Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 26 May 2011

Public Authority: **The Governing Body of Kingston University ('The University')**
Address: **River House**
53-57 High Street
Kingston upon Thames
Surrey
KT1 1LQ

Summary

The complainant requested under the Freedom of Information Act 2000 (the 'Act') all of the workplace email addresses of the University's staff. The University confirmed that it held the information, but believed that it was exempt. It argued that the information was exempt by virtue of section 40(2) [third party personal data]. The complainant requested an internal review and it maintained its position. The complainant then referred this case to the Commissioner.

During the course of his investigation, the University provided evidence that it was now relying on section 36(2)(c) [information would prejudice the effective conduct of public affairs]. The Commissioner finds that section 36(2)(c) was engaged and in all the circumstances of the case the public interest favoured the maintenance of the exemption over the disclosure of the information. He has therefore not been required to make a formal decision about the operation of section 40(2). He has found procedural breaches of sections 17(1)(b) and section 17(3), but requires no remedial steps to be taken.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. The complainant owns a website that enables all Universities to receive requests for information simultaneously. He believes that the website should be able to investigate higher education matters through FOI requests and publishes the results.

3. This request has been made to every University in the UK and the complainant has told the University that he requires this information to inform the staff about his website. He explained that each member of staff was to be invited to suggest topics worthy of investigation in confidence.

4. The complainant has asked the Commissioner to consider a number of his requests, where those requests have been refused. The Commissioner has considered the arguments the complainant has made to him, across all of these complaints, in reaching his decision in respect of this particular case.

The Request

5. On 26 April 2010 the complainant requested the following information from the University:

> *'FOI Request – Staff E-mail Addresses*
>
> *I would like to request the following information under the provisions of the Freedom of Information Act. I would ask you to send your response by e-mail.*
>
> *A list of the workplace e-mail addresses for all staff.*
>
> *By workplace I am referring to corporate e-mail addresses ending in .ac.uk.*
>
> *By staff I am referring to all individuals employed by your institution.*
>
> *Please note that I do not require any segmentation of the list or any associated details.'*

6. On 25 May 2010 the University issued its response. It confirmed it held the relevant information that was embraced by the request. It explained

it believed that it was entitled to withhold the information because the workplace email addresses were all exempt by virtue of section 40(2) [third party personal data][1]. It explained it believed the disclosure would not be fair or lawful and would therefore breach the first data protection principle. To be helpful, it provided links to its website that contained the email addresses of its key business and subject areas.

7. On 25 May 2010 the complainant wrote to the University to request an internal review.

8. On 4 June 2010 the University communicated the results of its internal review. It explained that it upheld its position that section 40(2) applied and explained why.

The Investigation

Scope of the case

9. On 4 June 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant told the Commissioner that he did not accept that the section 40(2) exemption had been applied appropriately.

10. The Commissioner has been asked by the complainant to consider a number of requests for the email addresses of all staff. The complainant has explained that he wanted the Commissioner to decide whether he could receive the full list in every case, except for those staff who had specifically requested anonymity on grounds of personal safety.

11. It also became apparent that the University was unable to regenerate the list of work place email addresses as it stood on 26 April 2010. The list was always evolving as new staff came and went from the University. The Commissioner agreed with the complainant and the University that the only equitable thing would be for him to consider the contemporary list in this investigation. In this case, he has considered the email list as it was on 3 March 2011.

12. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. In particular, it must be noted that the Commissioner must consider the operation of the Act as it has been passed.

[1] All sections of the Act mentioned in this Notice are attached in full in its Legal Annex.

Chronology

13. On 23 July 2010 the Commissioner wrote to the complainant to explain that the complaint he had made was eligible to be considered. He also wrote to the University to inform it of the complaint and to ask it for a copy of the withheld information.

14. On 10 August 2010 the University replied. It provided a list of email addresses that were sampled 18 months previously for another purpose. It explained to the Commissioner in light of his guidance that it believed that its position was appropriate.

15. There followed a delay when the Commissioner considered a number of other complaints that were also made by the complainant about workplace email addresses at other Universities.

16. On 17 January 2011 the Commissioner wrote again to the University. He asked detailed questions about how the information was held and why section 40(2) had been applied in this case. On 16 February 2011 the Commissioner called the University to chase a response to his letter. It became apparent that the original letter had not been received.

17. On 22 February 2011 the Commissioner wrote a different detailed letter to the University. He asked detailed questions about how the information was held, whether the public authority still wished to withhold the information and if so, asked detailed questions about whether any appropriate exemptions could be applied.

18. On 3 March 2011 the University issued a preliminary response. It explained what it held, provided the Commissioner with the dates he had requested and explained that its position was now under review. On 18 March 2011 the University wrote to the Commissioner to tell him that it was now considering the application of section 36(2)(c) and would move to approach its Qualified Person.

19. On 1 April 2011 the University issued its latest response. It explained that in light of the Commissioner's decision in **FS50344341** it wished to rely on section 36(2)(c)[disclosure would prejudice the effective conduct of public affairs][2]. It provided its detailed arguments about the operation of that exemption.

[2] This decision can be found at the following link:
http://www.ico.gov.uk/~/media/documents/decisionnotices/2011/fs_50344341.ashx

Findings of fact

20. The person designated as being the Qualified Person for this University at the time when section 36(2)(c) was considered was the Acting Vice Chancellor – Dr David Mackintosh. This corresponds with an Order issued by David Willetts, the Minister of State for Universities and Science.[3]

Analysis

Exemptions

21. The Commissioner is obliged to consider all exemptions that are raised by a public authority in the course of his investigation. This is the result of the Upper Tribunal (Information Rights)' decision in the linked cases *DEFRA v Information Commissioner and Simon Birkett* [2011] UKUT 39 (AAC) and *Information Commissioner v Home Office* [2011] UKUT 17 (AAC).[4]

Section 36(2)(c) – prejudice to the effective conduct of public affairs

22. The Commissioner has chosen to consider section 36(2)(c) first because should it be appropriately applied then it would cover all of the withheld information. Only one exemption needs to be applied correctly to withhold the information under the Act.

23. Section 36(2)(c) provides that information is exempt if in the reasonable opinion of the qualified person, disclosure of the information would, or would be likely to, prejudice the effective conduct of public affairs. It is a qualified exemption, so subject to a public interest test. The Commissioner will first consider whether the exemption is engaged and, if so, will move on to consider where the balance of the public interest lies.

Is the exemption engaged?

24. In *McIntyre v the Information Commissioner* (EA/2007/0068), the Information Tribunal noted that no definition of 'public affairs' was given

[3]The relevant Ministerial Order can be found at the following link: http://www.bis.gov.uk/assets/biscore/corporate/docs/foi/foi-authorisation-of-a-qualified-person.pdf

[4] This decision can be found at the following link: http://www.osscsc.gov.uk/judgmentfiles/j3160/GIA%201694%202010-01.doc

in the Act. However, The Tribunal commented that this category of exemption was:

> *"intended to apply to those cases where it would be necessary in the interests of good government to withhold information, but which are not covered by another specific exemption, and where the disclosure would prejudice the public authority's ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of the disclosure."*

25. In order to establish that this exemption is engaged the Commissioner must:

- Ascertain who the qualified person is;
- Establish that an opinion was given;
- Ascertain when the opinion was given; and
- Consider whether the opinion was objectively reasonable and reasonably arrived at.

26. The Commissioner has established that the 'Qualified Person' as noted above is Dr Mackintosh.

27. The next two criteria can be dealt with swiftly. The Commissioner has established that an opinion was given by Dr Mackintosh on 30 March 2011. This was in response to a submission being put to him on the 25 March 2011.

28. The last criterion noted in paragraph 26 requires detailed analysis. In the case of *Guardian & Brooke v Information Commissioner & the BBC* [EA/2006/0011 and 0013] ('*Guardian & Brooke*'), the Information Tribunal stated that "in order to satisfy the subsection the opinion must be both reasonable in substance and reasonably arrived at." (paragraph 64). The Commissioner will consider each of these requirements in reverse order:

Reasonably arrived at

29. In determining whether an opinion had been reasonably arrived at, the Tribunal in *Guardian & Brooke* suggested that the qualified person should only take into account relevant matters and that the process of reaching a reasonable opinion should be supported by evidence, although it also accepted that materials which may assist in the making

of a judgement will vary from case to case and that conclusions about the future are necessarily hypothetical.

30. When considering whether the opinion was reasonably arrived at, the Commissioner has received a copy of the submissions provided to the Qualified Person and his detailed opinion. He has also been provided with the evidence that was considered when the opinion was provided by the Qualified Person. The Commissioner's view is that the evidence considered when coming to an opinion is an important factor in considering whether that opinion is reasonably arrived at. He has therefore noted what was considered below:

- A fourteen page submission from the relevant officer to the Qualified Person. This included:

    1. A copy of the request dated 26 April 2010;

    2. An explanation about what the withheld information consisted of;

    3. An explanation of how the request was handled previously;

    4. A summary of its correspondence with the ICO;

    5. A detailed overview about why it accepted that other exemptions could not be appropriately applied to all of the information withheld;

    6. An explanation about the nature of section 36(2)(c) and the circumstances about when it can be applied;

    7. It explained exactly what the Qualified Person needed to decide to apply section 36(2)(c) – namely that disclosure would or would be likely to prejudice the effective conduct of public affairs. It also explained that it was for the University to prove that this decision was reasonable in substance and reasonably arrived at;

    8. It then explained in detail what the factors were that the officer viewed as being likely to cause prejudice. There were four pages explaining why the officer felt that these effects may occur; and

    9. It finally explained the public interest considerations that it felt applied to this case.

- A letter from the Commissioner which explained the evidence that was required in order to apply section 36(2)(c) (this was an appendix attached to his letter dated 22 February 2011); and

- A copy of Decision Notice **FS50344341**.

31. In his opinion the Qualified Person outlined what he had taken into account and clearly explained that he felt that the lower threshold applied and why (these reasons will be examined in more detail at paragraph 34 below). The reasons he gave showed that he had put his mind to this decision because he explained what he felt was particularly compelling information that supported his view. He commented that email was critical to the University's business and that the disclosure of the requested list would be very likely to cause it disruption. From these documents, the Commissioner is satisfied that the Qualified Person has taken into account relevant considerations and does not appear to have been influenced by irrelevant ones. He has therefore determined that the Qualified Person's opinion was reasonably arrived at.

Reasonable in substance

32. In relation to the issue of whether the opinion was reasonable in substance, the Tribunal indicated in *Guardian & Brooke* that "the opinion must be objectively reasonable" (paragraph 60).

33. In order to determine whether the opinion was objectively reasonable, it is important to understand what the Qualified Person meant when he gave his opinion. There are two possible limbs of the exemption on which the reasonable opinion had been sought:

- where disclosure "would prejudice" the effective conduct of public affairs; and

- where disclosure "would be likely to prejudice" the effective conduct of public affairs.

34. The Qualified Person explained in his submission that he was relying on the 'would be likely to prejudice' limb of the exemption. This means the Qualified Person's decision was that he was of the view the chance of the prejudice being suffered was more than a hypothetical possibility and that there was a real and significant risk[5]. The Commissioner will judge whether the opinion was a reasonable one on the basis of this threshold.

[5] The nature of the threshold was confirmed in paragraph 15 of the Information Tribunal decision in *John Connor Press Associates Limited v The Information Commissioner* [EA/2005/0005]*:*
http://www.informationtribunal.gov.uk/DBFiles/Decision/i89/John%20Connor.pdf

35. When providing his opinion, the Qualified Person explained that he had examined all the evidence noted in paragraph 31 above. He explained that his opinion was that disclosure of the full list of email addresses would be likely to prejudice the effective conduct of public affairs.

36. The submission that was considered explained in detail the nature of the prejudice that was likely to occur. The Qualified Person through providing his opinion indicated that he agreed with these arguments. The arguments that the Commissioner feels are relevant are noted below:

    1. Email is crucial to how the University functions. It is a cornerstone of its business and enables it to more easily support the delivery of its core purposes - its teaching and its research. It also is required for its Human Resources, Finance and Student records systems (such as student applications). Email has failed previously for 48 hours and it had a huge impact on its staff being unable to undertake their ordinary work. These effects would be particularly pronounced at busy times – such as the clearing process and exam periods;

    2. The University has calibrated the email addresses that it disclosed to ensure that the correct emails go to the right people. It also has more general email addresses that can be accessed by a number of relevant staff members when priorities allow. The disclosure of the full list would undercut its carefully planned system, lead to duplication of work, inefficiencies and a considerable waste of its limited resources;

    3. More SPAM – it explained that it already received considerable SPAM and the majority of it was blocked. However, this meant that a minority got through and a number of these are sophisticated enough to cause real problems. It explained that the SPAM emails that could just be discounted and deleted would take a lot of time cumulatively to deal with, if one allocates five minutes a day for all of its staff, then this would be thousands of working days utilised in an annual period. The placement of the full list in the public domain without segmentation would make it a lot easier for an individual to send emails to every member of its staff at the same time;

    4. Dangerous SPAM – the University explained that it had spoken to its Professor of Forensic Computing who explained that those SPAM emails that got through the University's systems can cause real damage. It explained that it could lead to more viruses and/or phishing attacks (where staff get misled into giving their contact details to criminals). It explained that this had recently occurred on two occasions – once in August 2010 and once in January 2011. Both cases occurred because a member of staff had answered an email

purporting to come from its IT department. They each led to big increases in SPAM, a quick increase in viruses being found on the system – 23 viruses (an increase of 21 from the previous month) and caused many other organisations to block its normal emails which stopped it undertaking its ordinary business. These consequences occurred because the account was used to send 'Advanced Fee Fraud emails' to both other staff and those other organisations. The University explained that if this happened on more occasions, it would be prevented from contacting the students that it educates or undertake its other core functions. In addition, its IT service had to disable each person's account and undertake over 6 hours work to remedy the consequences. It explained that an increase in SPAM would be likely to lead to an increase in unacceptable attacks;

5. Spoofing University email addresses – it also expressed concern that the placing of the full list in the public domain would lead to those with nefarious aims having more information with which to plot an attack. It explained that it would provide further information with which to increase the potency on SPAM attacks – for example, accounts could be created that seem deceptively similar to genuine ones, which could cause more staff to be fooled. It explained that its staff do have a varied level of computer awareness and that, while it took the steps it could to help them, knowledge was less than perfect;

6. The University explained it had sophisticated IT systems, but argued that there would be a likely delay between the incident and the mitigating action and thus the damage could already be executed before intervention could take place; and

7. The University had consulted its staff about this request and found that around a tenth of its academic staff expressed particular concern about elements 2, 3 and 4 above. It explained that these malicious emails were regarded by many as being a form of harassment.

37. The Commissioner has also noted that the University has already published a number of the email addresses of its key contacts. The complainant has argued that this in itself has not adversely impacted on the University. The Commissioner notes that there is a difference in the current availability of the key email addresses (which the University accepts are necessary for the performance of an individual's role or duties) and the disclosure of a full list of email addresses. He has also noted the complainant's arguments that he would use the list responsibly. It is important to note that disclosure of information under the Act should be regarded as disclosure to the world at large. This is in line with the Tribunal in the case of *Guardian & Brooke* (following *Hogan and Oxford City Council v The Information Commissioner*

(EA/2005/0026 and EA/2005/0030)) which confirmed that, "*Disclosure under FOIA is effectively an unlimited disclosure to the public as a whole, without conditions*" (paragraph 52). The motivations of the complainant are therefore irrelevant. However, the argument that equivalent public authorities have not withheld the same information that was requested has been evidenced by the complainant. While it must be noted that the application of an exemption is discretionary, the Commissioner must consider whether the prejudice has been overstated by this University given the alternative approach by the others.

38. The complainant has also argued that the amount of email traffic would not be affected in a material way through the disclosure of the full list of email addresses to the public. However, the University has provided the Commissioner with an expert statement from a Professor and considered submissions from its Infrastructure Security Manager which has explained from experience the likely effect that the disclosure of the list to the public would have. It also showed what happened on two occasions when malicious email attacks were successful and how this caused very many more SPAM emails to be received. In view of the above, the Commissioner doubts that the release of the list to the public would not affect the traffic that the University receives. He finds that the University is further supported by evidence that he considered in **FS50344341** where the accidental disclosure of part of the contact directory led directly to very many more SPAM emails being received.

39. The complainant also argued that sophisticated IT systems ought to be able to counteract any possible prejudice that the University would experience through the disclosure of the list. The Commissioner accepts that there is some merit to this argument. However, the Commissioner is willing to accept that a method of attack can vary and there is always likely to be a time delay between where the problem is noted and counteracted as occurred in August 2010 and January 2011. This delay may mean that the attack has already done considerable damage and therefore the existence of IT security does not mitigate the prejudice to a significant extent.

40. The Commissioner is aware that the University is not entitled to take factors into account circumstances that arose after the date of the request, however he has mentioned the August and January attacks because they demonstrate that the University's concerns were well founded at the date of the request.

41. The Commissioner has carefully considered the arguments presented by both parties in this case and is satisfied that the Qualified Person's opinion was objectively reasonable in substance. This is because he is satisfied that in the particular circumstances of this case it was reasonable for the Qualified Person to conclude that the disclosure of the

withheld information to the public would be likely to cause an adverse effect to the University's ability to carry out its core functions (providing education and conducting research). He considers that in this case the evidence supports the opinion of the Qualified Person. In particular, he believes that the University should be entitled to organise itself so that the correct members of staff receive the correct emails to prevent both duplication and wastage of its limited resources. In addition, it should be able to protect itself and its staff from SPAM and/or unsolicited marketing material.

42. The Commissioner has concluded that the opinion of the qualified person appears to be both reasonable in substance and reasonably arrived at, and he therefore accepts that the exemption found in section 36(2)(c) is engaged.

The Public Interest Test

43. Section 36(2)(c) is a qualified exemption. That is, once the exemption is engaged, the release of the information is subject to the public interest test. The test involves balancing factors for and against disclosure to decide 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 arguments in favour of disclosing the requested information

44. The University has explained to the Commissioner that its starting point is always disclosure. It also listed the public interest factors that it believed to favour disclosure:

- The public interest in ensuring transparency in the activities of public authorities; and

- The public interest in ensuring that members of the public are able to contact appropriate staff within the University.

45. It explained that it understood the public interest in ensuring the transparency of the University's work is always strong as it is the fundamental objective of the Act. It explained that it took these responsibilities very seriously and released appropriate information proactively where possible. It also understood that it should be as accountable as possible.

46. However, it explained that these arguments should be given little weight for the following reasons:

- It believed that disclosure would not provide greater transparency about the University or its work to the general public;

- It explained that it already supports openness, scrutiny and accountability by:

    1. Educating its staff and providing a strong amount of awareness about the Act and what can be found on the publication scheme;

    2. Providing advice and training to its staff about both Freedom of Information and Data Protection – it explained that it was sure to make its staff aware of when a request needs to be passed on;

    3. Providing management information to its staff through its email system and electronic notice boards; and

    4. Having separate facilities to enable staff to raise issues anonymously – it explained that it had a Whistleblowing Procedure in place to protect staff during incidents of required public disclosure.

- It acknowledged that there is a public interest in individuals being able to contact members of staff when their expertise would merit their contact. It explained it had set up its website to facilitate this. However, the list of email addresses in the form requested could not be used in this way. Either an individual would email everyone or email people at random.

47. The Commissioner has considered the accountability arguments against the information that has been requested. He finds that it is appropriate to consider the Information Tribunal's view about accountability in *Cabinet Office v Lamb and the Information Commissioner* [EA/2008/0024 & 0029] which explained *'Disclosure under FOIA should be regarded as a means of promoting accountability in its own right and a way of supporting the other mechanisms of scrutiny, for example, providing a flow of information which a free press could use'*. This indicates that even though the email addresses on their own add little to the public understanding of how the University operates, their disclosure may facilitate or support scrutiny by allowing the applicant to invite the University's staff to raise issues of concern. He therefore finds the arguments about accountability should be given some weight. However, the weight of these arguments is mitigated by the further evidence that has been provided in this case. This evidence shows that there is real awareness of FOI within the University and there are set channels where members of staff can raise their concerns.

48. The Commissioner also accepts that there is a public interest in knowing the number of staff and who are employed by public funds. In addition, there is a public interest in making it possible to contact relevant individuals where their expertise would merit their contact. However, in this case it must be noted that the number of staff is known and the list by itself provides no information that would enable specific individuals to be selected.

49. The complainant has also argued that the University's staff are likely to be interested in the services that he offers. He supported this argument by the interest shown in his service when he has approached other Universities. He explained that the marketing of the service provided a real benefit to the staff. The Commissioner's view is that while some services will be useful to individual members of staff, he is obliged to consider the effect of disclosing this information to the whole public, which will include less useful and/or harmful services too.

Public interest arguments in favour of maintaining the exemption

50. The University has provided detailed submissions about why it believes that the public interest favours the maintenance of the exemption. It is important to note that only factors that relate to the likely prejudice of the effective conduct of public affairs can be considered in this analysis.

51. The University has detailed the following public interest arguments for the Commissioner to consider:

- Ensuring that all external email enquiries are routed through agreed communication channels, minimising disruption and the waste of staff time. This also ensures that enquiries are dealt with in a consistent and prompt manner;

- Avoiding the problems associated with disclosure of the list to the public, which would lead to many more unsolicited marketing messages, SPAM and phishing attacks;

- To protect its staff from the adverse effect of these additional attacks; and

- Ensuring the reputation of the University is not damaged by fraudulent mailings and stopping staff time wasted by preventing other stakeholders blocking legitimate business emails from being received (because of previous attacks) .

52. When making a judgment about the weight of the University's public interest arguments, the Commissioner considers that he is correct to

take the severity, extent and frequency of prejudice or inhibition to the effective conduct of public affairs into account.

53. The Commissioner considers that there are two key public interest arguments that favour the maintenance of the exemption:

    1. The provision of the list to the public would undermine the channels of communication and lead to a consistent loss of time from the University's core functions; and

    2. The provision of the list to the public would leave the University and its staff more open to phishing attacks and the resulting problems that may be suffered.

54. The Commissioner is satisfied that the first theme of arguments would amount to a fairly severe prejudice, whose extent and frequency would be potentially unlimited. He is therefore satisfied that these public interest factors should be given real weight in this case and they favour the maintenance of the exemption.

55. The Commissioner is also satisfied that the second theme of arguments relate to a severe prejudice, whose extent and frequency would be potentially unlimited. As noted above, he has considered the complainant's counterarguments that IT security systems should be able to mitigate this prejudice. However, he notes that IT security systems are not perfect and the nature of attacks is always evolving. In addition, the University has users of different experience and phishing attacks have caused bad consequences in the past for this University. The Commissioner considers that the presence of IT security systems cannot be taken into account, because future attacks may be able to do damage before the IT security systems can intervene. He is therefore satisfied that this prejudice would be likely from the release of this information to the public and that these public interest factors should be given real weight in this case and they favour the maintenance of the exemption.

Balance of the public interest arguments

56. When considering the balance of the public interest arguments, the Commissioner is mindful that the public interest test as set out in the Act relates to what is in the best interests of the public as a whole, as opposed to interested individuals or groups.

57. In this case the Commissioner considers that there is some weight to the public interest arguments on both sides. The Commissioner appreciates that the arguments in favour of additional accountability and transparency have some weight in this case. He accepts that it is

important for a University to be as transparent as possible where there is not a significant adverse effect. However, in the circumstances of this case he considers that the weight of public interest factors maintaining the exemption are greater than those that favour disclosure. He is satisfied that the disclosure of the information to the public would be highly likely to prejudice the University from its core functions – both because it would undermine the channels of communications and leave the University open to spam emails and their consequences. Given the negative impact this would have on the University, the Commissioner has concluded that the public interest favours maintaining the section 36 exemption.

58. In light of the above, the Commissioner finds that the public interest lies in maintaining the exemption, and therefore withholding the disputed information outweighs the public interest in disclosure. The Commissioner is satisfied that the disputed information was correctly withheld by the University and upholds the application of section 36(2)(c).

59. As the Commissioner has found that section 36(2)(c) has been appropriately applied, he has not gone on to consider the application of section 40(2).

Procedural Requirements

Section 17

60. Section 17(1)(b) requires that a public authority specifies which exemption it is relying upon by the time for compliance. The University did not rely on section 36(2)(c) until the Commissioner's investigation. It therefore failed to mention it within the time for compliance. This constitutes a breach of section 17(1)(b).

61. Section 17(3) requires that a public authority explains why the public interest factors that favour the maintenance of a qualified exemption outweigh the public interest in disclosure of the information. The University did not apply a qualified exemption until the Commissioner's investigation and therefore failed to outline the public interest factors by the time of its internal review. It therefore breached section 17(3).

The Decision

---

62. The Commissioner's decision is that the University dealt with the request substantively in accordance with the requirements of the Act. This is because it applied section 36(2)(c) appropriately to all of the withheld information.

63. However, the Commissioner has also decided that there were procedural breaches of sections 17(1)(b) and 17(3) because the University did not apply section 36(2)(c) until the Commissioner's investigation.

Steps Required

64. The Commissioner requires no steps to be taken.

Right of Appeal

65. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

66. 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.

67. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 26th day of May 2011

Signed ……

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

Legal Annex

The Freedom of Information Act 2000

Section 1 - General right of access to information held by public authorities

(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

(3) Where a public authority—

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

...

Section 17 - Refusal of request

(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.

(2) Where—

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—

(i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

(ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

(6) Subsection (5) does not apply where—

(a) the public authority is relying on a claim that section 14 applies,

(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

(7) A notice under subsection (1), (3) or (5) must—

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50.

Section 36 - Prejudice to the effective conduct of public affairs

(1) This section applies to-

(a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
(b) information which is held by any other public authority.

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(a) would, or would be likely to, prejudice-
(i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
(ii) the work of the Executive Committee of the Northern Ireland Assembly, or
(iii) the work of the executive committee of the National Assembly for Wales,

(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.

...

Section 40 – Personal information

"(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.

(3) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the [1998 c. 29.] Data Protection

Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

(5) The duty to confirm or deny—

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either—

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the [1998 c. 29.] Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the [1998 c. 29.] Data Protection Act 1998 shall be disregarded.

(7) In this section—

- "the data protection principles" means the principles set out in Part I of Schedule 1 to the [1998 c. 29.] Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
- "data subject" has the same meaning as in section 1(1) of that Act;
- "personal data" has the same meaning as in section 1(1) of that Act."

Data Protection Act 1998

Section 1 - Basic interpretative provisions

(1) In this Act, unless the context otherwise requires—

- "data" means information which—

  (a)
  is being processed by means of equipment operating automatically in response to instructions given for that purpose,

  (b)
  is recorded with the intention that it should be processed by means of such equipment,

  (c)
  is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or

  (d)
  does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

- "data controller" means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;

- "data processor", in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;

- "data subject" means an individual who is the subject of personal data;

- "personal data" means data which relate to a living individual who can be identified—

  (a)
  from those data, or

  (b)
  from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

  and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

- "processing", in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—

(a)
organisation, adaptation or alteration of the information or data,

(b)
retrieval, consultation or use of the information or data,

(c)
disclosure of the information or data by transmission, dissemination or otherwise making available, or

(d)
alignment, combination, blocking, erasure or destruction of the information or data;

- "relevant filing system" means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.

(2) In this Act, unless the context otherwise requires—

(a) "obtaining" or "recording", in relation to personal data, includes obtaining or recording the information to be contained in the data, and

(b) "using" or "disclosing", in relation to personal data, includes using or disclosing the information contained in the data.

(3) In determining for the purposes of this Act whether any information is recorded with the intention—

(a) that it should be processed by means of equipment operating automatically in response to instructions given for that purpose, or

(b) that it should form part of a relevant filing system,

it is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area.

(4) Where personal data are processed only for purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.