

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 16 January 2024

**Public Authority:** Governing Body of Liverpool Hope University

**Address:** Hope Park  
Liverpool  
L16 9JD

### **Decision (including any steps ordered)**

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1. The complainant has requested information from Liverpool Hope University ("the University") in relation to a specific code from the Universities and Colleges Employers Association ("UCEA"). The University refused to provide the requested information, citing section 41 of FOIA – information provided in confidence.
2. The Commissioner's decision is that the University was entitled to rely on section 41 of FOIA.
3. The Commissioner does not require any steps as a result of this decision notice.

### **Request and response**

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4. On 11 July 2023, the complainant wrote to the University and requested information in the following terms:

"Under the provisions of the FOI 2000 Act, I would like a copy of the so-called "UCEA Code for Participating Employers". For the avoidance of doubt, I refer to the document explained in this link:

<https://www.ucea.ac.uk/news-releases/11jul23/>."

5. On 9 August 2023, the complainant sent an email to the University, chasing for a response to their request.
6. The University responded on 9 August 2023. It refused to provide the requested information, citing section 41 of FOIA – information provided in confidence. The response was provided within the 20 working days statutory timeline for a response under FOIA, taking into account the non-working days of 12 July 2023 (Ulster Bank Holiday) and 7 August 2023 (Scottish Bank Holiday).
7. Following an internal review the University wrote to the complainant on 5 September 2023. It stated that it upheld its original position.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 23 September 2023, to complain about the way their request for information had been handled.
9. The Commissioner considers that the scope of his investigation is to determine if the University was correct to withhold the information under section 41 of FOIA.

### **Reasons for decision**

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10. This reasoning covers whether the Council is entitled to rely on section 41(1) of FOIA to withhold the requested information.
11. Section 41(1) of FOIA states that information is exempt from disclosure if the information was obtained by the public authority from any other person and the disclosure of the information to the public would constitute an actionable breach of confidence.
12. In order for section 41 to be engaged, the following criteria must be fulfilled:
  - the authority must have obtained the information from another person,
  - its disclosure must constitute a breach of confidence,
  - a legal person must be able to bring an action for the breach of confidence to court, and
  - that court action must be likely to succeed.

### **Was the withheld information obtained from another person?**

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13. In this case, the University has relied on section 41(1) to withhold the "UCEA Code for Participating Employers". The University has explained that the Code has been provided by the UCEA.
14. The Commissioner accepts that the information was obtained by the University from another person, therefore the test at section 41(1)(a) is met.

### **Would disclosure constitute an actionable breach of confidence?**

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15. The University has explained that the UCEA Code is not publicly available and it is disseminated to a limited number of recipients i.e. members, on the condition that it for their use alone. It added that the Code has the word 'confidential' recorded on every page.
16. The University also provided the Commissioner with a link to the UCEA membership conditions. It states within these conditions that "UCEA materials, or extracts from them, which are not publicly available on the UCEA website cannot be made public or distributed to other organisations or individuals without UCEA's explicit prior consent."
17. The University explained that it contacted the UCEA following the request for a review, asking for consent to share the information. UCEA specifically asked the University to not provide the information.
18. The University provided the Commissioner with an extract of the response it received from the UCEA, which stated, "...Members are reminded that the materials UCEA sends to members come with a specific expectation of express and implied duties of confidentiality..."
19. The Commissioner is therefore satisfied that the information was provided in confidence.

### **Could a legal person bring a court action for that breach of confidence?**

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20. The University explained that it owes a legally enforceable duty of confidentiality to UCEA. It advised that UCEA or any one of its members could bring an action for breach of confidence.
21. The University also added that students too could bring an action, as the industrial action had a significant impact on them.

22. The University added that there is a potential for UCEA, any one of its members or students themselves to bring a court action claiming that providing the UCEA code to the requester undermined the joint negotiations there were ongoing, thereby undermining the possibility of settlement.

### **Would an actionable breach of confidence succeed?**

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23. The University advised that the UCEA and/or a member could, on the balance of probability, go to court and vindicate a right in confidence in the UCEA code.
24. The University went on to explain that it considers that there is no public interest in disclosure of the code which would override the competing public interest in maintaining the duty of confidence.
25. The University explained that disclosing the information will have a detrimental impact on the public interest, potentially undermining negotiations in situations of industrial dispute. It also advised that Trade Unions negotiating with UCEA, as a non-public body, have a right of privacy and that UCEA demands a commitment of confidentiality from its members.
26. The University added that the relationship of trust between the University and the UCEA would be undermined. It says that the relationship of trust operates to serve the public interest as the purpose is to provide advice and support to Higher Education employers and to resolve industrial dispute for the benefit of staff, students and all stakeholders.

### **Commissioner's position**

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27. The Commissioner notes the complainant's arguments for disclosure of the information, including referring to the code as a "contract". The Commissioner is satisfied that the code is not a contract between the two parties.
28. The Commissioner has inspected the information in question and is satisfied that it relates to sensitive matters and is not trivial. He also notes that the information has been disseminated to a limited number of recipients and that the information is provided with an expectation of confidence. The obligation of confidence is outlined within the document itself.

29. The Commissioner notes the University's explanation that the relationship between it and the UCEA would be undermined if the information were to be released.
30. The Commissioner notes that detriment is not always a prerequisite, but accepts that disclosure of the information in this case is likely to cause a breakdown of trust between the two parties. Therefore, the three tests are met.
31. The exemption at section 41 is not subject to the public interest test at section 2(2) of FOIA. However, the Commissioner is mindful that an action for breach of confidence will fail if there is a public interest defence to disclosure. Therefore, the Commissioner has considered whether there is an overriding public interest in disclosure which is sufficient to set aside the public interest in maintaining the duty of confidence.
32. The complainant has argued that without knowing the code's content, it is possible that a large number of public authorities are binding themselves to unreasonable, unfair and inefficient terms. They have added that it is in the greater interest of society to scrutinize these matters and to ensure an efficient, fair, transparent and non-punitive operation that leads to harmony in negotiations between different stakeholders.
33. The complainant has also added that releasing the code has the potential of unlocking local negotiations and restoring good faith with the University and College Union, along with ending the impasse.
34. As referred to in paragraphs 32 and 33, the University does not consider that there is any interest in disclosure of the code which would override the competing public interest in maintaining the duty of confidence. It considers that disclosing the information will have a detrimental impact on the public interest, potentially undermining negotiations in situations of industrial dispute.
35. The Commissioner recognises that some weight should always be afforded to the general public interest in ensuring that public authorities remain transparent, accountable and open to scrutiny. However, the Commissioner is mindful that the public interest in maintaining a duty of confidence is inherently weighty. The courts are reluctant to overturn a duty of confidence, save in exceptional circumstances and in the context of an overriding public interest in disclosure.
36. However, in this case, the Commissioner is mindful that the subject matter of the information is of a sensitive nature, and considers that disclosure of the information is likely to undermine the relationship and

trust between the two parties involved. It could cause further issues with other UCEA members and/or students.

37. The Commissioner is also not aware of any exceptional circumstances in this case which would give rise to an overriding public interest in disclosure.
38. As such, the Commissioner finds that the University was entitled to rely on section 41 of FOIA to withhold the requested information.

## Right of appeal

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39. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

40. 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.
41. 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 .....**

**Michael Lea**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**