

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

### **Decision notice**

**Date:** 13 July 2022

**Public Authority:** The University Council (University of Huddersfield)

**Address:** Queensgate  
Huddersfield  
West Yorkshire  
HD1 3DH

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

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1. The complainant has requested from the University of Huddersfield (the university) any applications it submitted to Stonewall to become a Stonewall Diversity Champion, feedback received from Stonewall relating to the application, and the programme and communications from Stonewall over a specified timeframe. The university provided some information in response to the request, citing sections 43(2), 41(1) and 40(2) as its reasons to withhold the remaining information ("the withheld information").
2. The Commissioner's decision is that the university is not entitled to rely on section 41 FOIA to withhold some of the requested information. He has also decided that section 43(2) is engaged in relation to the specific withheld information it was applied to. However the balance of the public interest lies in the disclosure of some of that withheld information whilst the public interest favours maintaining the section 43(2) exemption for the remaining information withheld under it. The Commissioner's decision is that the university was correct to withhold the personal data which it redacted under section 40(2) of the FOIA. In failing to provide some information to which the complainant was

entitled within the statutory timeframe, the university breached section 10(1) FOIA.

3. The Commissioner requires the University to take the following steps to ensure compliance with the legislation.
  - Disclose to the complainant, part of the information it has withheld under sections 41(1) and 43(2) FOIA – specifically, the University's Workplace Equality Index 2020 Feedback (last item under reference 1).
  - Disclose the information the university has withheld under sections 41(1) and section 43(2) FOIA – provided to the Commissioner under reference 6.
  - Disclose the information the university has withheld under sections 41(1) and section 43(2) FOIA – provided to the Commissioner under reference 7.
4. The University must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Request and response**

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5. On 6 June 2021, the complainant wrote to the university and requested information in the following terms:

“This is a request under the Freedom of Information Act 2000 (FOIA). Please provide any information that you hold answering to any of the following descriptions:

  1. Any application you made in 2019, 2020, or 2021 to be a “Stonewall Diversity Champion” or to be included on Stonewall’s “Workplace Equality Index,” including any attachments or appendices to those applications. Please redact personal details if necessary.
  2. Any feedback you received in 2019, 2020 or 2021 from Stonewall in relation to either application or programme.
  3. Any other communication you have received from Stonewall in 2019, 2020, or 2021 unless privileged or otherwise exempt from disclosure (but if you claim privilege or exemption in relation to any

material, please say in broad terms what the material is and the basis on which you claim to be entitled to withhold it).

There are no permissible grounds to refuse this request - though I note that the university has refused a similar request made earlier this year (with which I have no connection). Should University of Huddersfield decide to refuse this request I will continue by all available means to pursue the University's compliance. If it becomes necessary to submit a complaint to the Information Commissioner to secure compliance, I will do so."

6. The university refused this request on 1 July 2021 citing section 41(1) (information provided in confidence) and section 43(2) (commercial interests).
7. The complainant requested an internal review on the same day based on public interest arguments.
8. On 22 July 2021, the university provided its internal review. The review upheld the withholding of the majority of the information under section 41(1) and section 43(2) but provided some general information, having made redactions for personal information under section 40(2).

### **Scope of the case**

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9. The complainant contacted the Commissioner on 20 August 2021 to complain about the way their request for information had been handled because they believe that it is in the public interest for the information to be disclosed.
10. The Commissioner considers that the scope of this case is the university's citing of section 41(1), section 43(2) and section 40(2) as a basis for non-disclosure of the requested information. He will also look at any procedural matters that may have arisen.

### **Background**

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11. The Commissioner has recently issued a decision notice [IC-129040-Y4T2](#) dealing with similar information to that requested in this decision notice. He has reproduced below the following 'background' paragraphs from that decision by way of context.
12. Stonewall first published its Workplace Equality Index (originally known as the Corporate Equality Index) in 2005. Participation in the scheme itself is voluntary and free. Each member employer receives a score

from Stonewall based on how well the organisation's policies and general culture reflect Stonewall's criteria for judging what an organisation supportive of LGBTQ+<sup>1</sup> employees should offer. Stonewall publishes an annual list of the 100 employers who have received the highest ranking in that year's survey.

13. For those employers which sign up to the Diversity Champions Programme, Stonewall also provides detailed feedback on their applications, noting how the employer could better meet its criteria. Participants pay a fee to join the programme. The University is a member of the Diversity Champions Programme.
14. The scheme attracted controversy in 2021 when Ofcom decided to withdraw from the Diversity Champions Programme citing a "risk of perceived bias" arising from its membership. Documents disclosed under FOIA indicated that Ofcom had, in its submission, highlighted some of its regulatory decisions as part of its evidence of work it had done to "promote LGBT equality in the wider community."<sup>2</sup>
15. A number of public authorities such as Channel 4, Ofsted, the Cabinet Office and the Equalities and Human Rights Commission have also withdrawn from the Diversity Champions Programme saying that it no longer represents value for money.
16. Stonewall maintains that both the Index and the Diversity Champions Programmes are only intended to promote the rights of LGBTQ+ employees and make them feel welcome in the workplace.

## Reasons for decision

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### Section 41 – information provided in confidence

17. Section 41(1) FOIA provides that –
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<sup>1</sup> The Commissioner has used the abbreviation LGBTQ+ (which stands for Lesbian, Gay, Bisexual, Transsexual, Queer (or Questioning) and others (the "+") who do not consider themselves to fall within any of those categories, but do consider themselves part of this community) as this is the abbreviation used by Stonewall and is thus the definition most appropriate in this context. The Commissioner is aware that both longer and shorter abbreviations are used.

<sup>2</sup> <https://www.bbc.co.uk/news/uk-58917227>

“(a) Information is exempt information if 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”.

18. The university provided to the Commissioner the information it had withheld under this exemption – the bespoke feedback and consultancy from Stonewall on its WEI submission. The university explained to the Commissioner that it did not receive any award based on its first submission for Stonewall WEI as the award system was not in place then. When the university submitted again in 2021 it received a Silver award but this was after the request had been made and is not within the scope of this case.
19. The Commissioner’s advice on section 41 states that “information will be covered by Section 41 if -
  - it was obtained by the authority from any other person,
  - its disclosure would constitute a breach of confidence,
  - a legal person could bring a court action for that breach of confidence, and
  - that court action must be likely to succeed

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

20. Section 41(1)(a) states that the information must have been obtained from “any other person”. The term ‘person’ means a ‘legal person’. This could be an individual, a company, another public authority or any other type of legal entity. In this case the withheld information was provided by Stonewall which is a registered charity, registered company and therefore a legal entity.

**Would disclosure constitute an actionable claim for breach of confidence**

21. The usual test for section 41 cases is set out in the case of *Coco v Clark* [1969] RPC 41 which sets out three elements which must be present in order that a claim can be made. According to the decision in this case a breach of confidence will be actionable if:
  - the information has the necessary quality of confidence;

- the information was imparted in circumstances importing an obligation of confidence; and
- there was an unauthorised use of the information to the detriment of the confider. However, for that claim to be 'actionable' within the meaning of section 41(1)(b) FOIA, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed.

**Does the information have the necessary quality of confidence?**

22. In order for information to have the necessary quality of confidence, it must be more than trivial and not otherwise accessible. The university explained that the feedback for the application and the advice to the university by Stonewall on training, materials, and presentation was bespoke. The "information is not accessible otherwise to the public". The university said that some of the information and advice is considered sensitive and that the information is not trivial.
23. The Commissioner accepts that the information has the necessary quality of confidence. He also accepts that the information in question is not otherwise accessible and is more than trivial.

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

24. The university argues that the information "was communicated by Stonewall in circumstances importing an obligation of confidence that was "implied explicitly" as part of the terms and conditions of both parties and which the university agreed to. The university also stressed that there is "a free space to the organisations to discuss issues and get advice".
25. The Commissioner notes that the university provided the terms and conditions of Stonewall membership. There are clauses that set out that members at any time will not disclose information it has received from Stonewall as a result of its membership benefits which may be confidential. The position is even clearer regarding training materials which it states must not be shared.
26. An obligation of confidence may be expressed explicitly or implicitly. In this instance the university has said that the obligation of confidence had been "implied explicitly". The Commissioner is unsure how something can be implied explicitly, and considers that the terms and conditions were explicit and not implied but there was some non-explicit wording in the use of "may be confidential" which would suggest that some information received from Stonewall may not be confidential. However, the terms and conditions are clear regarding training

materials. The Commissioner agrees that the information was imparted in circumstances importing an obligation of confidence.

**Would disclosure be detrimental to the confider?**

27. The university's view is that disclosure by the university would have a detrimental effect in that Stonewall could take legal action for breach of confidentiality. This suggests that the detriment would be to the university, however it may be that the university is suggesting that taking legal action and all that that entails is detrimental in itself which would also apply to Stonewall.
28. However, the university has set out its views regarding the detriment to the confider's commercial interests in its response to section 43(2). The Commissioner also accepts that the detriment to Stonewall's commercial interests satisfies the third element of the test.

**Would the breach be actionable?**

29. The Commissioner's guidance<sup>3</sup> explains that,

"... 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." (Hansard Vol.619, col. 175-176).

In other words. the Commissioner considers that it is not sufficient to merely claim that a breach of confidence might be brought. Any action must be likely to succeed.

30. To determine whether an action would be likely to succeed, the Commissioner must assess whether the university might be able to put forward a public interest defence. The test is whether there is a public interest defence in disclosure which overrides the competing public interest in maintaining the duty of confidence. However, this is not the same test that would be applied in the case of a qualified exemption.

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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)

### **Is there a public interest defence for disclosure?**

31. The university sets out what public interest defence it would have for releasing the requested information. These arguments revolve around its duty to be transparent and accountable in the decisions it takes. In this case, the university's approach and commitment to promote LGBT+ inclusion.
32. However, the university argues that it publishes<sup>4</sup> all the relevant information which it lists as strategy, framework, governance, glossary, policies and procedures that form the framework for its commitment to inclusivity. Therefore it does not believe that it would have a sufficient public interest defence for breaching its duty of confidence.

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

33. The Commissioner's guidance<sup>5</sup> states the following:

"A supplier may ask you to accept a confidentiality clause in a contract, to guard against the future disclosure of information. Such clauses may identify information you both consider to be confidential and which you do not want to be made public. They can be useful in identifying prejudice to a third party's commercial interests and also in providing a framework for redress in the event of an unauthorised disclosure."

34. The guidance states that a public authority has to have a consultation with the third party (Stonewall) and not use a confidentiality clause as a substitute when a public authority receives an information request. The university did elicit Stonewall's views.

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<sup>4</sup> [Strategy, Policy and Governance - University of Huddersfield](#)

[EDIFramework2020-25UniversityofHuddersfieldrevised150621.pdf](#)

[Developing our CPD portfolio \(hud.ac.uk\)](#)

[EDI TransEquality University of Huddersfield Trans Equality Policy Statement.pdf](#)

[LSexualOrientation \(hud.ac.uk\)](#)

<sup>5</sup> [information-provided-in-confidence-section-41.pdf \(ico.org.uk\)](#)



35. However, case law on the common law of confidence suggests that a breach of confidence won't succeed, and therefore won't be actionable, in circumstances where a public authority can rely on a public interest defence.

36. The Commissioner's guidance<sup>6</sup> explains the following:

"The courts used to take the position that the public interest in maintaining confidentiality could only be overridden on exceptional grounds, for example if the information would bring to light evidence of misconduct, illegality or gross immorality. However, this began to change following the Court of Appeal decision in *London Regional Transport v The Mayor of London* [2001] EWCA Civ 1491; [2003] EMLR 88, as this left open the question of whether exceptional grounds are a prerequisite for a public interest defence to succeed.

This ruling was subsequently interpreted by the Information Tribunal in *Derry City Council V ICO* (EA/2006/0014, 11 December 2006) to mean that an exceptional case is no longer required to override a duty of confidence that would otherwise exist."

37. The guidance goes on say that further case law has recognised the need to incorporate the provisions of the Human Rights Act into the test of confidence:

"The relevant provisions, in terms of the public interest, are the Article 8 right to privacy and a family life and the competing Article 10 right to freedom of expression (which includes the freedom to receive and impart information and ideas). The effect of these developments around the law of confidence has been to modify the public interest test into a test of proportionality."

38. The Commissioner is therefore of the view that, in the event of Stonewall bringing an action for a breach of confidence, the university would have a public interest defence on which it could rely.

39. The Commissioner acknowledges that the public are interested in Stonewall and there is a debate concerning the extent of its influence on public authorities. Transparency is a persuasive factor in situations when a public authority engages with organisations and there is an element of controversy. The Commissioner notes that some closely related

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<sup>6</sup> Ibid

information is already in the public domain, though it is unclear from where it has originated. For example, The Stonewall Workplace Equality Index 2021 can be found on the internet. The Welsh Government has published its submission to Stonewall's Workplace Equality Index<sup>7</sup> [Workplace Equality Index submission \(gov.wales\)](#).

40. In the following paragraphs the Commissioner is relying on his recent decision [IC-129040-Y4T2](#).
41. Firstly, the Commissioner notes that, whilst Stonewall is a charity, it is a charity with an agenda to promote. Whilst many may well agree with that agenda, it is not one that is universally accepted. Moreover, even those organisations which do enjoy broad support should not expect their actions to go free from scrutiny.
42. The Diversity Champions Programme is (to both its supporters and its detractors) fundamentally a scheme which aims to influence the policies, process and actions of the employers which take part in the scheme. Stonewall might gain some financial reward for the scheme, but its fundamental basis is to improve (in Stonewall's view) the policies of employers and to raise awareness of the issues faced by LGBTQ+ employees.
43. Stonewall has an established track record of campaigning on behalf of the LGBTQ+ community and it is a well-known brand both inside and outside that community. Whilst the Commissioner recognises that there are many other organisations offering training, guidance and even accreditation, none of these organisations come with the same brand reputation as Stonewall. Stonewall's track record as an advocate for LGBTQ+ rights (especially during its early years, when the rights of LGBTQ+ people were not widely recognised or respected) is its unique selling point. Therefore when organisations choose to sign up to Stonewall's schemes, they are not only signing up to bring their policies into line with Stonewall's targets, they are signing up to associate themselves with Stonewall's influential brand. Associating with that brand (Diversity Champions members are permitted to use the Stonewall-associated logo on their promotional materials) may give employers an advantage when recruiting and retaining staff – particularly staff within the LGBTQ+ community.

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<sup>7</sup> [Workplace Equality Index submission \(gov.wales\)](#).

44. By associating themselves with Stonewall's brand, employers are bound to chase its approval – if their policies do not match up with Stonewall's expectations, they will achieve a lower score and hence a lower ranking. That means that Stonewall is able to exercise, through its Index and its Diversity Champions Programme, a significant degree of influence over the policies that participating members operate. Such influence can be used for good and for bad. The withheld information shows exactly what sort of policies Stonewall is likely to give high scores to and what policies will generate score marks. In the Commissioner's view, there is a strong public interest in understanding how this scoring scheme works.
45. Disclosing this particular withheld information may not necessarily reveal any attempt on Stonewall's behalf to exercise undue influence – but it would provide reassurance to the public that the Index is operating fairly and that no undue influence is being exercised. It may even allay some of the concerns that have been raised about the scheme.
46. Additionally, public authorities which participate in the scheme should be robust enough to cope with negative feedback. Furthermore, if the organisation's score has fallen or remained static between years, there may well be a public interest in understanding why that is.
47. The Commissioner is also cognisant of the fact that a number of high profile organisations have withdrawn from the Diversity Champions programme, such as The Equalities and Human Rights Commission. Therefore he does not believe that concern about the operation of the schemes is restricted to a few individuals or campaigning groups. Although the Commissioner's decision is finely balanced and he recognises that there could be a commercial impact on Stonewall, his view is that transparency is served by disclosing part of the information concerning the workings of the Workplace Equality Index and Diversity Champions Programme and that this is proportionate. The Commissioner therefore considers that Stonewall could not guarantee that any action it brought for a breach of confidence would succeed.
48. The Commissioner is not persuaded that an actionable breach would occur and consequently section 41 FOIA is not engaged.

### **Section 43(2) – commercial interests**

49. Section 43(2) of the FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.

50. The university provided the Commissioner with all the withheld information relating to the request in separate files. Some of the information under references 1, 6 and 7 was withheld under both sections 43(2) and 41(1) FOIA. Newsletters provided under reference 2 were also withheld but solely under section 43(2). This exemption was cited in relation to the first two parts of the request.
51. The Commissioner has defined the meaning of the term “commercial interests” in his guidance on the application of section 43 as follows:
- “...A commercial interest relates to a legal person’s ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent.”<sup>8</sup>
52. This exemption is subject to the public interest test which means that, even if the Commissioner considers the exemption to be engaged, he then needs to assess whether it is in the public interest to release the information.
53. One of the files the university provided involved email exchanges about a previous information request that had been received by the university and the current request in order to ascertain whether Stonewall’s views had altered since it had provided its previous view. They had not.
54. In order for section 43(2) to be engaged the Commissioner considers that certain criteria must be met:
- “It is not sufficient for you to simply argue that because information is commercially sensitive, its disclosure would, or would be likely to, prejudice commercial interests. You must be able to demonstrate a causal relationship between the disclosure of the information in question and the prejudice you envisage.”<sup>9</sup>
55. The university confirmed that the third party whose commercial interests would, or would be likely to be prejudiced if the withheld information was disclosed is Stonewall. Stonewall’s views are contained in the university’s wider arguments below. It confirmed its previously expressed view that releasing the information would be commercially prejudicial to itself. Stonewall had earlier stressed that any personal

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<sup>8</sup> [Section 43 - Commercial interests | ICO](#)

<sup>9</sup> *ibid*

data, particularly special category data, would need to be redacted if the university was considering releasing its own submission.

56. The university provided evidence to support its view that disclosure of the requested information would or would be likely to be prejudicial. In order to become a Stonewall Diversity Champion employers are required to complete an application form and based on their responses and a point-based framework for best practice in LGBTQ+ inclusion, employers are graded gold, silver or bronze. The university states that the criteria to submit a submission for WEI and the award system is specific to an organisation's own policy, work on equality, and procedures. The university's view is that disclosure could give other organisations an advantage when submitting their own WEI application. They might replicate the university's submission details without having the necessary criteria in place.
57. The university pays a membership fee per year to Stonewall that entitles them to bespoke feedback on the university's application form, training materials and sector exclusive resources such as newsletters and one-to-one guidance from their experts concerning best practice. Disclosure would or would be likely to prejudice the commercial interests of Stonewall as it provides these services on payment of a membership fee. The university took into account the highly competitive nature of the sector when it cited this exemption. It provided a link to the Stonewall website for their members and two sets of terms and conditions Stonewall school and college champions sign up to. There are clauses stating that members must not disclose its membership benefits which are confidential.
58. The term "would...prejudice" means that prejudice is more probable than not to occur (ie a more than 50 per cent chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so).
59. To meet the threshold of "would be likely to prejudice" is a lower threshold. This means that there must be more than a hypothetical or remote possibility of prejudice occurring. There must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50 per cent.
60. The university consulted with Stonewall who said that the release of the information would be likely to be commercially prejudicial. The causal link is that Stonewall is selling a service through its membership scheme. The requested information would mean providing information without it having been paid for which could be detrimental to Stonewall's commercial interests.

61. The Commissioner accepts the arguments put forward by the university as to why it withheld the requested information under this exemption. The university has provided a causal link between the release of the requested information and the commercial interests of Stonewall, in that the services it offers could be compromised resulting in commercial detriment. The university has not specified whether the level of prejudice to Stonewall's commercial interests is at the higher or lower level. Therefore the Commissioner has decided that the prejudice to Stonewall is at the lower level. The exemption is engaged.

### **Public interest test**

62. Despite the fact that the exemption is engaged, the Commissioner has gone on to consider if it would nevertheless be in the public interest to disclose the requested information.

### **Public interest factors in favour of maintaining the exemption**

63. The university provided the Commissioner with its public interest factors in favour of maintaining the exemption.
64. It states that the feedback, advice and the newsletters from Stonewall were provided as part of the membership benefits received via a fee payment. Disclosing the feedback/advice received, and the newsletters would, or would be likely to have an impact on the commercial interests of Stonewall which the university does not consider to be in the public interest.
65. The assessment of the WEI application, if it was conducted incorrectly, would or would be likely to declare an organisation incorrectly as a diversity champion and have a serious adverse effect on the public interest in understanding the organisation's commitment towards equality and inclusivity, thereby affecting people's lives. The university contends that this would undermine the confidence of the public in the WEI and would/would be likely to devalue the services that Stonewall offers.

### **Public interest factors in favour of disclosing the requested information**

66. The complainant argues that the public interest in this matter favours disclosure. Their view is that:

"The influence of Stonewall in higher education is a subject of serious, sustained public and political interest at the current moment. A series of respected, senior academics within universities have raised concerns about Stonewall's influence on university

policies and procedures, including Alice Sullivan at UCL and Kathleen Stock OBE at Sussex. The serious substance of these concerns is by now well established. In particular, I draw ICO's attention the Reindorf report into University of Essex:

[Reindorf Review on "no platforming" - Cloisters - Barristers Chambers](#)

This report clearly identifies the deleterious effect of Stonewall's influence on academic freedom and University of Essex's upholding of its section 43 duties under the Education Act 1986. It follows that there is a pressing need - unambiguously in the public interest - for all universities to be transparent about their dealings with Stonewall, and the role that Stonewall plays in the formulation and operation of university policies, so that the public can be reassured that the impact of Stonewall's work within higher education is a positive one and fully in line with universities' legal duties towards academic freedom, free speech, and the avoidance of unfair discrimination."

67. The university stated that the application, feedback, guidance and advice provided by Stonewall could contribute to the public's understanding of the university's commitment towards LGBTQ+ inclusion matters which affect people's lives. Disclosure would provide a better understanding to the public of how the feedback and guidance provided by Stonewall influenced the university's practice to provide a safe environment for all, specifically to trans people and academics who hold gender critical views.
68. The university puts forward the view that openness and transparency in the university's decision-making processes, namely the factors taken into consideration when changes were made to university policies, procedures and commitment are a factor for disclosure. Additionally the university highlighted the contribution release would make to the public's understanding of the university's policy on equality and inclusion, freedom of speech and the related factors influencing these policies.
69. Disclosing the information would provide accountability in the spending of public money. It is a publicly available fact that the university pays £6000 per year for its membership fee to Stonewall.

### **The balance of the public interest**

70. The complainant puts forward strong reasons for the release of this information. There is clearly a public debate as to the role and influence of Stonewall on public authorities. There is undoubtedly a great deal of public interest in this issue. Whilst acknowledging that the disclosure of the university's first submission and the specific WEI 2020 Feedback (at

the end of reference 1); feedback (under reference 6); and, the consultancy document (under reference 7) are likely to be commercially prejudicial to Stonewall, the Commissioner is persuaded that the public interest in disclosure outweighs the maintenance of the exemption.

71. However, it is unclear to what extent the release of the information provided to the Commissioner under reference 2 (the newsletters) or the majority of the information provided under reference 1 would contribute to this debate. Some of it is protected by copyright, much of it is training materials, covering emails for training and photographs. Again, it is a fine balance, but the Commissioner has decided that the public interest would not be served by the disclosure of most of this material which is central to Stonewall's fee based subscription.

#### **Section 40 - personal information**

72. Firstly, the Commissioner intends to look at what was withheld under this exemption. The complainant has stated with regard to the first part of this request that personal details could be redacted, if necessary. However, this acceptance of redaction was not repeated regarding parts two and three of the request. At internal review the university provided some limited information by way of its response to part three of the request in the form of administrative emails between the university and Stonewall but withheld all the personal information. This information is what is being considered below.
73. 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.
74. In this case the relevant condition is contained in section 40(3A)(a)<sup>10</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
75. 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.

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<sup>10</sup> As amended by Schedule 19 Paragraph 58(3) DPA.



76. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

**Is the information personal data?**

77. Section 3(2) of the DPA defines personal data as: "any information relating to an identified or identifiable living individual".
78. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
79. 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, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
80. 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.
81. The university has explained that there were a number of communications with Stonewall – general discussion on topics such as meetings, conferences etc that were provided in a redacted form citing section 40(2). The university provided the unredacted version to the Commissioner. The individuals whose data was redacted are members of staff of the university and Stonewall. The information the university redacted relating to those individuals included their names, contact details (phone numbers/email addresses), discussion about their annual leave, availability, pronouns used to identify themselves and reasons for absence. The university considers all the redacted information to be personal data.
82. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to certain individuals that work for the university and Stonewall. She is satisfied that this information both relates to and identifies the individuals concerned including certain personal matters relating to them. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
83. 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.

84. The most relevant DP principle in this case is principle (a).

**Would disclosure contravene principle (a)?**

85. 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”.

86. 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.

87. 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.

**Lawful processing: Article 6(1)(f) of the GDPR**

88. 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.

89. The Commissioner considers that the lawful basis most applicable is basis 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”<sup>11</sup>.

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<sup>11</sup> 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”.

90. 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 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.
91. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

### **Legitimate interests**

92. 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.
93. The complainant wishes to see the communications that passed between the university and Stonewall. They have strong reasons to want to see these communications as they are concerned about Stonewall's influence over the university.

### **Is disclosure necessary?**

94. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
95. The university acknowledges that there is a legitimate interest in being transparent and accountable to the public so that they understand how

policies and procedures are made at the university. It considers that the redacted information does not add value to this purpose as it is information relating to the availability of third parties, their contact details and so on. Disclosure of the withheld information would be highly likely to identify them and disclosure under the FOIA is disclosure to the world at large. The university had revisited the redacted information and concluded that disclosure would not add value to the public's understanding of its decision/policy-making process or contribute towards accountability. Therefore it cannot identify a legitimate interest.

96. The Commissioner agrees that the disclosure of this information would identify the individuals concerned. There is no legitimate interest in the disclosure of this information as it concerns the personal information of staff members of the public authority and Stonewall. Having considered the withheld personal information which is really only of relevance to the individuals concerned and not to the wider public, he has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure. Therefore he has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

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

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

### **Section 10 – time for compliance**

98. Section 10 of FOIA states that a public authority must comply with its duty under section 1(1) FOIA and communicate all non-exempt information "promptly and in any event not later than the twentieth working day following the date of receipt."
99. The university identified information at the internal review stage that could be disclosed to the complainant. In failing to provide this to the complainant within 20 working days, the Commissioner finds that the university breached section 10 FOIA.

## Right of appeal

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100. 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](mailto:grc@justice.gov.uk)

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

101. 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.

102. 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 .....**

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