

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 March 2021

Public Authority: University Council
University of Essex

Address: Wivenhoe Park
Colchester
CO4 3SQ

Decision (including any steps ordered)

1. The complainant has requested the University of Essex (the university) to disclose information relating to the cancellation of a Criminology event. The university refused to disclose the requested information citing sections 22, 31, 36, 41 and 40 of the FOIA.
2. The Commissioner's decision is that the university is entitled to refuse to disclose the requested information in accordance with section 36(2)(b)(i) and (ii) of the FOIA. She has however recorded a breach of section 10 of the FOIA, as the university failed to respond to the complainant's request within 20 working days of receipt.
3. The Commissioner does not require any further action to be taken.

Request and response

4. On 9 December 2019, the complainant wrote to the university and requested information in the following terms:

"I refer to the Criminology event scheduled to take place on Thursday 5th December involving [named redacted]. I am aware that the event was cancelled at short notice and that different reasons have been given by different sources for the cancellation. I would like to see all documentation relating to the organisation of the event and the subsequent handling of the cancellation up to the issuing of a letter by [name redacted] to member of the University. This should include:

- all documentation, correspondence and notes relating to the University's approval process for external speaker(s) for this event;
 - all documentation, correspondence and notes relating to assessments of safety for the event;
 - all correspondence and notes between the Department and University leadership about the cancellation of the event;
 - documentary evidence that contributed to, describes, or explains the opinion that open debate and discussion might be obstructed:
 - documentary evidence that led to the department having concerns about safety (as cited by [name redacted] in an email to members of the University), or which explains or describes the concerns more specifically;
 - all correspondence and notes of conversations between managers in the drafting of the email from [name redacted] to all staff (sent on 9 December 2019); and
 - all correspondence and notes relating to the proposed content of the talk and structure of the event (including correspondence with [name redacted])."
5. As the complainant had received no response, he chased the university on 13 January 2020.
 6. The university responded on 16 January 2020. It refused to disclose the requested information citing sections 22 and 36 of the FOIA.
 7. The complainant requested an internal review on 17 January 2020. He disputed the application of the exemptions cited and raised concerns with regards to the section 36 opinion the university had obtained.
 8. As the complainant received no response, he referred the matter to the Commissioner on 1 February 2020.
 9. The university carried out an internal review and notified the complainant of its findings on 25 February 2020. It upheld the application of sections 22 and 36 and also applied sections 31, 41 and 40 of the FOIA. With regards to section 36 of the FOIA, the university confirmed that it realised that it was unable to delegate the role of the qualified person, regardless of any conflict of interest identified. It advised the complainant that it had now obtained the opinion of the

qualified person (Vice-Chancellor) and it is their opinion that section 36 applies.

Scope of the case

10. The complainant contacted the Commissioner on 1 February 2020 to complain about the way his request for information had been handled. Initially, the complainant was dissatisfied that the university had not responded to his request for an internal review. This was however then completed on 25 February 2020. On receipt of the internal review, the complainant wrote to the Commissioner again expressing his dissatisfaction with the university's application of the exemptions cited.
11. During the Commissioner's investigation the university provided a copy of the qualified person's opinion and the submissions on which this was based to the Commissioner. It clarified that it would like to apply section 36 of the FOIA to the withheld information in its entirety.
12. The university accepted during the Commissioner's investigation that it was unable to rely on section 22 of the FOIA for any information falling within the scope of the request which it did not intend to publish at a future date. It also accepted the Commissioner's view that it is unable to rely on section 31 of the FOIA.
13. As the university has applied section 36 of the FOIA to the withheld information in its entirety, the remainder of this decision notice will focus on the application of this exemption and whether the Commissioner is in agreement that it does apply. She will only go on to consider sections 22 and 31 more formally, and section 40, if she finds that section 36 is not engaged.
14. The university wishes to rely on sections 36(2)(b)(i) and (ii) and 36(2)(c) in this case.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

15. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, disclosure of the information –
 - (b) would, or would be likely to, prejudice-
 - (i) the free and frank provision of advice, or

- (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
16. The university confirmed that the qualified person for the purposes of section 36 of the FOIA is the university's vice chancellor. It stated that he considered the nature of the withheld information, the timing of the request and the specific subsections of section 36(2) of the FOIA and provided his opinion that subsections (b) and (c) applied to this request. As explained above, the qualified person's opinion was obtained for the internal review response. The university also provided the Commissioner with an updated opinion based on the circumstances at the time of the request during her investigation that clarified that it wishes to rely on both subsections for the withheld information in its entirety.
 17. The Commissioner must first consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy herself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.
 18. The university explained that in early December 2019 a seminar involving an external speaker invited to talk about transgender rights and justice was cancelled at short notice by the organising department as a result of their concerns about safety. An email was sent to all staff on 9 December 2019. It decided to undertake a review of its cancellation and this has been taking place since. The university confirmed that, initially, it had intended to conclude the review in May 2020. However, a decision had to be taken to extend the timescale due to issues in recruiting a reviewer, then issues with the availability of the reviewer selected and the impact of the COVID-19 pandemic. It advised that the review work is due to be concluded now by the end of the spring term 2021. The university commented that it is on track and the final report will be considered by its Senate and Council.
 19. With regards to section 36(2)(b)(i), the university stated that releasing the advice it has been given in relation to the sensitive issues the review includes to the wider public rather than using it as intended in order to deliberate on the issue and formulate the university's view in relation to the event would be likely to inhibit the free and frank provision of advice. It said that it is the qualified person's opinion that if the individuals involved felt that their advice might be revealed to a different

audience from the one in contemplation at the time it was provided, and entirely outside the intended context, it would be likely to inhibit the free, frank and candid provision of advice in the future. The university commented that advice given aids fair debate and resolution of difficult issues and benefits the university and its wider staff and student body.

20. Turning now to section 36(2)(b)(ii), the university confirmed that, similarly, it is the qualified person's opinion that the free and frank exchange of views for the purposes of deliberation would be likely to be inhibited if those providing the views feel they must self-censor and/or moderate their views for public consumption, thereby likely reducing their quality and consequently utility. It is the qualified person's opinion that only by freely exchanging views and testing ideas (some of which may be controversial or not widely held) can the university hope to ensure that it engages fully with an issue and conducts a full and thorough investigation into sensitive issues. Additionally, it said that as an institute of higher education, the university must uphold freedom of speech, something which would be difficult to do if exchanges of views were vulnerable to wider disclosure and scrutiny without the appropriate and necessary context.
21. In terms of section 36(2)(c), the university said that it is the qualified person's opinion that disclosure of the withheld information would be likely to otherwise prejudice the effective conduct of public affairs. It stated that it is currently carrying out a review of the event, so it is a live issue. The university must ensure that it gives due attention and consideration to the sensitive nature of the issues raised. Disclosure would be likely to prejudice the university's ability to ensure that it delivers on its public duties to ensure an environment in which free speech is enabled and its staff, student and visitors feel safe and secure. It is the qualified person's opinion that the ongoing review creates a safe space in which the university can debate ideas and arguments and come to conclusions as part of its review. Invasion of the safe space would undermine and threaten the proper conduct of the university's review and its decision making, as well as its duty as a public authority to ensure that such a review is carried out thoroughly, fairly and with all issues, views and opinions considered and debated in a free and frank manner and a decision is reached with due regard to all relevant information.
22. Addressing section 36(2)(b)(i) and (ii) first, the Commissioner is satisfied that it is a reasonable opinion to hold that disclosure of the withheld information would be likely to prejudice the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. She notes that at the time of the request the review was still ongoing. It is reasonable to conclude that the university still required the safe space to obtain and discuss the advice and views

of those involved and deliberate internally on the issues the subject of the review. It is a reasonable opinion to hold that disclosure would be likely to prejudice the free and frankness of such exchanges and debate and weaken the advice and views being shared.

23. Turning now to section 36(2)(c) for this subsection to also apply, the prejudice envisaged must be different to that covered by any other exemption. The fact that section 36(2)(c) uses the phrase "otherwise prejudice" means that it relates to prejudice not covered by section 36(2)(a) or (b). The First-tier Tribunal made this point in the hearing of *Evans v Information Commissioner and the Ministry of Defence* (EA/2006/0064, 26 October 2007).
24. The Commissioner recognises that there is a need for public authorities to have a safe space in which to develop ideas or make decisions. If the disclosure of information would or would be likely to prejudice this, she accepts this may be an argument for engaging section 36(2)(c).
25. However, the safe space argument can also apply to section 36(2)(b) if disclosure would or would be likely to prevent or hinder the free and frank exchange of views or provision of advice.
26. Having read the qualified person's opinion and the submissions received from the university the Commissioner does not consider the arguments presented are sufficiently different to those that would come under section 36(2)(b) to warrant the application of section 36(2)(c). The arguments presented relate to the prejudice to the review and the ability of the university to deliberate internally and to reach the right conclusions. It refers to the need for safe space to assess and debate the views and advice presented. The Commissioner considers these are more fitting to section 36(2)(b). For section 36(2)(c) to also apply the university would have to provide arguments which suggested that the prejudice is different – for example disclosure would interfere with or distract from the issue at hand in another way or would prejudice or undermine the decision itself rather than the frankness of the discussions specifically.
27. For the above reasons, the Commissioner is not satisfied that section 36(2)(c) of the FOIA applies to this request. As stated above, however, she is satisfied that section 36(2)(b)(i) and (ii) are engaged and will therefore now go on to consider the public interest test.

Public interest test

28. The university stated that it is generally an open organisation and one that looks to be transparent and to include staff, students and stakeholders in its decision making wherever practicable. Staff were informed prior to the request that was made of the event's cancellation and a text was published on the Vice Chancellor's blog, which is accessible to staff and students.
29. The university argued that the review itself will satisfy the public interest through looking at the reasons for the cancellation of the seminar, assessing the extent to which the university policy has been followed, producing recommendations for policy practice and providing an opportunity for members of the community to have their voice heard. The university has confirmed that the final report will also be published.
30. It recognised that there is a public interest in bringing the issue of transgender rights to a wider audience, and creating debate around the topic. The university stated that transgender rights are a relatively new area and it feels Essex, with its strong Human Rights Centre, is ideally placed to lead that debate.
31. However, it confirmed that the University will be best placed to lead, inform and support a controlled and thoughtful debate through publishing the findings of the planned review than through publishing the discussions that took place, the advice and views it received.
32. The Commissioner considers the public interest test considerations under section 36 of the FOIA require her to consider the extent, severity and frequency of the inhibitions claimed by the public authority.
33. She recognises the public interest in disclosure. It would promote openness, accountability and transparency and enable those interested in the cancellation of the event to understand more closely how the review is proceeding and what information is currently being considered. The Commissioner acknowledges the sensitive issues it will discuss and understands disclosure would further public debate in this area.
34. However, she considers the public interest rests in maintaining the exemption in this case. At the time of the request the review was still live and ongoing. She considers the university should be afforded the opportunity to review the matter in private and consider and deliberate internally the advice and views that have been shared. At the time of the request it still required the safe space to carry out this review and consider freely and frankly the issues that it considers need to be addressed. Disclosure at the time of the request would be likely to prejudice the ability of the university to carry out a thorough and frank

review and reach the most appropriate conclusions. It would also be likely to weaken the advice and the views of those involved, fearing that their communications could be share prematurely with the world at large.

35. The Commissioner is not aware of any significant public interest arguments in this case that would warrant the balance of the public interest tipping in favour of disclosure, particularly as the matter was still live and under investigation at the time of the request. She acknowledges that the university community (its staff and students) may be interested to know more fully why the event was cancelled and whether the university's own policies and procedures were followed. She notes that the withheld information may be of interest to those interested in transgender rights. However, she is not aware of any more wider reaching or significant public interest arguments in favour of disclosure.

Procedural matters

36. Section 10 of the FOIA requires a public authority to respond to an information request promptly and in any event no later than 20 working days from receipt. In this case the complainant made his information request to the university on 9 December 2019. However, the university did not respond until 16 January 2020, after the 20 working day timeframe had passed. The Commissioner has therefore recorded a breach of section 10 of the FOIA.

Right of appeal

37. 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

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

38. 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.
39. 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

Samantha Coward
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