuss matters freely and frankly with the Scheme – or that disclosure of this information might make the University less willing to provide forthright views in future.
25. The Commissioner is therefore satisfied that the Qualified Person's opinion in this respect is reasonable and therefore section 36(2)(b)(ii) of the FOIA is engaged.

Public interest test

26. Even though the Qualified Person's opinion is reasonable, the University is still required to disclose the information unless the balance of the public interest favours maintaining the exemption.
27. The complainant argued that USS consultation was likely to affect thousands of university staff across the country who might be asked to

pay more into (or expect less in eventual benefits from) their pension. This would include many employees of the University.

28. The complainant argued that such staff had a right to know what their employer was saying in response to this consultation – given the potential financial effects the consultation might have.

29. In his internal review, the complainant noted that:

"Please note that if this is refused I will forward this to the ICO who have decided in my favour for every request for other Universities' responses to UUK consultations on the USS. Previous responses to my FOIs have raised the exemptions you cite, but the ICO has agreed that they clearly do not meet the public interest test for withholding given the public interest in the USS."

30. The University, on the other hand, argued that the balance of the public interest should favour maintaining the exemption:

"we consider that [the public interest] is sufficiently met through the existing and ongoing publication of a broad range of information by the University and others."

"In relation to the USS 2020 valuation consultation, the University published the initial UUK and UCU responses on its webpages and the 'USS Employers' website also published the 'USS Employers Response' to the consultation which is a 17 page summary of the Employer responses. Therefore, although the University's specific response to the consultation has not been disclosed, information is available in relation to Employers' responses more generally."

"The University also provides significant information and updates about USS and the ongoing valuation to its staff to ensure that staff are kept up to date and aware of the issues and ongoing negotiations. The vast majority of that information is published on our webpages and does not require a Sussex log on, so is therefore accessible to the public. The information can be found on our USS webpages here."

"Information includes the USS Trustee's 'Update on the 2020 valuation' in March 2021, which provides an update following the completion of the USS 2020 valuation consultation. Alongside that, our webpages publish the response from the University's Vice-Chancellor to the USS Trustee's update, as well as the responses of Universities UK and UCU."

31. The University further explained that:

"The USS pension, including the 2020 valuation and proposed changes to the scheme, have been the subject of significant industrial action. Industrial action at the University of Sussex has included strike action between 22 February and 16 March 2018, 'action short of a strike' between 25 November 2019 and 29 April 2020 and strike action between 20 February and 13 March 2020."

32. Finally, the University explained that the USS consultation process for 2020 was still ongoing with a further period of consultation anticipated before the end of 2021. It noted that:

"Given that the issue is still very much live and the subject of ongoing negotiations, it is important that the University is able to continue to provide candid views in response to consultations."

The Commissioner's view

33. The Commissioner considers that the balance of the public interest falls in favour of maintaining the exemption.
34. Having found that the Qualified Person's opinion is reasonable, there will always be some inherent public interest in preventing the identified prejudice from occurring. The strength of that public interest will be determined by the likelihood of the prejudice occurring and its severity – if it were to occur. Because the University has engaged the lower bar of "would be likely to" cause prejudice, this carries less weight in the balancing exercise.
35. Contrary to the complainant's claim, the Commissioner has not always ruled in favour of disclosure of such submissions. Rather, she has taken a balanced view, based on the circumstances that existed at the time of the request. In decision notice FS50718980, for example, she ruled that the University of Nottingham was required to disclose its response to the 2014 USS consultation, but not its response to the 2017 consultation – which was ongoing when the request was responded to.¹ Those timing factors are important in this present case as well.
36. There may soon come a time (particularly if a further round of consultation is imminent) when the University's original submission will cease to be as sensitive as it currently is – because it will have been overtaken by developments. At that point, the balance of the public

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2259445/fs50718980.pdf>

interest is likely to tip in favour of disclosure – but that tipping point has not yet been reached.

37. There is clearly a contentious debate going on between the Trustee of the scheme, the employers and the employees. That debate is very much one which was “live” at the point the University completed its internal review – and remains the case now.
38. There is a strong argument for preserving a “safe space” for the various parties involved to exchange views and deliberate matters freely and frankly before deciding on a way forward.
39. There has been and remains a realistic possibility that further developments of the USS will prompt industrial action. Disclosure of this information is likely to make officials at the University less candid in their responses if those responses prioritise maintaining harmonious labour relations over frank assessments of the facts.
40. The Commissioner is aware that the USS represents dozens of universities across the country. The University’s particular response to this consultation is likely to have been one of many and, of itself, is unlikely to carry significant weight in the decision-making process. Consequently, disclosure would make a very limited impact on public understanding of the issues involved – whilst at the same time breaching the safe space in which employers and the Trustee can deliberate matters freely and frankly.
41. Finally, the Commissioner notes that the University has published a great deal of information about the USS, the consultation and its response. This information goes a long way towards meeting the public interest in transparency.
42. The Commissioner is therefore satisfied that, in the circumstances of this case, the balance of the public interest favours maintaining the exemption.

Right of appeal

43. 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

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

44. 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.
45. 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

Roger Cawthorne
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