

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 April 2020

Public Authority: The Council of the University of Cambridge
Address: University Offices
The Old Schools
Trinity Lane
Cambridge CB2 1TN

Decision (including any steps ordered)

1. Cambridge University Press ('the Press') is the publishing business of the University of Cambridge. Although it is operationally separate from the Academic University – having its own executive board, HR, IT, legal and finance departments – it is not corporately separate from the University (eg a trading subsidiary). As such, although this decision notice is served on the Council of the University of Cambridge, it concerns the Press and the Press is discussed throughout.
2. The complainant requested information about a book proposal. The Press addressed one part of the request, withheld information within the scope of another part under section 41 of the FOIA (information provided in confidence) and confirmed that it does not hold information relevant to two other parts of the request. The complainant is dissatisfied with the Press' reliance on section 41 to withhold information he has requested.
3. The Commissioner's decision is as follows:
 - The information the Press is withholding is exempt information under section 41(1) as it was provided to the Press in confidence.
4. The Commissioner does not require the Press to take any remedial steps.

Request and response

5. On 6 March 2019 the complainant wrote to the Press and requested information in the following terms:

"(1) I would like information concerning the book proposal:

(a) How many different versions of the book proposal were sent to reviewers, both external and internal (including the final approved version)?

(b) For each version, I would like to see all excerpts (including any relevant references) that concern the material in chapters 16 to 19, i.e. concerning solutions of topologically massive gravity.

(2) I would information received by CUP prior to publication concerning reuse of third party material:

(a) All statements by the book author received prior to publication that declare what third party material is contained in the book, both those that related to my own publications and those relating to others (including the book author), or an author statement declaring that no such material is contained.

(b) Any documents received prior to publication that confirm that appropriate permissions had been obtained."

6. The Press responded on 3 April 2019. It answered part 1(a) of the request, relied on section 41 of the FOIA to withhold information falling within the scope of part 1(b) and stated that it does not hold information falling within the scope of part 2(a) or 2(b) of the request.
7. The complainant requested an internal review on 26 May 2019; he was dissatisfied with the Press' reliance on section 41 to withhold particular information that he had requested on 6 March 2019.
8. The Press provided an internal review on 5 July 2019. The Press maintained its reliance on section 41 with regard to the request of 6 March 2019 and noted that it considered that section 43 (commercial interests) might also be engaged.

Scope of the case

9. The complainant contacted the Commissioner on 4 October 2019 to complain about the way his request for information had been handled.

10. In the first instance, the Commissioner's investigation has focussed on whether the Press can withhold the information requested in part 1(b) of the complainant's request under section 41(1) of the FOIA. If necessary, she has been prepared to consider whether section 43 is engaged.

Reasons for decision

11. The Press is withholding under section 41(1) of the FOIA two documents that fall within the scope of part 1(b) of the request. These are an original book proposal and a revised book proposal. The Press has provided this material to the Commissioner.
12. Section 41(1) provides that information is exempt if the public authority obtained it 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?

13. In its submission to the Commissioner, the Press has explained that the complainant has an interest in a publishing matter relating to a particular book that it published ('the book').
14. The Press has then explained to the Commissioner the circumstances under which the disputed information was provided to it. She does not intend to reproduce the detail in this notice, but she is satisfied that the Press obtained the information, ie the book proposals, from another person.

Would disclosure constitute an actionable breach of confidence?

15. In considering whether disclosing the information constitutes an actionable breach of confidence the Commissioner considers the following:
 - whether the information has the necessary quality of confidence
 - whether the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider.
16. **Necessary quality of confidence:** The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.

17. The Press has told the Commissioner that the effort in creating proposals is substantial and is a considerable academic effort. It says that in this particular case, the proposal was the culmination of this academic's career to date. The author has crafted the proposals from their own ideas and concepts and refined these ideas during the peer review process. This is a personal process for the author and one which can take several months and iterations and carries with it a risk of rejection by publishing houses.
18. The proposals are based on academic and professional experience and expertise, and contain personal information in respect of qualifications and personal opinions of the author on them subject area, the academic and commercial aims of the book and on the academic rigour of the research, making this information more than trivial in nature.
19. The Press has gone on to explain that this subject area can be searched online, and the resulting book itself is publicly available, the contents and purpose of the proposal documents differ greatly from the final published version of the book. These proposal documents are not routinely published, making this information not otherwise accessible.
20. The Commissioner is satisfied that the information has the necessary quality of confidence because it is not trivial information and is not information that would otherwise be available to the public.
21. **Circumstances importing an obligation of confidence:** In its submission to the Commissioner the Press has provided the following reasoning. It says that a breach of confidence will not be actionable if the information was not communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.
22. At the proposal stage in the publication process, there is no contract in place, and the Press accepts that there is no explicit obligation of confidence.
23. However, it says the author will submit a book proposal to the Press with the aim of securing the Press's approval of that book, in principle. The proposal will be communicated directly with the publishing house and is submitted for the single purpose of evaluating the suitability of the proposed book.
24. This proposal may contain information such as proposed chapter headings, sample chapters, citations of works which may be incorporated into the work, intended markets, and the frank personal views of the author on the relevant academic field and how the proposal fits within this field. The submission of a book proposal to the Press, and

any revisions or updated proposals submitted during the process, is considered by the author and the Press to be confidential and thus creates a relationship in which one can reasonably expect confidence. That is the industry practice and is generally understood. It would materially undermine academic publishing if proposals were considered not to be covered by any relationship of confidence.

25. The fact that the proposal is part of the process which did, in this particular instance, result in a contract for a book does not detract from the author's expectation that the submission of a proposal is confidential between them and their publisher. The proposal and the resulting book are distinct, in scope, nature and purpose. The proposal has lost no quality of confidence to the author or to the Press because the related book has subsequently been published. At no stage is the proposal expected to be, or is in fact, published or made generally available.
26. This is reinforced by the Committee on Publishing Ethics guidelines and case examples which repeatedly state that book and journal, proposals and manuscripts are to be treated as confidential and not used in any other way. Even during the review process, reviewers are expected to treat any documents which they have received as being confidential. The Press notes that the law recognises that a proposal, or a pitch, of unfinished or unpolished idea is to be treated as confidential: *Wade (and others) v British Sky Broadcasting Ltd* [2014] EWCA (Civ) 1214.
27. The Press says that, as it referred in its response to the complainant's request for internal review, there is an analogy with a job application: the application itself will invariably be confidential to the applicant and recipient, not least because the application may be rejected. If the application is successful, the fact that the applicant has the job in question and that this is in the public domain does not render the particular content of their application no longer confidential. The information is concerned with a different, and inherently confidential stage.
28. The Commissioner has considered the Press' well-explained position and the circumstances in which the requested information was shared with the Press. She is satisfied that the other person – the author - will expect that the information they provided to the Press will remain private and confidential and will not be disclosed to the general public as a result of an FOIA request. She is therefore satisfied that the withheld information was imparted in circumstances which give rise to a duty of confidence.
29. **Detriment to the confider:** In its submission to the Commissioner, the Press has confirmed that, as outlined above, the information was imparted in situation in which the author, as a private individual,

expected confidentiality in their dealings with the Press. It considers that the loss of privacy and failure to meet this expectation would constitute a detriment.

30. The Press has referred to *Bluck v ICO and Epsom and St Helier University NHS Trust (EA/2006/0090)*, where it was found that there does not need to a detriment established beyond the fact that there is an invasion of the reasonable expectations of the confider in the maintenance of confidentiality, and that it is not necessary for there to be a tangible loss for private information to be protected by the law of confidence.
31. The Press has provided the Commissioner with further detail on the specifics of this case, which the Commissioner has taken account of but does not intend to reproduce in this notice.
32. The Commissioner's published guidance on section 41 establishes that case law now suggests that "*any invasion of privacy resulting from a disclosure of private and personal information can be viewed as a form of detriment in its own right*".
33. The Commissioner has established that the information that another person provided to the Press in this case constitutes information of a confidential nature. Its release may well therefore cause that person a degree of damage or distress, as it would any person who had provided information in confidence. So, it is not necessary for there to be any detriment to the confider in terms of tangible loss, for this information to be protected by the law of confidence. The Commissioner accepts the Press' position and has not considered this issue further.
34. As has been noted, section 41 of the FOIA is an absolute exemption and therefore not subject to the public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under the FOIA).
35. The Press notes that there must be a sufficient public interest to override the duty of confidence. It says that while a public interest may be shown by confidential information materially contributing to matters of general public concern, it cannot identify any such matters here. For context, the Press has told the Commissioner that the average worldwide sales for books of this type are in the low hundreds in the first year of publication, in both print and digital formats, with numbers decreasing heavily in the following three years.

36. Academic monographs such as the book in this case are highly technical and/or scientifically advanced in nature. Academic book publishing is aimed at a fairly exclusive market so is of minimal wider public interest. The main contributors to this arena are academics who publish in order to validate their research and the intended audience is highly specific and very narrow. The Press says that where a work has been published, it is extremely difficult to understand what value to any public debate there might be in the publication to the world of the proposal material for that work.
37. The Press also notes the considerable harm which could be done to its commercial position through the application of the Act in this context, when it does not apply to other publishers. The Press argues that is not in the public interest to create an unequal playing field in this context, and the expectation of a proposal being made public would serve only to direct authors to submit their proposals to those other publishers, and would reduce the ability of the Press to provide high quality academic and learning materials.
38. For these reasons, the Press believes that there is no overriding public interest in undermining the confidentiality of the academic publishing process.
39. The complainant has written to the Commissioner at length about his concern. As well as his initial complaint form, the complainant subsequently submitted a further 42 A4 pages of arguments (with 23 A4 pages of appendices, and other supporting material) about the status of the Press, the background to his complaint, the process of publishing books and arguments to support his position that the Press cannot rely on section 41 (or section 43) to withhold the disputed information. The complainant's section 41 arguments can be broadly summarised as follows:
 - **Was the information obtained from a third party?** The complainant argues that at least part of the information is a negotiated agreement and became "mutual information" after the contract was signed ie that information was not provided by another person. He also posits the argument that the information was created jointly by the Press and the author through communications between themselves.
 - **Would disclosure of the information be authorized by the author?** The complainant notes that in general it is not contested that book proposals are originally submitted in confidence. However, he argues that the Press is assuming that the author has not consented to its release and that it is not known whether or not they object.

- **Was confidence attached to the information at the time of the request?** According to the complainant no information remains confidential indefinitely and, in this case, for various reasons (such as the book having been published almost two years ago), any confidence has been lost.
 - **Would disclosure result in detriment to the author?** The complainant considers that the Press is unlikely to be able to provide a compelling argument that disclosure would lead to detriment; conjecturing detriment is insufficient in his view.
40. The complainant has also presented public interest arguments for the information's disclosure. These can be summarised as follows:
- The need for public authorities to be accountable.
 - Disclosure would:
 - show whether the book author did or not have particular intentions
 - reveal any evidence of culpability in moral and/or legal wrongdoing
 - provide evidence of whether the Press exposed the University to risk; and
 - contribute to a public debate about models of academic publishing.
41. Both the complainant and the Press have discussed the concerns the complainant has about the book in question which, again, the Commissioner has noted but does not intend to reproduce in this notice. In its submission to the Commissioner the Press has advised that the complainant has made repeated requests for information about this matter. It disputes that there is any evidence of any public interest in this particular case, beyond what it says is the complainant's persistent campaign in relation to it. It has noted that the complainant has attempted to instigate a public debate by bringing the matter of this publication to the attention of numerous high-profile academics in this field, but without success.
42. The Commissioner appreciates that the concerns that the complainant has are of considerable importance to him, but she considers this is a private interest for the complainant and that the concerns do not have any wider public interest; at least not sufficient to override maintaining the duty of confidence. And the Commissioner notes that the Press has

demonstrated its accountability in this case by answering the complainant's questions where it was able to.

43. The Commissioner has considered the information in question, the Press' submission, the complainant's arguments and all the circumstances associated with this request. She finds the Press' reasoning and arguments more compelling. The Commissioner is satisfied that disclosing the withheld information requested in part 1(b) of the complainant's request would be an actionable breach of confidence and is therefore exempt information under section 41(1) of the FOIA. Because she has found that information engages the section 41 exemption it has not been necessary to consider whether section 43 is engaged.

Right of appeal

44. 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

45. 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.
46. 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

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