

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 February 2019

Public Authority: The Governing Body of the Open University

Address: The Open University

Walton Hall

Milton Keynes

Buckinghamshire

MK7 6AA

Decision (including any steps ordered)

1. The complainant requested information about emails and tutor forums on recorded tutorials and reasonable adjustments. The Open University (the University) provided some information and refused the remainder of the request under section 36(2)(b)(ii), – prejudice to the conduct of public affairs.
2. The Commissioner is satisfied that section 36(2)(b)(ii) is engaged. The Commissioner does not require the public authority to take any action.

Request and response

3. On 4 March 2018 the complainant requested the following information:

'[Q1] - Email Communications

Emails have been exchanged between members of staff, employed by the Open University, discussing the subject of recorded tutorials and also discussing the need to make reasonable adjustments for disabled students.

I would like to receive a copy of these email transcripts. I believe emails have been sent or received by, at least, the following departments or individuals:

The Student support team [email address redacted];

Student recruitment and Fees [email address redacted];

Student recruitment and support [email address redacted];

*OU Computing helpdesk email address redacted];
[8 names of staff and their email addresses redacted]*

This list is not exhaustive and there may be other individuals or departments who have sent emails about these topics of conversation that I have not listed. I would like these emails to be included in your response.

[Q2] - Tutor Forum

Discussions have taken place on what I understand to be a 'tutor forum' in relation to recorded tutorials or reasonable adjustments for disabled students. I would like to receive a copy of these discussions, please.

[Q3] - All other information

Please send me any other information you hold on file that relates to the recording of tutorials or the need to make reasonable adjustments for disabled students...'

4. On 29 March 2018 the University provided a response and disclosed documents for protocols and guidance on the recording of tutorials for Q3 - all other information. The University requested additional time to consider the public interest test for the first part of the request.
5. On 27 April 2018 the University provided a response to Q2 - for discussions on tutor forums relating to the recording of tutorials. The University confirmed that it held some information and cited the exemption at section 36(2)(b)(ii) where, in the reasonable opinion of a "qualified person", disclosure of the information would, or would be likely to, inhibit the free and frank exchange of views for the purpose of deliberation.
6. The complainant requested an internal review on 21 May 2018. She advised that no information had been provided for Q1 - information held within email accounts. Section 36 had been cited to withhold the information for Q2 - tutor forums and she had received some information for Q3 - other relevant information.
7. The complainant argued that:
 - Emails were exchanged by, at the very least, two members of staff (2 names from the 8 staff names on the request redacted) that discussed recorded tutorials and reasonable adjustments for disabled students ... I originally asked the Open University to provide me with a copy of this email exchange in a letter relating to my subject access request, dated 1st March 2018.

- A dispute has developed between myself and the Open University in relation to the recording of tutorials this term. My understanding is that, whether it be within the tutor forum or within email exchanges, the Open University is obliged to provide information about its' internal activities... I do not believe it is appropriate to suggest there should be a "safe place" for tutors to discuss important issues relating to students.
8. The University sent the outcome of its internal review on 6 June 2018. It apologised for not responding to the first part of the request [Q1]. The University cited section 12 of FOIA to refuse the request for all email communications on tutorial recordings and reasonable adjustments, assuming 60 relevant staff/generic mailboxes. It offered to search for a narrower request and would contact the 2 named members of staff on their return to work.
 9. The University upheld the decision to cite the exemption at section 36(2)(b)(ii) for Q2 on the tutor forum discussions.
 10. The University also noted that there were comments relating to a complaint (not FOIA) and these were forwarded to the appropriate team.
 11. On 20 December 2018, the University advised the Commissioner that it had separately responded to the complainant's refined FOIA request for the emails of 2 named members of staff citing section 40.

Scope of the case

12. On 17 June 2018 the complainant wrote to the Commissioner to complain about the way her request for information had been handled.
13. The Commissioner notes that this FOIA request follows a subject access request and that there are other issues, disputes and complaints mentioned on this subject area. However, this investigation is limited to the FOIA request of 4 March 2018.
14. The Commissioner notes that information has been disclosed for Q3 and the complainant has not disputed this.
15. The Commissioner advised the complainant that her initial view was that the University was correct to cite section 12 to all the emails in Q1. The complainant has not disputed this initial view and has since received a separate response to her refined request. Therefore section 12 (for Q1) will not be investigated by the Commissioner in this decision notice.

16. The Commissioner considers the focus of the investigation to be whether the University was entitled to rely upon the exemption at section 36(2)(b)(ii) to refuse the tutor forum information in Q2.

Reasons for decision

Section 36 – prejudice to the conduct of public affairs

17. Section 36(2) of FOIA states that information is exempt if in the reasonable opinion of a qualified person, disclosure of the information –
- (b) would or would be likely to inhibit:
- (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purpose of deliberation, or
- (c) would otherwise prejudice, or would be likely to otherwise prejudice the effective conduct of public affairs.
18. Section 36 is unique in that its application depends on the opinion of the qualified person that the inhibition envisaged would, or would be likely to occur. To determine whether the exemption was correctly engaged by the University, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:
- Ascertain who the qualified person is,
 - Establish that they gave an opinion,
 - Ascertain when the opinion was given, and
 - Consider whether the opinion was reasonable.
19. The qualified person for the University is Professor Mary Kellett, Vice Chancellor. The University has advised the Commissioner that the qualified person's opinion was sought at the time of the initial request, was given the background to the application and the nature of the information requested. She gave her opinion on 25 April 2018 and upheld this opinion on 6 December 2018.
20. The Commissioner is therefore satisfied that the qualified person did provide her opinion that the information in question was exempt under sections 36(2)(b)(ii).

21. The exemption can be engaged on the basis that the prejudice to public affairs either 'would' or would be 'likely' to occur. In this case, the University's qualified person did not specify, at the time, a recommendation on the level of likelihood. On review, the University stated that the level of likelihood of prejudice '*fell within the broad range but included the higher level*'. The University stated that it now uses the Commissioner's pro-forma which requires a more explicit recommendation of likelihood. The Commissioner considers that in this case, the University has applied the higher level of likelihood i.e. that the qualified person considers the prejudice would occur.
22. The Commissioner now needs to consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy herself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold. The qualified person's opinion can only be considered unreasonable if it is one that no reasonable person could hold.
23. The University has explained that the requested information related to tutorial discussions on the recording of online tutorials on a particular undergraduate module.
 - The University policy for recording online tutorials is flexible and allows different module teams to agree their own approach.
 - In late 2017/early 2018 module teams were reviewing their own approaches and the discussions on the tutor forums informed these reviews.
24. The University considered that releasing these discussions from the tutor forum would prejudice the free and frank exchange of views for the purposes of deliberation. Disclosure would have a 'chilling effect' on the exchange of views in the 'safe space' for discussion:
 - The importance of such a safe space is particularly relevant to the University as the majority of tutors are not physically based in the same building, they operate externally as the University is a distance learning organisation.
 - the safe space nature of the forum is an essential element of its operation in a distance learning environment

25. The University advised the Commissioner that although the current position is now settled for the module, the policy on recording tutorials is to be flexible and may be revised in the future. Therefore, the chilling effect remains live.
26. Having viewed the withheld information, the Commissioner is satisfied that the qualified person's opinion (that disclosure would inhibit the free and frank exchange of views for the purpose of deliberation) is a reasonable opinion to hold. Internal discussions relating to the recording of online tutorials for a particular module need a safe space to ensure that there can be a candid analysis of the issues and that it would not necessarily be helpful to publish these discussions to a wider audience.
27. The Commissioner is satisfied that it is reasonable for the qualified person to have concerns over the release of this information.
28. For these reasons, the Commissioner finds that the exemption provided by section 36(2)(b)(ii) is engaged in respect of all the information to which it has been applied.

Public interest test

29. Section 36 is subject to the public interest test as set out in section 2 of the Act. This means that although the exemption is engaged, the information can only be withheld if in all the circumstances of the case the harm that disclosing the information would cause is greater than the public interest in its disclosure.
30. The Commissioner's approach to the competing public interest arguments in this case draws heavily upon the Information Tribunal's Decision in the case of *Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)*¹. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion the Commissioner must give weight to that opinion as an important piece of evidence in her assessment of the balance of the public interest.
31. Although the Commissioner has accepted the qualified person's opinion to be a reasonable one in respect of the withheld information, and will therefore give some weight to that opinion, she will reach her own view on the severity, extent and frequency of that inhibition to the decision making process occurring.

¹ EA/2006/0011; EA/2006/0013

Public interest arguments in favour of disclosure

32. The complainant argued it is not appropriate to suggest there should be a "safe place" for tutors to discuss important issues relating to students.
33. The University recognised that there is a public interest in greater transparency on issues relating to access by disabled students and has already released all policies on the recording of tutorials (Q3).

Public interest arguments in favour of maintaining the exemption

34. The University considered that the public interest centred on the key role of tutor forums in the University as a distance learning organisation.
35. Disclosure would inhibit free discussion which would then disable the operation of the tutor forums as fully functioning collaborative tools. This could then damage the quality of the teaching and student support offered by the University:
 - Tutors would find it increasingly difficult to collaboratively discuss and develop initiatives and test policies and practices.

Balancing the public interest arguments

36. The University considered that it was not in the public interest to undermine the University's success and effectiveness in supporting their students to access higher education.
37. The Commissioner has considered both the complainant's and the University's public interest arguments.
38. The Commissioner notes that there is always a strong public interest in openness and transparency, particularly in ensuring fair and effective decision-making. However, the Commissioner recognises that there is a strong public interest in tutors having the ability to conduct free and frank discussions for the purposes of deliberation and decision making in order to deliver an effective and responsive service to their students.
39. Both the need for candour and the value of safe space are important if the tutors in a distance learning organisation, such as the University, are to have the best opportunity to discuss and resolve such initiatives and practices as recording online tutorials.
40. In light of the above, and having viewed the withheld information, the Commissioner is satisfied that the public interest favours withholding this information. The Commissioner finds that the University is entitled to withhold the requested information under section 36(2)(b)(ii).

Right of appeal

41. 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

42. 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.
43. 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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