

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 May 2024

Public Authority: The Governing Body of the University of Sussex

Address: Sussex House 317
Falmer
Brighton
BN1 9RH

Decision (including any steps ordered)

1. The complainant has requested information about a protest arranged by the Sussex Friends of Palestine Society. The University of Sussex ('the University') withheld the information under sections 38 and 42 of FOIA, which concern health and safety and legal professional privilege. The University has now confirmed that it's no longer relying on section 42 but has applied sections 31, 36, 40, and 41 to the request. These exemptions concern investigations, prejudice to the conduct of public affairs, personal data and information provided in confidence, respectively.
2. The Commissioner's decision is that the University is entitled to withhold the requested information under section 36(2)(b)(i) and section 36(2)(b)(ii) of FOIA.
3. It's not necessary for the University to take any corrective steps.

Request and response

4. The complainant made the following information request to the University on 18 October 2023:

"Please can you show a copy of all the correspondence you had regarding the PROTEST FOR PALESTINE which took place on your campus two days ago. I need emails etc. between you and the Student's Union and the Palestine society, and also any other communications you have had about it."

5. The University's final position was that the requested information was exempt under section 38 of FOIA, which concerns health and safety. The University had also applied section 42 to the some of the information.
6. As a result of the complaint to the Commissioner, the University reconsidered its response. It has confirmed to the Commissioner that it's no longer relying on section 42 but has now applied sections 31, 36, 40, and 41 to the request, in addition to section 38.

Reasons for decision

7. This reasoning will first consider the University's reliance on section 36(2)(b) to withhold the requested information. If necessary, he'll also consider the remaining exemptions on which the University's relying.

Section 36 – prejudice to the effective conduct of public affairs

8. The University has provided the Commissioner with a copy of the information it's withholding. It comprises correspondence, risk assessments, administrative and management information, and images.
9. Under section 36(2)(b)(i) of FOIA information is exempt from disclosure if, in the reasonable opinion of a qualified person, its disclosure would otherwise prejudice or would be likely to otherwise prejudice the free and frank provision of advice.
10. Under section 36(2)(b)(ii) information is exempt from disclosure if, in the reasonable opinion of a qualified person, its disclosure would otherwise prejudice or would be likely to otherwise prejudice the free and frank exchange of views.
11. These two exemptions can only be engaged on the basis of the reasonable opinion of a qualified person. The qualified person (QP) in this case was Professor Sasha Roseneil, the University's Vice-Chancellor. The Commissioner is satisfied that this individual is authorised as the QP under section 36(5) of FOIA.
12. The University has provided the Commissioner with a copy of its submission to the QP about the request. This shows that the QP gave their opinion on 1 May 2024. From the submission the Commissioner

accepts that the QP gave their opinion that the exemptions were engaged. Given the University's late application of section 36 the opinion was given later than is desirable; however, the Commissioner understands that the QP considered the circumstances as they were at the time when the University's response to the request had been due.

13. The QP was provided with a copy of the request, a broad description of the information caught by the request and the two exemptions, the background and context to the request and an explanation of why the University considered the exemptions were engaged. The QP was also presented with public interest arguments.
14. Regarding section 36(2)(b)(i) and the provision of advice, the QP was advised that advice and liaison were needed with colleagues across the University and with external stakeholders about the proposed protest, in relation to a range of issues associated with the protest. The University has provided the Commissioner with more detail about that which he hasn't included in this notice at the University's request.
15. The QP was advised that it was fundamental that there should be an opportunity for staff to provide free and frank advice to support the University in assessing the matter and coming to a decision. Without the opportunity for free and frank advice, the quality of internal decision making, and the University's response, may have been inhibited and risked it not meeting its legal and other obligations including to keep people safe.
16. It was considered that individuals would be inhibited from providing free and frank advice in circumstances where that advice would be published, in response to FOIA request. This was particularly so given the continuing circumstances, in terms of the conflict in Gaza, but also a continuing weekly 'Protest for Palestine' at the University.
17. Regarding section 36(2)(b)(ii) and the exchange of views, the QP was advised that given the context, and the complexity and sensitivity of the issues, disclosing the requested information would, or at the very least, would be likely to inhibit the free and frank exchange of views for the purpose of deliberation. It was explained that deliberation in this context meant the University's internal deliberations about the proposed protest. The University presented the QP with more detailed discussion of that matter. This included the sensitive and controversial nature of the circumstances, the need for a 'safe space' to discuss the matter internally, possible risk to University staff, a security incident that had occurred at the University recently, and other incidents, events and protests associated with the University.

18. The QP's signed opinion confirms that they considered that disclosing the information "would be likely to" cause the prejudice envisioned under the two exemptions, rather than "would" cause this prejudice. The Commissioner will accept that the lower level is a credible level of likelihood ie that there's a more than a hypothetical or remote possibility of the envisioned prejudice occurring.
19. It's important to note that 'reasonableness' in relation to the QP's opinion isn't determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it's a reasonable opinion, and not necessarily the most reasonable opinion.
20. The Commissioner considers that the QP had sufficient information to enable them to make a decision on the matter, in this case. Based on the submission to the QP, the Commissioner considers that the QP's opinion about withholding the information under sections 36(2)(b)(i) and 36(2)(b)(ii) of FOIA was a reasonable one. He accepts that, in the circumstances of this case, disclosing the information at the time of the request would have been likely to inhibit the provision of advice and the exchange of views.
21. The University was therefore entitled to apply the exemptions under section 36(2)(b) to the request. The Commissioner has gone on to consider the public interest tests associated with these exemptions.

Public interest test

22. In its submission to the Commissioner, the University has acknowledged the general public interest in openness and transparency about the University's decision making. It says that transparency is a key element of accountability; there is a strong public interest in transparency as it can improve trust in, and the reputation of, the University and provide assurance about its decision making. Disclosure would facilitate this accountability and scrutiny of the University's decision-making processes in the context of the protest.
23. But the University considers that there's a stronger public interest in maintaining the exemptions and allowing the University, and its staff, to continue to conduct and consider matters of risk on a frank and full basis. It argues that conducting and considering risk assessments is an essential University function to identify the means by which protests should be allowed to proceed in a safe and proper manner. It's the University's position that this clearly outweighs the public interest in disclosing the withheld information.

Balance of the public interest

24. The Commissioner has found that disclosing the information being withheld under section 36(2)(b) would be likely to prejudice the effective conduct of public affairs.
25. When he considers the balance of the public interest, the Commissioner takes account of the weight of the QP's opinion, the timing of the request, and the severity, extent and frequency of the envisioned prejudice or inhibition.
26. The QP in this case was the University's Vice-Chancellor; as such they had the requisite knowledge of how the University works and the consequences of any disclosure. Their opinion that the envisioned prejudice would be likely to happen therefore carries weight, though less than if they'd considered the prejudice would happen.
27. The Commissioner has next considered the timing of the request. In respect of section 36(2)(b), the public interest in being able to provide advice and exchange views about an issue freely and frankly will be greater if the issue is ongoing and live at the time of a request.
28. The Commissioner notes that the protest that's the subject of the request took place on 16 October 2023, two days before the complainant submitted their request. This specific protest was therefore over. However, the matter was still fresh, and the Commissioner has seen from the University's website that in the following days it had to deal with a situation related to the protest. In a wider sense, the matter remained ongoing; the University has referred to a separate, weekly 'Protest for Palestine' at the University and the Israeli-Palestinian conflict ('the conflict') continues at the date of this notice.
29. The Commissioner has also considered the severity, extent and frequency of the envisioned prejudice or inhibition.
30. In a fast-moving situation that continues to be sensitive and somewhat febrile, the University needed to feel confident that it could discuss the planned protest and its aftermath with a range of stakeholders completely openly. This is to make sure that it considered all eventualities, to help make sure that the protest went ahead peacefully and safely for everyone concerned. The University also needed to be able continue to discuss and manage ongoing situations associated with the conflict, and that remains the case. People not feeling able to give frank advice or to offer their views openly – for fear of repercussion – could lead to the University not being able to manage the effects of the conflict – such as ongoing protests - effectively. And this would

potentially jeopardise people's physical or mental health and jeopardise the University's reputation.

31. The Commissioner appreciates that the complainant has an interest in the protest on 16 October 2023 and considers that interest is entirely valid. However, he's noted that the University posts regular updates and statements about the conflict¹, as it affects the University, and considers that this satisfactorily addresses the general interest in transparency. In the circumstances of this case the Commissioner considers that there's greater public interest in keeping people safe and protecting the University's reputation. This is more likely to be achieved if the University's staff, and others, feel fully confident to give advice and exchange views about managing the effects of the conflict on the University - including the protest that's the subject of the request and ongoing protests.
32. On balance therefore, the Commissioner finds that the public interest favours maintaining the section 36(2)(b)(i) and section 36(2)(b)(ii) exemptions.
33. The Commissioner has found that the withheld information engages the exemptions under sections 36(2)(b), and the public interest favours withholding the information under these exemptions. It's therefore not necessary to consider the other exemptions the University has applied to the information.

¹ <https://www.sussex.ac.uk/broadcast/read/62221>

Right of appeal

34. 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

35. 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.
36. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Cressida Woodall
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF