

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 19 September 2024

**Public Authority:** The Council of St Mary's University

**Address:** Waldegrave Road  
Strawberry Hill  
Twickenham  
TW1 4SX

#### **Decision (including any steps ordered)**

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1. The complainant has requested consultation material and email correspondence associated with the Universities and Colleges Employers Association (UCEA). St Mary's University ('the University') relied on section 41 of FOIA (provided in confidence) to refuse part one of the request and stated that it did not hold the information requested in part two.
2. The Commissioner's decision is that the University was entitled to rely on section 41(1) of FOIA to refuse the first part of the request. However, he also finds that the University breached sections 1(1)(a) and 17(1) of FOIA by failing to confirm that it held the requested information, and by failing to provide a section 41 refusal notice within 20 working days of the request.
3. The Commissioner does not require further steps.

#### **Request and response**

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4. On 29 November 2023, the complainant wrote to the University and requested information in the following terms:

"Pursuant to the FOIA 2000, I'd like to respectfully ask for:

Part I

The contents of the 2021-2022 and 2022-2023 formal UCEA consultation that correspond to Stage 3 of the "Consultation process", and which you need to fill when you decide to partake in the New [Joint Negotiating Committee for Higher Education Staff] JNCHES mechanism. I refer to the mechanism described in the "UCEA Code For Participating Employers", for further contextualization.

## Part II

Electronically recorded information (memorandums, e-mails, briefings, guidance, etc.) related to the "3 in 3" strategy deployed by UCEA and its members in response to UCU's Marking Boycott. You can restrict search from the 01-08-2022 to the 25-11-2023 (1 year 4 months approx.) and only deal with the accounts of your "Senior Management Team" (SMT or equivalent)."

5. The University responded on 1 February 2024. It stated that it was relying on section 41 of FOIA to refuse the first part of the request and that it did not hold the information requested in the second part of the request.
6. The complainant requested an internal review of the University's response on 3 February 2024. The University did not provide an internal review response.

## Scope of the case

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7. The complainant contacted the Commissioner on 2 April 2024 to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of his investigation is to determine whether the University was entitled to rely on section 41 of FOIA to refuse the first part of the request. As the complainant did not raise issue with the University's response to the second part of the request, the Commissioner has not considered whether information is held in scope for that part.

## Reasons for decision

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### Section 41(1) of FOIA – information provided in confidence

9. Section 41(1) of FOIA states that information is exempt from disclosure if (a) the information was obtained by the public authority from any other person and (b) disclosing the information to the public would constitute an actionable breach of confidence.

10. The Commissioner has recently made decisions on similar cases - IC-283331-T1J9<sup>1</sup> and IC-288421-N3R9<sup>2</sup> - which consider the same request handled by different public authorities. He has also made a recent decision about a very similar request to another public authority in IC-288420-G5Z4<sup>3</sup>.
11. In their complaint to the Commissioner, the complainant has stated that the substantive information they sought, namely answers to a consultation, is obviously information generated by the University.

**Was the withheld information obtained from another person?**

12. The information in this case has the same characteristics as the information in IC-283331-T1J9 and IC-288421-N3R9, which the Commissioner found to have been provided to that public authority by UCEA. As outlined in IC-288420-G5Z4 (paragraph 33) the Commissioner finds that the limited information that has been created by the University is not disclosable because it would also require the disclosure of the questions asked by UCEA in order for it to be understood. He also considers that any selected responses from a drop-down or multi-choice menu to have been "obtained from any other person", even if the selection has been made by the University.
13. For the same reasons, the Commissioner is satisfied that disclosing the withheld information in this case would mean disclosing information the University obtained from UCEA. Therefore, the test at section 41(1)(a) is met.

**Would disclosure constitute an actionable breach of confidence?**

14. When he's considering whether disclosing information would constitute an actionable breach of confidence, the Commissioner takes account of three tests.
15. First, the Commissioner is satisfied that the information in this case has the necessary quality of confidence because it's not trivial and it's not otherwise accessible.
16. Second, the Commissioner has considered whether the withheld information was imparted in circumstances importing an obligation of confidence. In its submission to the Commissioner, the University has

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<sup>1</sup> [ic-283331-t1j9.pdf \(ico.org.uk\)](#)

<sup>2</sup> [ic-288421-n3r9.pdf \(ico.org.uk\)](#)

<sup>3</sup> [ic-288420-g5z4.pdf \(ico.org.uk\)](#)

explained that all information provided by UCEA under the University's conditions of membership are provided in confidence. It explained that this is an explicit term of its membership and any disclosure would be viewed as an actionable breach of confidence by UCEA against the University. The Commissioner is satisfied that the University obtained the requested information from UCEA in confidence as per its conditions of membership.

17. Third, the Commissioner has considered whether unauthorised disclosure of the information would cause a specific detriment to either the party which provided it or any other party.
18. The University explained that confidentiality of the information provided by UCEA is essential in ensuring that the pay JNCHES process is not undermined. It considers that the release of information could compromise the whole process and also damage relations with the trades unions.
19. For the same reasons as set out in the recent decisions referenced earlier in this notice, the Commissioner is satisfied that damaging the relationship of trust between the University and UCEA would cause a detriment to both parties.
20. Having considered the three tests above, the Commissioner is satisfied that, with regard to UCEA, disclosing the information would constitute a breach of confidence.

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

21. 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.
22. 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.
23. The University hasn't put forward a public interest defence and the Commissioner isn't satisfied that such a defence would be viable in this case.

24. The Commissioner acknowledges that the complainant has a valid interest in information about the UCEA and its engagement with universities. There is also a wider public interest in information about the UCEA's approach to pay negotiations and industrial action.
25. However, the Commissioner notes that the UCEA routinely publishes a large amount of information on these topics on its website, which can be considered to satisfy the public interest in the request.
26. The Commissioner is therefore satisfied that it would be an actionable breach of confidence for the University to disclose the withheld information under FOIA. The Commissioner's decision is that the University is entitled to rely on section 41(1) of FOIA to refuse part one of the request.

### **Procedural matters**

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27. The Commissioner finds that University breached sections 1(1)(a) and 17(1) of FOIA by failing to confirm that it held the requested information and failing to provide a section 41 refusal notice within 20 working days of the request.

### **Other matters**

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28. The Commissioner notes that the University did not include details of how to request an internal review in its response to the complainant. Under section 17(7) of FOIA, public authorities are obliged to notify applicants of whether they have an internal review process and, if they do, to set out the details of their review procedures, including details of how applicants request an internal review. They should also inform the applicant of their right to complain to the Commissioner under section 50 if they are still dissatisfied following the outcome of the public authority's internal review.

## **Right of appeal**

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29. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

30. 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.
31. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Keeley Christine**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**