

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 July 2024

Public Authority: The Council of the Royal College of Music
Address: Prince Consort Road
London SW7 2BS

Decision (including any steps ordered)

1. In a two part request, the complainant has requested from the Royal College of Music (RCM) consultation material associated with the Universities and Colleges Employers Association (UCEA) and email correspondence. RCM refused to disclose the requested information, citing section 41(1) of FOIA which concerns information provided in confidence.
2. The Commissioner's decision is that RCM was entitled to rely on section 41(1) of FOIA to withhold the information requested in part one of the complainant's request.
3. The Commissioner doesn't require any steps as a result of this decision notice.

Request and response

4. On 29 November 2023, the complainant wrote to RCM and requested information in the following terms:

"Part 1

The contents of the 2022-2023 and 2023-2024 formal UCEA consultation that correspond to Stage 3 of the

"Consultation process", and which you need to fill when you decide to partake in the New JNCHES mechanism. I refer to the mechanism described in the "UCEA Code For Participating Employers", for further contextualization.

Part 2

Electronically recorded information (memorandums, e-mails, briefings, guidance, etc.) related to the "3 in 3" strategy deployed by UCEA and its members in response to UCU's Marking Boycott. You can restrict search from the 01-08-2022 to the 25-11-2023 (1 year 4 months approx.) and only deal with the accounts of your "Senior Management Team" (SMT or equivalent)"

5. RCM responded on 16 January 2024. It refused to provide the information requested in part one under section 43(2) of FOIA, which concerns commercial interests. RCM also applied section 41(1) to parts one and two of the request.
6. Following an internal review, RCM wrote to the complainant on 29 January 2024. It said it had modified its response to part one and was relying on section 41 in respect of that part. Since it had already cited section 41 in its original refusal, the Commissioner assumes RCM had withdrawn its reliance on section 43.

Scope of the case

7. The complainant contacted the Commissioner on 14 February 2024, to complain about the way part one of their request for information had been handled. The Commissioner considers that the scope of his investigation is to determine if RCM was correct to withhold the information requested in part one under section 41(1) of FOIA.

Reasons for decision

8. The information being withheld in this case is consultation material, copies of which RCM has provided to the Commissioner.
9. The Commissioner has made a decision in a similar case - IC-283331-T1J9¹ - which considers the same request handled by a different public

¹ [ic-283331-t1j9.pdf \(ico.org.uk\)](#)

authority. He has also made a recent decision about a very similar request to another public authority in IC-288420-G5Z4².

10. Section 41(1) of FOIA states that information is exempt from disclosure if (a) the information was obtained by the public authority from any other person and (b) disclosing the information to the public would constitute an actionable breach of confidence.

11. In their complaint to the Commissioner, the complainant argued that section 41,

“cannot be applicable (sic) here because the substantive information corresponds to the answers that RCM filled-in in a formulary sent, admittedly, by UCEA. The contents of the 'empty' formulary do not attract the Coco vs. Clark Quality of Confidence, because it is public knowledge that they consist in a series of questions regarding the financial status of RCM, the maximum uplift they could offer, local and/or regional problems with the Union, etc.

-In other words, from the Summary of the UCEA code, a document publicly available, the formulary is designed to "shape UCEA's negotiating mandate by responding formally to a consultation document seeking definitive views on the full range of issues for the forthcoming negotiations."

12. The complainant considers that because RCM filled in the consultation questionnaire itself, it generated this information itself, didn't receive it from another person and that, "No substantial or inventive work is required to know the nature of the questionnaires."

13. The complainant also noted the Commissioner's decision in IC-285678-R9B5³ where the Commissioner found that section 41 wasn't engaged. However, as the Commissioner pointed out to the complainant, that case concerned email correspondence that originated from the public authority.

Was the withheld information obtained from another person?

14. The information in this case has the same characteristics as the information in IC-283331-T1J9, which the Commissioner found to have been provided to that public authority by UCEA. His view is (in line with IC-288420-G5Z4, paragraph 33) that the limited information that has

² [ic-288420-g5z4.pdf \(ico.org.uk\)](#)

³ [ic-285678-r9b5.pdf \(ico.org.uk\)](#)

been created by RCM is not disclosable because it would require disclosing the questions asked by UCEA in order to be understood. He also considers that any selected responses from a drop-down/multi-choice menu to have been "obtained from any other person", even if the selection has been made by RCM.

15. For the same reasons, the Commissioner is satisfied that disclosing the withheld information in this case would mean disclosing information RCM obtained from UCEA. Therefore, the test at section 41(1)(a) is met.

Would disclosure constitute an actionable breach of confidence?

16. When he's considering whether disclosing information would constitute an actionable breach of confidence, the Commissioner takes account of three tests.
17. First, the Commissioner is satisfied that the information in this case has the necessary quality of confidence because it's not trivial – concerning as it does financial matters – and because it's not otherwise accessible. If it was otherwise accessible, the complainant wouldn't need to request it from RCM.
18. Second, the Commissioner has considered whether the withheld information was imparted in circumstances importing an obligation of confidence. RCM has explained to the Commissioner that the UCEA Members' Guide to Negotiations in Higher Education includes a UCEA Code for participating members. It says that the code is unambiguous in the confidentiality of the process. Section 3.1 of the Code states that the consultation paper circulated to institutions:

"will be shared only with heads of institutions, in strict confidence... The consultation paper may need to be shared with executive teams or governing bodies, but each head of institution must give an undertaking that the contents of the consultation paper will be shared no wider than strictly necessary and that all recipients respect and agree to the confidentiality of the paper."
19. RCM has also provided evidence that communications associated with the consultation made it clear that participating organisations should keep the content of the consultation confidential.
20. In view of the above, and for the reasons discussed in IC-283331-T1J9, and IC-288420-G5Z4 the Commissioner is satisfied that RCM did obtain the information from UCEA in circumstances importing an obligation of confidence.

21. Third, the Commissioner has considered whether unauthorised disclosure of the information would cause a specific detriment to either the party which provided it or any other party.
22. RCM says that its relationship with UCEA is predicated on trust and an understanding of the requirement for confidentiality. It says it's committed to sustaining the crucial relationship it has with UCEA. RCM says it cannot perceive any overriding public interest test which would justify breaching UCEA's confidence.
23. For the same reasons as in IC-283331-T1J9, the Commissioner is satisfied that damaging the relationship of trust between RCM and UCEA would cause a detriment to both parties. In addition, the Commissioner understands that if the requested information was disclosed, it would allow individuals to access information which is usually protected behind a paywall. This would undermine UCEA's commercial interests and business model.
24. UCEA describes itself as, "the leading voice on employment and reward matters in the UK HE sector. We support our members to be employers of choice through collaboration, advocacy and expert advice."
25. The withheld information relates to the UCEA's work to support the higher education sector in times of ongoing industrial action. The Commissioner notes that disclosure wouldn't just cause substantial harm to UCEA's commercial interests or reputational damage to RCM, but it could also adversely affect the position of UCEA members regarding union and pay disputes.
26. Having considered the three tests above, the Commissioner is satisfied that, with regard to UCEA, disclosing the information would constitute a breach of confidence.
27. But for section 41 to apply the breach must be actionable. This means that there must be a good chance of such an action succeeding because the public authority wouldn't have a valid defence to such a claim.
28. A public authority can defend itself against an action for a breach of confidence if it can establish a public interest defence – that the breach of confidence was necessary in the public interest. The Commissioner isn't satisfied that such a defence would be viable here.
29. He acknowledges that the complainant has a specific interest in the UCEA, its role and its engagement with higher education providers. This is a valid interest for them to have. UCEA's negotiations set the salaries of thousands of staff so its actions have a widespread impact. Disclosing the information would therefore also help those staff understand how

UCEA's negotiating position(s) had been reached. And in addition, there's a general public interest in public authorities being transparent and accountable by complying with requests that they receive under FOIA.

30. However, UCEA makes a significant amount of information, including its approach to pay negotiations and industrial action, available to the public on its website, which goes a long way to satisfy the public interest in the request and the matters behind it.
31. The Commissioner has considered whether undermining the trust between RCM and the UCEA, and the other negative effects that disclosure would cause, including undermining the position of UCEA members regarding union and pay disputes, would be proportionate. He finds that it wouldn't be proportionate and that, given the information that's already in the public domain, there's greater public interest in maintaining the confidentiality in this case.
32. In the absence of a sufficiently strong public interest defence, the Commissioner is satisfied that it would be an actionable breach of confidence for RCM to disclose the withheld information under FOIA. As such, section 41(1)(b) is met, and the Commissioner's decision is therefore that RCM is entitled to rely on section 41(1) of FOIA to withhold information in scope of part one of the request.

Right of appeal

33. 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

34. 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.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Janine Gregory
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Wycliffe House
Water Lane
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