

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 April 2024

Public Authority: Governing Body of University of Sheffield
Address: Western Bank
Sheffield
S10 2TN

Decision (including any steps ordered)

1. The complainant requested copies of briefings provided to the University of Sheffield (the University) by Horus Security Consultancy Ltd and information on how much the University has spent on services provided by Horus Security Consultancy Ltd ('Horus'). The University refused the request under section 41 (provided in confidence), section 43 (commercial interests) and section 40 (personal information) of FOIA.
2. The Commissioner's decision is that the University was entitled to rely on sections 41 and 43 of FOIA to refuse the request.
3. The Commissioner does not require further steps.

Request and response

4. On 17 July 2023, the complainant wrote to the University and requested information in the following terms:

"This is a request for information under the Freedom of Information Act. I would like to request the following information:

(1) According to this report:

<https://nowthenmagazine.com/articles/sheffield-university-hired-private-investigators-monitored-student-elections-activists-occupations>
the university received briefings from Horus Security Consultancy Ltd. One briefing is displayed on the website, and is titled "Issue 35".

In light of this, please provide:

- Issue 35 in full
- Issue 1 to 34 in full
- And any further issues the university received after 8th March 2023

(2) Please state how much the university has spent on services provided by Horus Security Consultancy Ltd.”

5. The University responded on 11 August 2023 and advised that it was relying on section 41 to withhold the briefings and on section 43 of FOIA to withhold information related to spend on services provided by Horus.
6. On 1 December 2023, the University provided its internal review response. It upheld its reliance on sections 41 and 43 and advised that it was also relying on section 40(2) of FOIA to withhold the copies of the briefings.

Scope of the case

7. The complainant contacted the Commissioner on 29 October 2023 to complain about the way their request for information had been handled.
8. The Commissioner considers the scope of his investigation is to determine whether the University correctly applied the cited sections of FOIA to refuse the request.

Reasons for decision

Section 41 – information provided in confidence

9. Section 41(1) of FOIA states that information will be exempt if:
 - it was obtained by the authority by any other person;
 - its disclosure would constitute an actionable breach of confidence;
 - a legal person could bring a court action for that breach of confidence; and
 - the court action would be likely to succeed.

Was the information obtained from another person?

10. Section 41(1)(a) states that the information must have been obtained from "any other person".
11. In its responses to the complainant and its submission to the Commissioner, the University confirmed that the briefings were provided by a security consultancy firm that is a private limited company and separate legal entity. The Commissioner is therefore satisfied that section 41(1)(a) has been met. He must now consider whether or not its disclosure to the public would constitute a breach of confidence 'actionable' by that or any other person. A breach of confidence will be actionable if:
 - The information has the necessary quality of confidence;
 - The information was imparted in circumstances importing an obligation of confidence; and
 - There was an unauthorised use of the information to the detriment of the confider.

Does the information have the necessary quality of confidence?

12. In the Commissioner's view, information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial.
13. The University advised that the briefings were shared in confidence, with clear confidential markings on the briefing itself. The University provided the Issue 35 briefing as part of its submission, and the Commissioner notes that the briefing is specifically marked as "sensitive-personal" and he notes that at the time of the request, the analytical information contained in the briefing was not otherwise accessible and was not trivial in nature. The Commissioner therefore accepts that the information clearly has the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

14. As noted above, the briefings are specifically marked as confidential and were provided to the University as per a paid service. Based on the content of the information and the manner in which it was shared with the University, the Commissioner is satisfied that this criterion is met.

Would disclosure be of detriment to the confider?

15. The University has explained that if it were to disclose the briefings, there would be a detriment to Horus' commercial interests. It explained that the information in the digest briefings consists of briefings about

potential security risks, including occupations, demonstrations, and protests, which directly affect the University, as well as briefings on issues which affect the city of Sheffield and national university developments. It stated that although some of the information contained in the briefings is already in the public domain, it is not available publicly in a centralised format. The briefings also contain commentary from Horus relating to analysis of risk, including its probability and severity, that is not in the public domain.

16. The University explained that the briefings take a significant amount of time and research to prepare and that Horus' business model involves offering the service of carrying out this research and preparing an easy-to-read digest on behalf of its clients. The University considers that if the briefings were made available to the public soon after preparation, then this would undermine the business model. This is because it would mean that the information they had prepared would enter the public domain and become accessible to other universities for free, without those universities having to pay for Horus' services.
17. The University added that while the briefings contain an element which is bespoke to the University, they also contain information about national university developments. This would be of interest to other universities and would become accessible to those universities without them having to pay for it.
18. The University added that if it released the requested information it could weaken its contracting position in the future. If organisations believe that the University releases sensitive documents of this nature then it could impact organisation's willingness to contract with the University for fear of what it might disclose under FOI.
19. The Commissioner notes that the withheld information contains detailed information and analysis provided as part of a paid service. He is satisfied that disclosing it would be likely to be detrimental to Horus as the provider and to the reputation of the University if it was considered to be releasing confidential information.

Is there a public interest defence to the disclosure of the information?

20. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional 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 FOIA). British courts have historically recognised the importance of

maintaining a duty of confidence, so it follows that strong public interest grounds would be required to outweigh such a duty.

21. However, disclosure of confidential information where there is an overriding public interest is a defence to an action for breach of confidentiality. The Commissioner is therefore required to consider whether the University could successfully rely on such a public interest defence to an action for breach of confidence in this case.
22. The complainant has stated: "it is vital that the public sees the withheld information to assess the extent of this surveillance. It appears that the monitoring concerned demonstrations and protests - which relate to Article 10 and 11 of the Human Rights Act - so it is necessary to examine how these rights may have been violated."
23. The Commissioner notes the complainant's argument that there is strong public interest in having the ability to assess the extent of surveillance of students and their elections and protests. However, he also notes that information about such student activity is already available in the public domain and can be therefore be accessed and analysed to meet the public interest.
24. The Commissioner has, therefore, decided that the University was correct to apply section 41 to withhold the copies of the briefings. He will now go on to consider the University's application of section 43 of FOIA to the second part of the request.

Section 43(2) – commercial interests

25. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
26. The Commissioner has defined the meaning of the term "commercial interests" in his guidance on the application of section 43 follows:

"A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent."¹

¹ [Section 43 - Commercial interests | ICO](#)

27. Most commercial activity relates to the purchase and sale of goods but it also extends to other fields such as services.
28. The Commissioner's guidance says that there are many circumstances in which a public authority might hold information with the potential to prejudice commercial interests.
29. The public authority must demonstrate a clear link between disclosure and detriment to the commercial interests of either itself, a third party or both. There must also be a significant risk of the prejudice to commercial interests occurring and the prejudice must be real and of significance for it to be successfully engaged.
30. The actual harm that the public authority alleges would or would be likely to occur if the withheld information was disclosed has to relate to commercial interests.
31. The exemption is subject to the public interest test. This means that, even if the exemption is engaged, the Commissioner needs to assess whether it is in the public interest to release the information.
32. The University has explained that disclosing information on spend for service provided by Horus would prejudice the commercial interests of the company because it would reveal information about its pricing structure and would reveal the annual fee that it charges the University for providing the briefings.
33. The University explained that, if this information became publicly known, it would enable competitors to adjust their prices accordingly, which would undermine Horus and place the company at a disadvantage when negotiating for future work. It would also place Horus at a commercial disadvantage when negotiating with other potential clients, who would be aware of the amount paid by the University for this service. It considers that this would have a negative impact on Horus' business model and would be likely to lead to increased costs for the company. It reasoned that these costs would then be passed onto Horus' existing clients, which would have a negative financial impact on the University.
34. The University also considered that if it were to disclose the requested information, its own commercial interests could be impacted as it could affect its future contract negotiations and it could prevent other companies from choosing to work with the University in the future.
35. The Commissioner accepts that disclosing this information would be likely to result in commercial prejudice to Horus and the University alike. The exemption at section 43(2) is engaged.

36. The Commissioner will now consider the public interest factors in favour of disclosing this information or continuing to withhold it.

Public Interest Test

Public interest factors in favour of disclosing the requested information

37. The University has acknowledged that there is a public interest in openness and transparency into how the University spends public money.

Public interest factors in favour of maintaining the exemption

38. The University has explained that there is a public interest in allowing the University to withhold information which, if disclosed, would reduce the ability of the University and its contractors to negotiate or compete in a commercial environment.
39. The University considers that revealing information about Horus' pricing structure would be likely to discourage contractors from cooperating with the University if they feel that their pricing information will be published in the public domain. It considers that this could hamper the University's ability to procure services in the future.
40. The University added that disclosure of the information may prejudice prices offered by other third party suppliers for different contracts in the future if those third party suppliers have an expectation that their commercial terms will be published.

Balance of the public interest

41. Whilst the Commissioner accepts that there is public interest in transparency about how the University spends its money, he also understands the importance of maintaining its ability to negotiate and procure services competitively. The Commissioner is also mindful that the prejudice to commercial interests extends to Horus. The balance of the public interest is weighted in favour of non-disclosure as the Commissioner agrees that the release of this information is likely to result in a reduction in both Horus' and the University's ability to negotiate, a reduction in Horus' competitiveness and a risk to its business model. None of these factors are in the public interest.
42. As the Commissioner has decided that the information has been appropriately withheld under sections 41 and 43(2) of FOIA, he has not gone on to consider the University's citing of section 40(2) of FOIA.

Right of appeal

43. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

44. 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.
45. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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