

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 September 2015

Public Authority: The Open University

Address: Walton Hall
Milton Keynes
MK7 6AA

Decision (including any steps ordered)

1. The complainant has requested information from the Open University ("the University") relating to the University's redundancy criteria for Associate Lecturers. The University disclosed some information to the complainant, however it refused to disclose the remainder ("the withheld information"), citing section 36(2)(b)(ii) as a basis for non-disclosure.
2. The Commissioner's decision is that the University has correctly applied section 36(2)(b)(ii) to the withheld information and that the public interest in maintaining the exemption outweighs that in disclosure of the withheld information.
3. The Commissioner therefore requires no steps to be taken.

Request and response

4. On 8 February 2015, the complainant wrote to the University and requested information in the following terms:

"The OU have a "Redundancy Criteria for Associate Lecturers To Be Applied To Modules Presented From September 2014" with regard to 'Fluctuation in student numbers and distribution'.

In relation to the above Redundancy Criteria I would like the following information:

- a) copies of all documents, including, but not limited to, policies and procedures about the application of the redundancy criteria to ALs circumstances and the selection of ALs for loss of work/redundancy;

- b) copies of all documents in relation to staff training and guidance for ALL personnel who are involved in/ responsible for the application of the redundancy criteria to ALs circumstances and the selection of ALs for loss of work/redundancy;
- c) a list of the databases that are checked by relevant OU personnel involved in and responsible for the application of the redundancy criteria to ALs circumstances and the selection of ALs for loss of work/redundancy;
- d) details of the information that each database listed in c) contains, eg. length of service, module contract length, number of continuing modules held, subject to PIP etc;
- e) copies of all documents, background papers, minutes of meetings, emails, including discussions with AL representatives and UCU etc, which resulted in the adoption of and implementation of the redundancy criteria from September 2014;
- f) confirm the process(es) adopted in applying the redundancy criteria to ALs circumstances and the selection of ALs for loss of work/redundancy and confirm the job titles, departments and geographical location(s) of the personnel who are responsible for the application of the redundancy criteria to ALs circumstances and the selection of ALs for loss of work/redundancy. I am particularly interested in the social sciences in region 7, ie. the Yorkshire Region.
- g) copies of all documents outlining the quality control and assurance measures that are put in place to ensure that the redundancy criteria is applied consistently, accurately, fairly and reliably across all regions, faculties, modules and ALs;
- h) copies of all documents outlining the procedure to be followed if a dispute or query arises about the application of the redundancy criteria to an ALs circumstances;
- i) a copy of the ALs appeals/complaints procedure where an AL appeals/complains about the application of the redundancy criteria to their circumstances;
- j) copies of all documents which consider and/or dismiss adopting a transparent approach to the application of the redundancy criteria to ALs circumstances and the selection of ALs for loss of work/redundancy;
- k) confirmation of whether sick leave absence is taken into consideration when applying the redundancy criteria."

5. The University provided some information in response to the complainant's request, however the complainant on 15 March 2015 sought an internal review of the University's response as she felt that insufficient information had been provided in relation to parts b) e) f) g) i) and j) of her request. The complainant complained to the Commissioner on 7 May that she had still not received the University's response to her request for internal review. The Commissioner wrote to the University confirming that, after discussions with the University, the Commissioner agreed that complex issues were involved and as such that the University had 40 calendar days to complete its review. This meant that the deadline for completion was 14 May 2015. On 18 May 2015 the complainant complained to the Commissioner the she had not yet received the result of the internal review, however she had received an acknowledgement letter and further correspondence to state that the University needed more time. The Commissioner wrote to the Open University extending the deadline to 29 May 2015 and informed the complainant of this.
6. Following an internal review the University] wrote to the complainant on 15 June 2015. It stated that it was refusing to disclose the withheld information, citing section 36(2)(b)(ii) of FOIA as a basis for non-disclosure. It did, however, provide the complainant with a summary of information in response to her request.

Scope of the case

7. The complainant was not satisfied with the summary provided and made a complaint to the Commissioner about the University's refusal to provide the withheld information.
8. The Commissioner has considered whether the University has correctly applied section 36(2)(b)(ii) to the withheld information.

Reasons for decision

9. Section 36(2) of FOIA states that information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under the FOIA-
 - (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. Section 36 is also a qualified exemption and is therefore subject to the public interest test.
 11. For a public authority to cite section 36 of the FOIA the qualified person must give their reasonable opinion that the exemption is engaged. For the Commissioner to determine that the exemption is engaged it must be demonstrated that the designated qualified person has given their opinion, and that the opinion is reasonable.
 12. The qualified person for the University is the Vice Chancellor, Mr Peter Horrocks, and the University has confirmed that the Vice Chancellor gave his reasonable opinion in his capacity as the qualified person that section 36(2)(b)(ii) applies in this case.
 13. As the Commissioner is satisfied that the opinion is the opinion of the qualified person for the University, he now needs to consider whether that opinion is reasonable. It is important to highlight at this point that this is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold.
 14. The Commissioner has reviewed the withheld information, the submissions he received from the University and the information that was given to the qualified person in order for him to reach his opinion.
 16. The University stated that it considers disclosure of the withheld information would inhibit the free and frank exchange of views for the purposes of deliberation. It argued that the process of discussing and agreeing the redundancy criteria necessitated meetings, and the meeting members would expect the notes of meetings to be held confidentially. It also considers that the redundancy criteria would not have been discussed so openly if the participants in the discussions had thought that the notes of these discussions could be disclosed into the public domain.
 17. The University further argued that the inhibition of such free and frank discussions would prevent discussions progressing – not only in relation to redundancy criteria but any future confidential discussions regarding University employees, which would not be in the interests of staff affected. It considers that it is extremely important to maintain a confidential discussion forum for issues affecting University employees.

18. Given the importance of such discussions, the need for such meetings and decisions to be fairly and appropriately carried out and the often sensitive issues that arise, the Commissioner has decided in this case that the qualified person's opinion that disclosure would prejudice the free and frank exchange of views for the purposes of deliberation is a reasonable opinion to hold. As a result he is satisfied that section 36(2)(b)(ii) is engaged.

The Public Interest Test

19. As section 36 is a qualified exemption, it is subject to a public interest test. The Commissioner therefore went on to consider whether the public interest in maintaining the exemption outweighed that in disclosure of the remaining withheld information.
20. In *Guardian Newspapers & Brooke v Information Commissioner & BBC*¹, the Tribunal noted the distinction between consideration of the public interest under section 36 and under the other qualified exemptions contained within the Act:

'The application of the public interest test to the s 36(2) exemption involves a particular conundrum. Since under s 36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person, it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s 36(2)(b), or indeed of prejudice under s36(2)(a) or (c). But when it comes to weighing the balance of public interest under s 2(2)(b), it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice'.

21. The Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and so
- "...does not necessarily imply any particular view as to the severity or extent of such inhibition (or prejudice) or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant."*
22. Therefore, in the Commissioner's opinion, this means that while due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, the Commissioner can

¹ EA/2006/0011 & EA/2006/0013

- and should consider the severity, extent and frequency of the inhibition on the free and frank exchanges of views for the purposes of deliberation.
23. The University accepts there is a public interest in there being transparency in the arrangements made for redundancy and the process by which the criteria are applied and decisions are arrived at. It accepts that disclosure of the arrangements would provide assurance to affected employees that a previous statement made to them regarding consultation on redundancy criteria was true, therefore maintaining the relationship of trust between the University and its employees.
 24. However, it considers there is also a public interest in ensuring effective decision making and ensuring the process is one in which deliberation can occur in a free and frank way, with a view to securing best decisions. Therefore, in the University's opinion the public interest in disclosing the decision making regarding the redundancy criteria and procedures in this case is not as strong as the public interest in maintaining the exemption cited.
 25. The University stated that those who are given these responsibilities must be allowed to consider and deliberate the merits of redundancy options with relevant colleagues, as part of ensuring a fair process. A lack of privacy in this deliberation process would inhibit the free and frank exchange of views, such that individuals in this role would not feel able to properly rehearse, consider and make optimal decisions regarding the relevant procedures. Deliberations and exchanges of views relating to options in these cases could not be free and frank and would be less accurate if they had to be conducted on the expectation of open publication. The relevant individuals would also be likely to be inhibited in their decision making if there was an expectation of potential publication.
 28. The Commissioner has considered the arguments for and against disclosure and the severity and frequency of the prejudice and inhibition the University has argued.
 29. The Commissioner considers there is a public interest in transparency and accountability and in the disclosure of information which enables members of the public to scrutinise decisions made by public authorities.
 30. The Commissioner also considers that there is a public interest in maintaining the relationship of trust between the University and its employees, however he accepts the University's argument that the

outcomes of meetings have already been made available to affected staff. Therefore the public interest in disclosing the withheld information would be negligible as the University has already been transparent about Associate Lecturer redundancy.

31. In terms of severity and the extent of the prejudice claimed, given the University's statement that negotiations regarding Associate Lecturers' contracts of employment are ongoing, and the acceptance that such a process is sensitive and does require the private space in which to deliberate freely and frankly, the Commissioner accepts that the extent and severity of prejudice is such that the public interest in favour of disclosure in this case is outweighed by the public interest in maintaining the exemption.
32. The Commissioner considers there is a stronger public interest in maintaining the University's ability to make decisions regarding employment contracts and redundancy in a fair and appropriate way. The public interest is not served by releasing information which would inhibit and prejudice the process, as this would then impact negatively on the future decisions the university is to make.

Right of appeal

33. 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

34. 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.
35. 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

Rachael Cragg
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