

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 August 2017

Public Authority: Trinity College

Address: Oxford
OX1 3BH

Decision (including any steps ordered)

1. The complainant has requested information on a development project in Teddington.
2. The Commissioner's decision is that at the time of the request Trinity College ('the College') appropriately withheld some of the information within the scope of the request in reliance of sections 41(1) and 43(2). However, during her investigation the Commissioner determined that the public interest favoured disclosure of parts of the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information detailed in paragraph 11 of the Confidential Annex.
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 13 March 2016 the complainant, on behalf of the community group "The Friends of Udney Park Playing Fields", made the following request

for information:

"This is a Freedom of Information request for copies of all documentation between the College and the Quantum Group of Bournemouth, Hampshire.

In particular we require copies of the investment prospectus or proposal provided to the College by Quantum Group including any outline plans for the Teddington project, the internal papers produced by the College recommending the investment and the terms of engagement between the College & the Quantum Group."

6. The College responded on 12 May 2016 with a refusal notice in reliance of sections 43(2), 41(1) and 36(2)(b)(i) & (ii).
7. On 17 May 2016 the complainant refined his request to focus on the 'Information Memorandum'; this is the document created by Quantum Group detailing the project to be developed in Teddington. He also agreed that he would accept the College's redaction of "commercially sensitive parts of the College's internal papers."
8. In the absence of an acknowledgement to his letter of 17 May 2016, the complainant requested an internal review on 9 June 2016. The College apologised for not acknowledging the complainant's earlier correspondence and provided the internal review on 3 August 2016. It provided some redacted information and maintained its reliance on sections 43(2), 41(1) and 36(2)(b)(i) & (ii) and in addition section 42(1).
9. In the review the College explained that :

"...a key consideration on the part of the College when it decided to invest in Quantum was the undertaking from the management of the latter that it would work **with** the local community and other interested parties...".
10. On 15 August 2016 the complainant wrote to the College in response to the review. He raised various points with the College including matters concerning Quantum Group and its engagement with the community. The complainant provided very negative feedback in this regard to the College.

Scope of the case

11. The complainant contacted the Commissioner on 7 November 2016 to complain about the way his request for information had been handled.

The complainant focussed his complaint on the College's refusal to provide the 'Information Memorandum' which the complainant refers to as 'the Prospectus'. He explained:

"We seek only to obtain the original prospectus issued by Quantum Group in 2015 on which Trinity made its Investment decision."

"Our justification for this request is because of the considerable public interest in the outcome of the project. It is very much in the public interest to see what was stated in the prospectus."

Further the University of Oxford is committed to ensuring that it makes investment decisions responsibly and with integrity. The University's Policy (UOSRIRC) is to ensure that its investment decisions (including those taken on its behalf) take into account social, environmental and political issues in order to maintain its ethical standards."

12. In the light of the refinements to the initial request the Commissioner considers the scope of her investigation to be the College's refusal to provide the entirety of the 'Information Memorandum' in reliance of sections 41(1) and 43(2).
13. In the course of her investigation the College agreed with the Commissioner to disclose a substantial amount of the content of the 'Information Memorandum' much of which she found was already in the public domain on the website of Quantum Group.

Reasons for decision

Section 41– Information provided in confidence

14. Section 41(1) states -

"Information is exempt information if –

(a) 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."

15. During the Commissioner's investigation the settled position of the College changed and a significant amount of information which had been

initially withheld in reliance of both section 41 and section 43 was disclosed to the complainant. The Commissioner notes the willing co-operation and ready assistance the College provided at this time.

16. The information contained in the "Information Memorandum" was provided by Quantum Group to the College consequently the Commissioner accepts that the information was obtained from a third party.
17. For section 41(1)(b) to be met disclosure of the withheld information must constitute an actionable breach of confidence. The Commissioner's view is that a breach will be actionable if the following criteria are met:
 - The information has the necessary quality of confidence. Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial; information which is of importance to the confider should not be considered trivial.
 - The information was communicated in circumstances importing an obligation of confidence. An obligation of confidence can be expressed explicitly or implicitly. Whether there is an implied obligation of confidence will depend upon the nature of the information itself and the relationship between the parties.
 - Unauthorised disclosure would cause a specific detriment to either the party which provided it or any other party.
18. The Commissioner accepts that the information contained in the "Information Memorandum" is not trivial. The Memorandum is a detailed proposal concerning Quantum Group's development project in Teddington. The proposal contains the nature and structure of an investment opportunity, targeted returns and profits and taxation implications.
19. The information specifically concerning the development project is not in the public domain. The complainant considered that such a proposal would be publically available as Quantum Group sought investors. However, it is clear that Quantum only approached specific investors who it considered may be interested in the proposed investment. The College provided the Commissioner with correspondence from Quantum Group stating its expectation that the information would not be disclosed to the public.

20. The College explained to the Commissioner that it is normal practice for prospectuses for private investments to be kept confidential. It further explained that this is to ensure compliance with laws preventing unregulated investments being offered to members of the public.
21. The Commissioner explained to the College that some of the information contained in the "Information Memorandum" was already in the public domain as the information appeared on the Quantum Group's website. The College subsequently agreed to disclose this information.
22. The Commissioner notes that if Quantum Group approaches public authorities with investment opportunities seeking public money it should be aware that public authorities are subject to the FOIA and as such information may be requested and provided in accordance with the Act.
23. Nevertheless the Commissioner accepts that the residual withheld information has the necessary quality of confidence.
24. In consideration of the third criteria the College explained that the detrimental impact on Quantum Group concerned disclosure of its commercial strategy to its competitors and the resultant risk of prejudice to the investment proposal which in turn could result in detriment to the College and other investors in financial terms.
25. Quantum Group explicitly marked the 'Information Memorandum' as confidential and detailed conditions restricting its further release. As referenced in paragraph 19 Quantum Group's views were specifically sought by the College. Its written reply gave explanations of 'Non Mainstream Pooled Investments' such as the project at Teddington and the associated governance by the Financial Services and Market Act advising:

"The Information Memorandum is not a public document and was issued on a confidential basis to a limited number of potential investors."
26. Quantum Group clearly informed the College that disclosure of:

"the participants in the scheme or the manner in which they are formed or operate would be highly damaging to the commercial interests of Gallium, Quantum and investors."
27. The Commissioner accepts the potential for detriment as described.
28. Consequently, the Commissioner considers that the College has provided sufficient justification that disclosure of the information

withheld by virtue of section 41(1) would constitute an actionable breach of confidence. The Commissioner has concluded that the exemption in section 41(1) is engaged.

29. Section 41 is an absolute exemption and therefore not subject to the conventional public interest test under section 2 of the FOIA. However, case law suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. Therefore the Commissioner considered whether there would be a public interest defence available if the College disclosed the requested information. The duty of confidence public interest test assumes that the information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence.
30. The Commissioner is mindful of the wider public interest in preserving the principle of confidentiality and the need to protect the relationship of trust between confider and confidant. However, she is also aware of the public interest in transparency and disclosure of confidential information where there is an overriding public interest which provides a defence to an action for breach of confidentiality.
31. The Commissioner has considered the public interest in the specific circumstances of this case. She is aware of the serious concerns of the public in the development of the land involved, in particular the Udney Park Playing Fields, which has support from the local Member of Parliament. The complainant has explained his concerns in respect of the content of the 'Information Memorandum':

"If Quantum's prospectus is at one with its present stated position, then it has nothing to fear. If its Prospectus differs from its present publically stated position then Trinity cannot hide behind any supposed commercial benefit which Quantum may gain from duplicitous behaviour."
32. The Commissioner's investigation revealed contradictory information which required further clarification. She noted that information appearing on Quantum Group's web site 'Frequently asked questions' appeared to contradict information stated in the 'Information Memorandum'.
33. The College responded to the Commissioner's questions in considerable detail. The Commissioner's consideration following these submissions is given in the Confidential Annex.
34. The Commissioner has explained her reasoning in having found some of the withheld information exempt from disclosure. She has accepted that the criteria necessary to engage the exemption have been met notwithstanding her concerns regarding the level of detriment to the

confider in relation to some of the information which she has ordered should be disclosed.

35. Consequently the Commissioner must now consider whether there is a public interest in disclosure which overrides the competing public interest in maintaining the duty of confidence.
36. This test does not function in the same way as the public interest test for qualified exemptions, where the public interest operates in favour of disclosure unless outweighed by the public interest in maintaining the exemption. Rather, the reverse is the case. The test assumes that the public interest in maintaining confidentiality will prevail unless the public interest in disclosure outweighs the public interest in maintaining the confidence.

Public interest defence arguments

37. Some weight should always be afforded to the general public interest in ensuring that public authorities remain transparent, accountable and open to scrutiny, for example where disclosure would:
 - further public understanding of, and participation in the debate of issues of the day;
 - enable individuals to understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions; or
 - facilitate accountability and transparency in the spending of public money.

Arguments in favour of maintaining the confidence

38. When considering the public interest in favour of maintaining the confidence, the Commissioner has had regard to:
 - the wider public interest in preserving the principle of confidentiality, and
 - the impact of disclosure on the interests of the confider.
39. In the circumstances of this case the Commissioner has decided that the public debate surrounding the Teddington site is such that as much information as possible should be provided in order that those interested members of the public are fully aware of the project. This will enable local residents to be well informed which is a stated commitment of the Quantum Group.
40. The College has invested public money in a project which will affect local residents' lives and disclosure of the information identified in the

Confidential Annex enables a fuller picture of the potential options for the use of the land. This thereby facilitates greater accountability and transparency.

41. The Commissioner is cognisant of the public interest in preserving the principle of confidentiality. She has taken account of this particularly in her decision not to order disclosure of the other elements of the withheld information which is primarily focussed on Quantum Group's method of operation and the financial projections associated with that.
42. Organisations may be discouraged from confiding in public authorities if they do not have a degree of certainty that this trust and confidence will be respected. The weight carried by this factor will depend upon on the context and, more specifically, how the relationship of trust operates to serve the public interest.
43. The Commissioner has weighed the arguments put forward by the College and Quantum Group in support of the possible detriment to both. The detriment described in this case is a commercial one. In respect of commercial impact, this is most likely to carry weight if the breach of confidence would damage the confider's competitive position or ability to compete, for example where disclosure would:
 - reveal information that would assist competitors;
 - undermine the confider's future negotiations with the authority or other organisations; or
 - negatively impact on the confider's relationship with the authority or other organisations.
44. The Commissioner is not satisfied that disclosure of the information set out in the Confidential Annex paragraph 11 would assist Quantum Group's competitors. The information has greater significance to the local residents of Teddington.
45. Similarly the Commissioner does not accept that disclosure would significantly undermine Quantum Group's future negotiations with the College or would negatively impact upon their relationship. Quantum Group must be aware of the need for appropriate transparency and accountability when in a relationship with public sector organisations involving the spending of public money.
46. Having reviewed the withheld information and the arguments put forward by the complainant and the public authority , the Commissioner has concluded that there is a strong public interest in disclosure of the information set out in paragraph 11 of the Confidential Annex. The Commissioner has reached the view that the public interest in maintaining a duty of confidence to the specified

information is outweighed by the public interest in disclosure in this case. Consequently the Commissioner has concluded that a public interest defence could be established in this case. Accordingly, her conclusion is that the information specified above is not exempt from disclosure under section 41 of the FOIA.

47. Having made her determination on section 41 the Commissioner has gone on to consider the application of section 43 to the withheld information including the information which she has determined not to be exempt from disclosure under section 41.

Section 43(2) – commercial interests

48. Section 43(2) of FOIA states that information is exempt information if its disclosure under the FOIA would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
49. In order for a prejudice based exemption, such as section 43(2) to be engaged the Commissioner considers that three criteria must be met:
- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed must relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. The resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
50. The College explained its view that disclosure of the withheld information would reveal Quantum Group's commercial strategy for the 'Teddington Project' to its competitors. The Information Memorandum contains Quantum Group's proposal and strategy including information on targeted profits, costs and returns. The information is considered to be commercially sensitive in respect of this particular project and future

developments in terms of competitors understanding Quantum Group's approach to such projects.

51. The Confidential Annex contains some of the College's reasoning in support of the application of section 43.
52. Quantum Group explained its concerns to the College, such that disclosure under the FOIA would damage its on-going operations and its relationship with its group of private investors.
53. The College explained that it has a commercial interest in securing value for money in its investments, competing with similar institutions to secure that value for money from third parties. It considers that its own commercial interests would be prejudiced because disclosure of the withheld information would:

"Undoubtedly result in no further investment opportunities being offered by Quantum Group to the College (or similar investment opportunities being offered by other companies). This is because Quantum Group (and similar companies) would not offer investment opportunities to public bodies if commercially sensitive information would be placed in the public domain through FOIA."
54. The College also explained that it is one of a group comprising "high net worth private individuals" investors and it considered that disclosure of the withheld information would reveal to the world at large information on their private investments. The Commissioner does not accept this point as the other investors are not cited in the Information Memorandum and the investment is therefore anonymous.
55. The College's investment in this project is a 'taster' for future investments of a similar kind and it considers that the commercial prejudice which would be likely to result reaches beyond the current project.
56. With regard to the first criterion of the three limb test described in paragraph 49, the Commissioner accepts that the potential prejudice described by the College relates to the commercial interests which the exemption contained at section 43(2) is designed to protect.
57. The Commissioner is satisfied that the second criterion is met as disclosure of the information withheld on the basis of this exemption has the potential to harm both Quantum Group and the College's commercial interests as described above.
58. The College specified that it believed that prejudice to commercial interests *would be likely to* result, rather than *would* result. This means

that the test that the Commissioner has applied here is whether there is more than a hypothetical or remote possibility of prejudice occurring. She is satisfied that the level of prejudice has been met with regard to the information withheld.

The public interest

59. In considering whether there is an overriding public interest in providing the requested information, the Commissioner has considered the arguments put forward by both the complainant and the College. She must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
60. In forming a conclusion here, the Commissioner has taken into account the general public interest in the transparency of the College, as well as specific factors that apply in relation to the information in question.
61. The arguments advanced by the College in favour of maintaining the exemption include maintaining the ability of the College to achieve the best investment outcomes, in relation to this specific investment and any future opportunities offered by Quantum Group or other third parties, to assist with the funding of the university. The College relies on the premise of a breakdown in relationships with third parties in the private sector as put forward in paragraph 53. The College also stressed the potential of the project to benefit the local community in terms of housing, care and leisure facilities. It considers that there is a public interest in Quantum Group competing fairly without prejudice to its commercial interests within the marketplace.
62. The College recognises the level of legitimate public concern around the future of the site and the Teddington Project and the impact on local residents of the redevelopment of the site. However, it also considers that the information already in the public domain is sufficient for the public to have an informed debate.
63. The Commissioner accepts that there is a strong public interest in the College managing its investments wisely. She also accepts that there is little public interest in disclosure of the Quantum Group's business strategy in terms of its methods of operation. However, she does not accept that the College will be in some sense 'punished' by private sector organisations should any information be disclosed in the public interest, such that the College's investment opportunities will be curtailed as a result.
64. The Commissioner considers that private sector organisations should be aware of public authorities' duties in respect of access to information

legislation when approaching those authorities. Trinity College is not an exception in how the Commissioner would approach any complaint brought to her attention.

65. The Commissioner does not accept that disclosure of those elements of the withheld information which she has decided should be disclosed would prejudice the commercial interests of the other investors in this project.
66. In conclusion, the Commissioner has recognised that it is in the public interest to maintain the exemption in order to avoid a situation in which the commercial interests of private sector organisations are prejudiced as a result of involvement in the public sector. She does not, however, consider that the weight of that public interest is greater than that in favour of disclosure with regard to the information set out in paragraph 11 of the Confidential Annex, the grounds for which are set out in more detail under the section 41(1) consideration. The Commissioner finds, therefore, that the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure in respect of the specified elements of the withheld information.

Other matters

67. The Commissioner would wish to commend the College on its submissions to her and the co-operation it has provided. She acknowledges that the College has attempted to resolve this matter informally and has amended its position in disclosing further information in the course of her investigation. She is aware that the complainant has acknowledged and appreciated the College's efforts in this regard.

Right of appeal

68. 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@hmcts.gsi.gov.uk

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

69. 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.
70. 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

Gerrard Tracey
Principal advisor
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF