

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 January 2024

Public Authority: Queen's University Belfast
Address: University Road
Belfast
BT7 1NN

Decision (including any steps ordered)

1. The complainant requested from Queen's University Belfast (the University) information regarding UCEA Code for Participating Employers. The University refused the request and cited sections 36(2)(b)(i) and 36(2)(c) (prejudice to the effective conduct of public affairs) of FOIA.
2. The Commissioner's decision is that the withheld information engages section 36(2)(c) of FOIA and the public interest favours maintaining the exemption. The Commissioner does not require the University to take any steps as a result of this decision.

Request and response

3. 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/> "

4. On 3 August 2023 the University responded. It stated that the "UCEA Code for Participating Members" is not provided as this information is considered exempt under section 36(2) of FOIA.
5. On 3 August 2023 the complainant asked for an internal review.
6. On 31 August 2023 the University provided its review response and upheld its original decision. It concluded that the exemptions in section 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) would apply.
7. Following the Commissioner's involvement in this case, the University responded to the questions regarding its application of the exemptions cited. The University clarified its final position and relied on sections 36(2)(b)(i) and 36(2)(c) of FOIA.

Reasons for decision

8. This reasoning covers why the University was entitled to rely on section 36(2)(c) of FOIA to refuse to provide the requested information.

Section 36 – prejudice to the effective conduct of public affairs

9. Section 36(2) of FOIA states that information is exempt information if, in the reasonable opinion of a qualified person, disclosure of this information:
 - (b) would, or would be likely to, inhibit –
 - (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.
10. The University applied section 36(2)(c) of FOIA to withhold the requested information in its entirety.

11. The Commissioner's guidance on section 36¹ states that prejudice to the effective conduct of public affairs could refer to an adverse effect on a public authority's ability to offer an effective public service or to meet wider objectives or purpose. The effect does not have to be on only on the public authority claiming the exemption; it could be an effect on other bodies or the wider public sector. It may also refer to the disruptive effects of disclosure, for example the diversion of resources in managing the effect of disclosure.
12. For any part of the exemption at section 36 to be engaged, the qualified person within the public authority is required to give a reasonable opinion about the likelihood of prejudice or inhibition. When determining whether the qualified person's opinion is a reasonable one, the Commissioner takes the approach that the opinion is in accordance with reason and not irrational or absurd; in short, if it is an opinion that a reasonable person could hold.
13. The University confirmed to the Commissioner that the University Secretary is formally designated as the 'qualified person'. It explained "the new position of University Secretary encompasses that of the Registrar in the Charter, Statutes and Regulations. The University Secretary is part of the University's Senior Management Team and has a significant role in the University's decision-making processes. The University Secretary's opinion was initially sought in July, this opinion was formalised at a meeting with the University Secretary on 31 July 2023."
14. The complainant, in their internal review request, argued against the University Secretary acting as a 'qualified person' for the purposes of section 36(5) of FOIA. The University explained to the complainant the new position of University Secretary as described in the above paragraph 13. In its response to the Commissioner, the University affirmed that whilst the University Secretary has not directly replaced the role of Registrar, this role has absorbed some of the responsibilities including that of 'qualified person' as defined by FOI provisions. The University supplied the Commissioner with a document showing leadership structure, this demonstrated the University Secretary's significant position within the University.

¹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/>

15. The University also directed the Commissioner to a link to a communication published on its website, this refers to the University Secretary's membership of the University Management Board which includes the Vice Chancellor.² It said "this is the highest-level of operational decision-making within the University; therefore, the University Secretary is well-placed to make decisions on the appropriateness of section 36 of FOIA." The University provided the Commissioner with further evidence that the University Secretary's qualified opinion was obtained in this case.
16. The University explained that the University Secretary was engaged with the Information Compliance Unit from the outset, providing the Unit with a copy of the requested information. It was also provided with access to the arguments supplied by UCEA. The University confirmed the qualified person was provided with submissions supporting a recommendation that the exemption was engaged. It said this was further supported by the arguments put forward by UCEA which was supplied to the University Secretary as part of the internal review process.
17. The Commissioner is satisfied that the University Secretary is authorised as the qualified person under section 36(5) of FOIA.
18. The Commissioner received evidence from the University that it had sought the advice of the qualified person, they had been provided with the withheld information and submissions supporting a recommendation that the exemption was engaged.
19. The University stated it classes the UCEA Code for Participating Members as an advisory document. It explained that "the Code sets out specific arrangements on pay negotiations which is used by UCEA to inform their negotiation strategy which is of significant commercial value to UCEA and its members."
20. The University confirmed its reliance on section 36(2)(c) as it believes disclosure of the information would impact on the University, UCEA and the wider HEI (Higher Education Institution) sector in having significant impact on public affairs.

² <https://www.qub.ac.uk/News/Allnews/2023/two-new-senior-appointments-announced-at-queens.html>

21. With regard to section 36(2)(c) of FOIA the University confirmed the complainant's assertion that the University is currently suspended from UCEA. However, the University informed the Commissioner that it is currently in negotiations with UCEA aimed at restoring membership.
22. The University said whilst it has resolved the pay dispute with its own staff, it believes disclosure of the information – the UCEA Code for Participating Employers against their advice, would disrupt negotiations. This, it said, would have a significant impact on its own public affairs, potentially locking the University out of any future representation or damaging the overall negotiating powers of the UCEA membership group. It added, "specifically in collective negotiations with unions on employee related matters. Our exclusion from collective negotiations with unions on employee matters and the provision of advice, would have a significant impact on our own public affairs in managing employee related matters."
23. The University confirmed which threshold of likelihood it is relying on in this case. It said disclosure 'would' have a prejudicial effect. It explained disclosure of this information would disrupt current negotiations and in doing so, would jeopardise any opportunities the University has in restoring membership status. This would impact on its receipt of advice and representation in employment related matters. The University believes this would weaken the ability of UCEA in representing UCEA members in areas of negotiation.
24. The University further explained disclosure of this document which is marked as 'confidential without consent to release' would undermine UCEA confidence in the University. Also, it said that disclosure would damage the University's relations with UCEA as release of this information would have a detrimental impact on public affairs.
25. Having viewed the withheld information, the Commissioner is satisfied it is information which the University classifies as an advisory document, and would not expect it to be released into the public domain. Disclosing the information would have an impact on the University's public affairs in managing employee related matters. Specifically, with regard to negotiating with unions regarding employee terms and conditions, thereby prejudicing the effective conduct of public affairs between the University and unions.
26. The Commissioner accepts it was reasonable for the qualified person to hold the opinion that disclosure of the requested information, would result in prejudice to the effective conduct of public affairs. He also accepts that it would impact on the University's current position of seeking to rejoin UCEA following its suspension in 2023.

27. In view of this, the Commissioner is satisfied a reasonable opinion has been given and he finds that the exemption is engaged.

Public interest test

28. As section 36(2) is a qualified exemption, the Commissioner will consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in disclosing the information

29. The University recognises disclosure would provide a detailed understanding of the advice and guidance received by the University relating to employment matters. It also recognises that there is a public interest in promoting transparency and accountability, in particular knowing what contribution UCEA makes to negotiations within the higher education sector.
30. However, the University argued that the public interest in transparency and accountability has been met to an extent by the information placed in the public domain relating to the University's resolved pay dispute and membership suspension.

Public interest in maintaining the exemption

31. The University said "UCEA provides regular updates in relation to ongoing pay negotiations and also trade unions have a responsibility to keep members informed of union activities and negotiations. In the interest of fairness it is felt that all parties involved in negotiations should be afforded the right to protect the interests they represent without having to disclose information that has been developed for that purpose." In this way, the prejudice claimed by releasing the documents would affect multiple universities and higher education institutions.
32. The University argued that in the interest of the University and the wider high education sector, being able to carry out its functions regarding pay negotiations outweighs the public interest in disclosure of information relating to live issues. The University said it does not believe disclosure of the information requested – the UCEA Code for Participating Employers, would further benefit or inform the public, or outweigh the public interest in withholding it.
33. The University stated that as its position on the pay dispute and membership suspension has already been made public, the public already has understanding of how and why the University made its decisions.

Balance of the public interest

34. When considering complaints regarding the application of sections 36(2)(c) of FOIA, where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of the opinion in applying the public interest test. This means, whilst the Commissioner accepts that a reasonable opinion that prejudice would occur has been expressed, he will go on to consider the severity, extent and frequency of that prejudice in forming his own assessment of whether the public interest test favours disclosure.
35. The Commissioner deems that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding how public authorities make their decisions and carry out their functions, and in turn fosters trust in public authorities.
36. The Commissioner considers the public interest in good decision-making by the University, to be a compelling argument in favour of maintaining the exemption. While the Commissioner acknowledges that the public interest in openness and transparency would be served if the information was disclosed, on balance, he finds the public interest in enabling the University and other educational establishments to negotiate in confidence with unions and staff, thereby supporting the effective conduct of public affairs, to be a stronger argument.
37. The Commissioner is satisfied that, in this case, the public interest favoured maintaining the exemption and the University was entitled to rely on section 36(2)(c) of FOIA to withhold the information. He has therefore not gone on to consider section 36(2)(b)(i).

Right of appeal

38. 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

39. 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.
40. 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

Joanna Marshall
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Wycliffe House
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