

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 24 June 2014

**Public Authority:** Governing Body of University of Cambridge  
**Address:** Trinity Lane, Cambridge, CB2 1TN

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to the University of Cambridge's investments.
2. The Commissioner's decision is that the University of Cambridge (the University) has correctly applied section 41(1) of the FOIA to the withheld information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

#### Request and response

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4. On 20 October 2013, the complainant wrote to the University and requested information in the following terms:

*"I am writing as a student involved in the current investigations into University and College investment practice, to request the following information under the FOI Act 2000, as part of our responsibility to make information about students' Universities' investments available to students. We would be very grateful if you can provide us with:*

- i. *Cambridge University's most current written investment policy.*
- ii. *The most recent available list of equity securities (ie ordinary and preference shares) and other direct investments held by Cambridge University.*
- iii. *The most recent available list of exchange-traded funds (eg index funds, mutual funds) in which Cambridge University has invested and the size of Cambridge University's investment (either by number of*

*shares in a fund or market value).*

- iv. *The name of all securities (ie shares and bonds), exchange-traded funds, mutual funds, and security and fund-based derivative contracts (eg futures, options, dividend swaps) held indirectly on behalf of Cambridge University by a third party (to include assets managed by a third party fund manager) and the number of assets held. Please also provide the names of the fund managers.*

*Any information about the nature and content of Cambridge University's endowment and its respective investment portfolio(s) will be welcomed."*

5. The University responded on 4 November 2013 and refused to provide the requested information. It cited sections 41(1) and 43(1) and 43(2) of the FOIA as its basis for doing so.
6. Following an internal review the University wrote to the complainant on 17 December 2013 and maintained its position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 27 January 2014 to complain about the way his request for information had been handled.
8. In correspondence with the Commissioner, the University stated it had reviewed the request and noted that its response did not explicitly address the questions about those University assets that are directly invested in some way (e.g. in property, or in spin-out companies).
9. Information about these investments is published on an annual basis in the University's Reports and Financial Statements and in a special issue of the Cambridge University *Reporter*, its official journal. Although the complainant did not complain about the absence of information regarding direct investments when requesting a review of the University's original response to him, it now considered that it would have been reasonable and appropriate to have engaged section 21(1) of the Freedom of Information Act 2000 and to have directed him to this published information with regard to his questions about 'direct investments'.
10. The University confirmed its willingness to do so at this stage for the sake of completeness. The relevant information in relation to the past two completed financial years is published as follows:

Year ended 31 July 2013: <http://www.admin.cam.ac.uk/reporter/2013-14/weekly/6329/section4.shtml> [note 31 in particular refers]

<http://www.admin.cam.ac.uk/reporter/2013-14/special/06/> [section M in particular refers]

Year ended 31 July 2012 <http://www.admin.cam.ac.uk/reporter/2012-13/weekly/6289/section4.shtml> [note 31 in particular refers]

<http://www.admin.cam.ac.uk/reporter/2012-13/special/06/> [section M in particular refers]

11. The Commissioner notes that the University has acknowledged it did not initially address the request correctly. He therefore finds that the University should relay this information to the complainant directly.
12. The Commissioner considers the scope of this case to be to determine if the University has correctly applied the exemptions it has cited to the withheld information.

### **Reasons for decision**

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13. The University explained that the vast majority of its investments are invested in units of the Cambridge University Endowment Fund ('CUEF'), a collective investment scheme in the form of a unit trust in which the University, its Colleges and other charities linked with the University are permitted to invest.
14. This unit trust is managed and operated by Cambridge Investment Management Limited ('CIML'), a wholly-owned subsidiary of the University, which is authorised by the Financial Conduct Authority. The University's considered position continues to be that information about underlying holdings indirectly held in the CUEF constitutes exempt information under sections 41, 43(1) and 43(2) of the Freedom of Information Act 2000.

### **Section 41 – Information provided in confidence**

15. Section 41(1) provides that information is exempt if it was obtained by the public authority from any other person and disclosure would constitute an actionable breach of confidence. This exemption is absolute and therefore not subject to a public interest test.

*Was the information obtained from another person?*

16. The University stated that the third parties which provided it with the withheld information under circumstances which would give rise to such actionable breach are CIML and the fund managers appointed by CIML.
17. The University confirmed that CIML is a separate legal entity and not part of the University. Therefore the Commissioner is satisfied that CIML is a third party.

*Would disclosure constitute an actionable breach of confidence?*

18. In order to determine whether disclosure would constitute an actionable breach of confidence the Commissioner considered the following questions.
  - i. Does the withheld information possess the necessary quality of confidence?
  - ii. Was the withheld information imparted in circumstances importing an obligation of confidence?
  - iii. Would unauthorised disclosure cause a detriment to the party providing the information or to another party?
  - iv. If parts (i)-(iii) are satisfied, would the public authority nevertheless have a defence to a claim for breach of confidence based on the public interest in the disclosure of the withheld information?

*Quality of confidence*

19. For information to have the necessary quality of confidence it must be more than trivial and not otherwise accessible. The Commissioner is satisfied that the information in this case is not trivial.
20. However, as stated above, this alone is not sufficient to indicate that the material has the necessary 'quality of confidence'. Therefore the Commissioner has considered whether the information is otherwise accessible.
21. The University has not specifically confirmed that the information is not otherwise accessible. However, it is reasonable to deduce that, given the type of withheld information, it is not accessible elsewhere. The Commissioner therefore accepts that the withheld information in this case has the necessary quality of confidence.
22. The Commissioner considers that the University has not presented substantive evidence in support of its position. However, having reviewed the information provided it is clear that the withheld information does have the necessary quality of confidence, as it is not otherwise accessible and is more than trivial.

*Obligation of confidence*

23. In its response to the Commissioner the University advised that different arrangements apply depending on whether the CUEF is invested in a collective fund or a segregated managed account. In the former case, the CUEF is bound by the terms incorporated within the standard fund documentation of the managers, while in the latter case an individual Investment Management Agreement will be negotiated. The University provided the Commissioner with samples of both types of documentation which contain examples of the form(s) of confidentiality clause typically in place.
24. Even if information is to be regarded as confidential, a breach of confidence will not be actionable if it was not communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.
25. Although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the judge in *Coco v Clark*, suggests that the 'reasonable person' test may be a useful one. The test was described as follows:

*"If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence."*
26. The Commissioner notes that a confidentiality clause in a contract is not enough in itself to prevent disclosure. If it were it would be relatively straight forward for all public authorities bound by the FOIA to opt out of their obligations under the FOIA. It is the Commissioner's view that there must be an actionable breach of confidence for the exemption to be engaged. Nonetheless, having viewed the clauses within the contract in this case, the Commissioner accepts that the requested information has been provided in circumstances importing an obligation of confidence.

*Detriment to confider*

27. Having considered whether the information in this case was imparted in circumstances giving rise to a duty of confidence and had the necessary quality of confidence, the Commissioner must also consider whether unauthorised disclosure could cause detriment to the confider.
28. In many cases it may be difficult to argue that disclosure will result in the confider suffering a detriment in terms of any tangible loss. The real consequence of disclosing information provided in confidence is

sometimes simply an infringement of the confider's privacy and there is a public interest in the protection of privacy.

29. The case of *Pauline Bluck v IC & Epsom & St Helier University NHS Trust*<sup>1</sup>, which dealt with the confidentiality of a deceased person's quotes from the *Attorney General v Guardian Newspaper* case<sup>2</sup> in which first Lord Goff agreed that it was appropriate "to keep open the question of whether detriment to the plaintiff is an essential ingredient of an action for breach of confidence ...". However later in the same ruling Lord Keith of Kinkel found that it would be a sufficient detriment to the confider if information given in confidence were disclosed to persons to whom he "... would prefer not to know of it, even though the disclosure would not be harmful to him in any positive way."
30. Therefore, it can be seen that there are two ways of looking at the issue of detriment in relation to information provided in confidence. One can say it is not necessary that the confider will suffer a detriment as a result of a disclosure, or one can view the loss of privacy as a detriment in its own right as the Tribunal did in the *Bluck* case above.
31. The Commissioner in this case has adopted the first approach, i.e. the detriment is not a prerequisite of an actionable breach, as the University has not made any submissions to the effect that disclosure would cause detriment to any party the Commissioner is satisfied that the absence of detriment would not defeat a cause of action.

### **Public interest in confidence**

32. As Section 41 is an absolute exemption there is no requirement for an application of the conventional public interest test. 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. The Commissioner has therefore gone on to consider whether there would be a defence to a claim for breach of confidence.
33. Whereas in the case of qualified exemptions, the public interest test operates in favour of disclosure unless exceeded by the public interest in maintaining the exemption applied, the reverse is the case in respect of the duty of confidence public interest test as it is assumed that

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<sup>1</sup> EA/2006/0090

<sup>2</sup> [1990] 1 AC 109

information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence.

34. The Commissioner recognises that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly. Whilst much will depend on the facts and circumstances of each case, a public authority should weigh up the public interest in disclosure of the information requested against both the wider public interest in preserving the principle of confidentiality and the impact that disclosure of the information would have on the interests of the confider. As the decisions taken by courts have shown, very serious public interest matters must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality.
35. As stated earlier, the Commissioner recognises the wider public interest in preserving the principle of confidentiality. The Commissioner accepts that if information provided in confidence is disclosed, this would undermine the University's confidentiality obligations.
36. The Commissioner accepts that there is a general public interest in transparency in relation to the performance and practice of public authorities. However, he considers that this has to be weighed against the potential damage which disclosure in any particular instance might cause to an authority's ability to carry out its role. Where authorities rely on the co-operation of third parties in order to carry out functions and where this is facilitated by a climate of trust and the sharing of information in a confidential context, there are strong public interest grounds in not doing damage to this dynamic.
37. The Commissioner has seen no evidence of illegality, misconduct or gross immorality which would warrant the disclosure of the information or which could form the basis of a public interest defence against breach of confidentiality. He therefore considers that the public interest in maintaining the duty of confidence outweighs the public interest in disclosure in this case and that the University were correct to withhold in this case under section 41 of the FOIA.
38. As the Commissioner has found that section 41 applies to all of the withheld information he has not gone on to consider the application of section 43.

## 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: 0300 1234504

Fax: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.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 .....**

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