

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 March 2023

Public Authority: The Council of the University of Southampton
Address: University Road
Southampton
SO17 1BJ

Decision (including any steps ordered)

1. The complainant has requested an unredacted copy of the Broadlands Archive Agreement (the "new request"). The complainant had previously requested this information in 2017 (the "previous request") and received a redacted copy of the agreement following a First Tier Tribunal decision. In response to the new request, the Council of the University of Southampton (the University) continued to rely on sections 40(2) and 41 of FOIA to withhold the redacted information.
2. The Commissioner's decision is that, on the balance of probabilities, the University failed to properly reconsider whether the exemptions relied on to redact information when responding to the previous request still applied to the redacted information when responding to the new request. Consequently, the Commissioner finds that the University has breached section 1 of FOIA.
3. The Commissioner requires the University to take the following steps to ensure compliance with the legislation:
 - carry out a proper review of the redacted information and issue a fresh response to the request either disclosing the redacted information no longer covered by an exemption or provide an adequate refusal notice.
4. The public authority 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

5. On 20 June 2022, the complainant made the following request for information to the University:

"I request under the Freedom of Information Act a complete unredacted copy of the Broadlands Archive Agreement dated 18 July 2011, given that all confidentiality obligations expired August 2022 under clause 60.4."

6. The University responded on 18 July 2022, stating:

"In accordance with section 1(1)(a) of the Act, we confirm the University holds the information of the description specified in your request.

A redacted copy of the Broadlands agreement was provided to you on the 26th of April 2022. This was provided to you as the University had agreed during the proceedings in the tribunal hearings EA2020/0021-0026-0058-0059, that Lord Brabourne's name would not be redacted and that his information could be released along with the information in clauses 25 to 27.

Having considered the redactions to this agreement throughout the afore-mentioned proceedings and as recently as 26th April 2022, the University is satisfied that the exemptions applying to the remaining information redacted still stands and they remain valid for your current request.

Since, you already have a copy of that agreement and the exemptions relied upon for the redactions so made, the requested information you have requested is accessible to you by other means, it is exempt information under section 21(1) of the Act and this is an absolute exemption."

7. The complainant requested an internal review on 19 July 2022, stating the following:

"I believe it is strongly arguable no exemptions apply. The tribunal case concerns FOI requests I made in 2017, etc. – all predating the tenth anniversary of the Effective Date of the 2011 Agreement (5 August 2011). So, as I stated in my FOI request, all confidentiality obligations under the Agreement ceased in August 2021 (clause 60.4). Thus, the FTT decisions are irrelevant re this fresh request."

8. The University provided the outcome of its internal review on 17 October 2022, maintaining its original position. It also stated that it was now relying on section 14 of FOIA as it considered that the request was vexatious and exempt from disclosure.

Scope of the case

9. The complainant initially contacted the Commissioner on 20 August 2022 to complain about the University's failure to respond to his request for internal review.
10. On 5 September 2022, the Commissioner wrote to the University advising it to respond to the internal review request within 10 working days.
11. On 17 September 2022, the complainant contacted the Commissioner to advise that he had still not received a response to his internal review request.
12. The Commissioner has discretion to accept a complaint for full investigation without an internal review decision. Given the delay that had already occurred, the Commissioner exercised his discretion in this case.
13. During the Commissioner's investigation the University confirmed that it stood by the exemptions and redactions utilised in the disclosure of the redacted Broadlands Agreement that were reached in discussion and agreement of the Commissioner following the tribunal decision in relation to the previous request.
14. To ensure the Commissioner correctly understood the University's position on the matter, he asked it to provide an unredacted copy of the withheld information, showing the information that was withheld from the version provided to the complainant following the tribunal in relation to the previous request, and the exemptions relied on to continue withholding that information in response to the new request. He also asked for the University to provide the detailed rationale that was agreed following the tribunal to continue to rely on section 40(2) and section 41 to withhold the redacted information. The University refused to provide this information, stating that it was a repetition of action it had already taken following the tribunal decision in relation to the old request and directing the Commissioner to those previous submissions.
15. The Commissioner considers the scope of his investigation is to consider whether the University can withhold the redacted information under sections 40(2) and 41 of FOIA, given the circumstances at the time of

the new request. As the University refused to provide new submissions to the Commissioner, he has come to this decision based on the information he holds in relation to the position agreed after the tribunal in relation to the previous request.

Reasons for decision

16. Under section 1(1) of FOIA, anyone who requests information from a public authority is entitled:
 - a. to be told if the authority holds the information and,
 - b. to have the information communicated to them if it is held and is not exempt information.
17. The complainant previously requested a copy of the Broadlands Archive Agreement in 2017 and, following a tribunal hearing, was provided with a redacted copy of the Agreement. The redactions were made following discussions between the ICO and the University.
18. As stated above at paragraph 13, the University referred the Commissioner to the exemptions relied on to make redactions in response to the previous request, on the basis that its position remains the same as it was then. This included the withholding of some information under section 40(2) of FOIA ("third personal information").
19. Upon reviewing the withheld information, to determine whether the exemptions still applied, the Commissioner identified that some of the information that the University has continued to withhold under section 40(2) is no longer personal data, as the individuals concerned died between the previous request in 2017 and the new request being made.
20. This indicates to the Commissioner that the University has not properly reconsidered the previous redactions when considering the new request. Instead, it has maintained its position from the previous request without taking into account the passage of time and considering how circumstances may have changed since then.
21. The Commissioner's decision is therefore that the University has breached section 1 of FOIA.
22. The Commissioner requires the University to carry out a proper review of the redacted information and provide the complainant with a fresh response, either disclosing the redacted information to the complainant or providing an adequate refusal notice based on the circumstances at the time of the new request.

Other matters

Confidentiality clause in Broadland Archive Agreement

23. The complainant has asked for an unredacted copy of the Broadland Archive Agreement document, as he believes that the circumstances that led to those redactions being made have now changed (as explained in his request for internal review at paragraph 7, in particular that "all confidentiality agreements under the Agreement ceased in August 2021", and the previous Tribunal decision was therefore irrelevant).
24. The University is of the view that the expiry of the confidentiality clause referred to by the complainant is irrelevant to the redactions made to the agreement.
25. When considering whether information is confidential, it is important to explain that having a confidentiality clause in place does not guarantee that information will not be disclosed under FOIA, nor does the expiry of such a clause mean the information automatically ceases to be confidential. Whilst the existence and/or expiry of any such clause is a factor that the public authority must consider, the public authority must consider all the circumstances at the time of the request in order to decide whether the requested information is subject to a duty of confidentiality.

Internal review request

26. The Commissioner notes that the time taken for the University to respond to the internal review request exceeded 40 working days. Although there is no statutory time set out in FOIA within which public authorities must complete a review, the Commissioner takes the view that a reasonable time for completing an internal review is 20 working days, and in no case should the total time taken exceed 40 working days. The Commissioner therefore recommends that the University review the Section 45 code of practice¹.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

Right of appeal

27. 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

28. 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.
29. 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
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