

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 July 2018

Public Authority: UK Research and Innovation

Address: Polaris House
North Star Avenue
Swindon SN2 1FL

Decision (including any steps ordered)

1. UK Research and Innovation has explained to the Commissioner that from 1 April 2018 the seven UK Research Councils (which include the the Engineering and Physical Sciences Research Council - EPSRC), Innovate UK and Research England became part of UK Research and Innovation (UKRI), a non-departmental public body funded by a grant-in-aid from the UK Government. UKRI is now the legal entity for complying with UK Information Access Regimes. UKRI provided the submission to the Commissioner, which retained reference to EPSRC for clarity. The Commissioner notes the new structure but also refers to EPSRC throughout this decision notice; again, for clarity.
2. The complainant requested from the EPSRC information about a particular grant. EPSRC directed the complainant to a website where some relevant information is published. It released other information with some redacted under section 36(2)(b) (inhibition to provision of advice and exchange of views), 36(2)(c) (prejudice to effective conduct of public affairs), 40(2) (third person personal data), 41(1) (information provided in confidence) and 43(2) (commercially sensitive information). During the investigation EPSRC's application of section 40(2) to some information was removed from the scope of the complaint.

3. The Commissioner's decision is that:
 - EPSRC is entitled to rely on section 36(2)(b)(i) and (ii) and section 36(2)(c) with regards to some of the withheld information but the public interest favours releasing this information.
 - EPSRC is not entitled to rely on sections, 41(1) or 43(2) with regards to the information it has withheld under these exemptions.
 - EPSRC breached section 10(1) of the FOIA as it did not comply with section 1(1) within 20 working days.
4. The Commissioner requires EPSRC to take the following step to ensure compliance with the legislation:
 - Disclose the information it has withheld under sections 36(2)(b), 36(2)(c), 41(1) and 43(2) having redacted any third person personal data.
5. EPSRC must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 24 April 2017 the complainant wrote to EPSRC and requested information in the following terms:

"I specifically request copies of all information held by the EPSRC, both electronic and in paper form, relating to –

EP/C51226X/1

Title. fault-Tolerant, Low-Cost Power Conversion and Control For Variable-Speed Generations"
7. EPSRC responded on 21 June 2017. It directed the complainant to a website where some relevant information is published. EPSRC released other information with some redacted under sections 36(2)(c), 40(2), 41 and 43(2).
8. EPSRC provided a review on 16 August 2017. It upheld its original position with regard to the exemptions it had applied. EPSRC also suggested the complainant contact the Principal Investigator to obtain the Final Report, in the first instance.

Scope of the case

9. The complainant contacted the Commissioner on 27 November 2017 to complain about the way his request for information had been handled. During the course of the investigation the complainant confirmed to the Commissioner that he was not interested in the identities of particular individuals and that EPSRC's application of section 40(2) to this information could be removed from the scope of his complaint.
10. The Commissioner's investigation has therefore focussed on EPSRC's application of sections 36(2)(b), 36(2)(c), 41(1) and 43(2) to the information it has withheld and, if necessary and where relevant, the balance of the public interest. She has also considered EPSRC's obligation under section 10(1).

Reasons for decision

Background

11. The complainant's request concerns documents associated with a particular research grant awarded by EPSRC, for a research programme that the Commissioner understands terminated in 2009. EPSRC has noted that at the core of the matter is the EPSRC Peer Review process and it has provided the Commissioner with information that explains that process: 'EPSRC Peer Review'.
12. This document advises that EPSRC relies on expert assessment to inform its investment decisions. For the majority of its schemes this involves sending the proposal documents to a number of experts (at least four) to review, make comments and score the proposal against published assessment criteria. Applications that have received enough support from reviewers will be considered at a prioritisation panel.
13. Prior to the panel, EPSRC staff check reviewer comments and these are made available to applicants to allow them an opportunity to correct factual inaccuracies and respond to any queries the reviewers have raised. The panel scores and ranks the proposals under consideration and EPSRC staff make investment decisions based on the panel's recommendation.
14. EPSRC's material notes that the peer review process follows a number of principles which include 'Confidentiality'. Under this heading, EPSRC advises that proposals are treated in confidence, and it asks those who advise it to do the same.

Section 36 – effective conduct of public affairs

15. EPSRC has withheld the following documents under section 36(2):
 - Referees Assessment and Referees Assessments
 - Speakers Report Forms
16. In its response to the complainant and internal review, EPSRC refers only to section 36(2)(c). In its submission to the Commissioner, EPSRC also refers to section 36(2)(b).
17. Section 36(2)(b) of the FOIA says that information is exempt information if, in the reasonable opinion of a qualified person, disclosure 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.
18. Section 36(2)(c) says that information is exempt information if, in the reasonable opinion of a qualified person, disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
19. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised, qualified person for that public authority. The qualified person's opinion must also be a "reasonable" opinion, and the Commissioner may decide that the section 36 exemption has not been properly applied if she finds that the opinion given is not reasonable.
20. Other than for information held by Parliament, section 36 is a qualified exemption. This means that even if the qualified person considers that disclosure would cause harm, or would be likely to cause harm, the public interest must still be considered.
21. To determine, first, whether EPSRC correctly applied the exemption, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
 - ascertain who was the qualified person or persons
 - establish that an opinion was given by the qualified person
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.

22. EPSRC has told the Commissioner that the qualified person in this case was the EPSRC Chief Executive, Prof Phillip Nelson. The qualified person's opinion was sought by the Director of Resources who was the EPSRC's Senior Information Risk Officer at the time, on 6 June 2017. The qualified person had access to all the information – the information being disclosed and the information being withheld under section 36. Professor Phillip Nelson had considered all the information and had concluded that, in his opinion, both sections 36(2)(b) and (c) were applicable and engaged for the following reasons; that disclosure would
- inhibit the free and frank provision of advice or
 - the free and frank exchange of views for the purposes of deliberation or
 - otherwise prejudice the effective conduct of public affairs.
23. The Commissioner is satisfied that the opinion was that of the appropriate qualified person for EPSRC, provided at the appropriate time. She has gone on to consider whether that opinion is reasonable. It is important to note that this is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold. This only requires that it is a reasonable opinion, and not necessarily the most reasonable opinion. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, she must find that the exemption is engaged.
24. With regard to both section 36(2)(b) and 36(2)(c), the qualified person's opinion in this case seems to be that prejudice *would be likely to* occur if the withheld information was to be disclosed, rather than would occur. 'Would be likely' imposes a less strong evidential burden than the higher threshold of 'would occur'.
25. With regard to section 36(2)(b), the Commissioner considers that the exemption concerns processes that may be inhibited at the time of the request and in the future, rather than harm arising from the content or subject matter of the requested information itself. The key issue in this case is whether disclosure could inhibit the process of providing free and frank advice for the purposes of deliberation, associated with a grant application peer review process.
26. Section 36(2)(c), on the other hand, refers to the prejudice that would be likely otherwise to apply. The Commissioner considers that if section 36(2)(c) is used in conjunction with section 36(2)(b), as in this case, the

prejudice envisaged must be different to that covered by section 36(2)(b).

27. In order for the qualified person's opinion to be reasonable, it must be clear as to precisely how the prejudice or inhibition may arise. In her published guidance on section 36 the Commissioner notes that it is in the public authority's interests to provide her with all the evidence and argument that led to the opinion, in order to show that it was reasonable. If this is not done, then there is a greater risk that the Commissioner may find that the opinion is not reasonable.
28. From the way EPSRC has presented its submission it first appears that it has not provided any arguments or reasoning to support the qualified person's opinion that section 36(2)(b)(i) and (ii) and section 36(2)(c) are engaged. The qualified person's opinion appears to be simply a restating of the two exemptions in the Act.
29. The Commissioner notes however that, in its submission, EPSRC provided additional arguments for applying the exemption: in its introduction to the application of section 36(2) and in its public interest arguments.
30. In this introduction EPSRC has argued that it is very important for it, as it is for all Research Councils (now UKRI), to be able rigorously to scrutinise, and to make fully-informed decisions about, the institutions it funds. EPSRC says it needs to do so through a free flow of relevant information – including information provided to it in confidence – from these independent institutions and reviewers. It argues that it is vital that this happens in an appropriate confidential space, by not *prematurely* (Commissioner's italics) disclosing information unless there is a sufficient public interest in doing so. As explained above, this is carried out by way of a peer review process.
31. EPSRC indicates that disclosing information withheld under section 36(2)(b) would undermine that confidential space. According to EPSRC there would be a real likelihood that, when the need for such input from reviewers arises in the future, the reviewers would be reluctant to provide such detailed and sensitive information.
32. It says the same also applies to highly respected academics and leaders in their respective fields recognised both nationally and internationally. Disclosure would, EPSRC says, inhibit the free and frank provision of advice and exchange of views which are needed for robust scrutiny and decision-making about important academic, financial and research matters.

33. With regard to section 36(2)(c), EPSRC argues that disclosing the withheld information would be likely to prejudice its ability to conduct its public affairs. It says it is likely that the flow of information to EPSRC relating to the information in question would be inhibited therefore restricting its ability to perform its public functions.
34. EPSRC states that any decision to order disclosure of this information would affect the research sector's ability to properly conduct public affairs, thereby seriously damaging the research sector and the public benefit gained from EPSRC funding and activities.
35. The Commissioner has considered the Qualified Person's opinion, which has been supported by EPSRC's additional reasoning. Although she finds the opinion somewhat broad, ie not specific to the circumstances of this case, the Commissioner is prepared to accept that the opinion is reasonable, that the prejudice envisioned under sections 36(2)(b) and 36(2)(c) are different and that both section 36(2)(b) and section 36(2)(c) are therefore engaged. The Commissioner has gone on to consider the public interest arguments associated with these exemptions.

Public interest in disclosing the information

36. EPSRC has referred to the general public interest in disclosing the information in order that it is shown to be open and transparent.

Public interest in maintaining the exemption

37. EPSRC says that releasing the information in question would reveal a peer reviewer's identity and the peer reviewer's assessment. According to EPSRC, this would undermine its peer review process which would have a major impact on, and be a detriment to, how EPSRC delivers its business and obligations. Releasing the information would, it says, have an adverse effect on EPSRC's ability to meet its wider objectives.
38. ESRC has drawn the Commissioner's attention to her decision in FS50074593¹, and particularly paragraph 115. The Commissioner notes that this paragraph simply confirms that the Commissioner considered that the public interest in maintaining the section 36 exemptions in that case outweighed the public interest in disclosing it.

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2008/442694/FS_50074593.pdf

Balance of the public interest

39. The opinion of the qualified person is limited to the degree of likelihood that inhibition or prejudice would occur. In assessing the public interest arguments therefore, particularly those relating to withholding the information, the Commissioner considers the relevance of factors such as the severity, extent and frequency with which providing advice and the free and frank exchange of views, and the conduct of public affairs, might be inhibited if the information was to be disclosed.
40. Finally, the Commissioner considered that the passage of time between the assessments having been carried out and the request for them being submitted did not significantly reduce the likely impact and the severity of the effects described above.
41. FS50074593 dates from 2008 and concerned a request to the MRC for evidence that supported its refusal to fund particular funding applications between 2002 and 2005, including the reports that independent experts who had reviewed the application on behalf of the MRC had provided.
42. On that occasion, the Commissioner decided that disclosing the requested information in that case would have reduced the willingness of Board members to provide detailed comment and advice in the future due to concerns that if potential applicants knew that critical comments might be disclosed, those applicants might be deterred from submitting an application. Any diminution of the free and frank provision of the Board members' views have produce more limited reviews of applications under consideration, which in turn would be detrimental to the quality of feedback that applicants receive on their applications.
43. The Commissioner further found that disclosure would make it more difficult to determine the true merits of particular applications and so would inhibit MRC's effective operation in terms of being able to determine which proposals to support with public money. On a broader level, it would restrict the exchange of ideas within the research communities on which everyone, including applicants and Board members, depended.
44. From its submission it is not quite clear what EPSRC's public interest argument is for maintaining the exemption. It appears to be saying that disclosing the requested information would diminish individuals' willingness to engage in the peer review process in the future. This in turn would be detrimental to how EPSRC carries out its business and objectives.

45. The Commissioner considers that the passage of time between the assessment in question having been carried out and the request for related information being submitted is important in this current case. EPSRC has told the Commissioner that the grant in question was awarded in 2004 – ie 13 years before the request was submitted - and completed in 2008 – nine years before the request was submitted. EPSRC's arguments do not satisfactorily explain why releasing material that is 13 years old, associated with a project that completed nine years ago, would produce a so-called 'chilling affect' ie discourage individuals from engaging in the peer review process now or prevent them from providing free and frank advice and comments on grant applications. Similarly, EPSRC has not satisfactorily explained why releasing material of this age would diminish EPSRC's ability to conduct its public affairs effectively now and in the future.
46. As discussed in her published guidance on section 36, chilling effect arguments operate at various levels. If the issue in question is still live, arguments about a chilling effect on those ongoing discussions are likely to be most convincing. Arguments about the effect on closely related live issues may also be relevant. However, once the decision in question is finalised, chilling effect arguments become more and more speculative as time passes. It will be more difficult to make reasonable arguments about a generalised chilling effect on all future discussions.
47. Whether it is reasonable to think that a chilling effect would occur will depend on the circumstances of each case, including the timing of the request, whether the issue is still live, and the actual content and sensitivity of the information in question.
48. In her published guidance, the Commissioner advises that prejudice to the effective conduct of public affairs (ie section 36(2)(c)) could refer to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose. It may also refer to the disruptive effects of disclosure, for example the diversion of resources in managing the effect of disclosure.
49. The Commissioner does not find EPSRC's public interest argument for withholding the information to be compelling. At the time of the request the research project had been completed nine years earlier. She notes that EPSRC has argued against disclosing information 'prematurely'. Disclosing the information in this case, nine years after the project concluded, could hardly be described a premature disclosure. Nor does the Commissioner find the content of the information in question to be, in the scheme of things, especially sensitive.
50. The identities of particular individuals have been redacted under section 40(2) and the Commissioner is therefore not persuaded that future

potential peer reviewers could now be inhibited if the disputed information in this case was to be released. The Commissioner has also noted the complainant's argument that that other institutions publish material that is similar to that which he has requested, withhold withholding any. Finally, the Commissioner has also taken into account that, during her investigation, EPSRC told her that it no longer uses the peer review process that was in place at the time that the requested information was generated and has not since 2008.

51. With regard to section 36(2)(c), the Commissioner has not been convinced that disclosing the disputed information at this point would cause a disruption to EPSRC's resources to the degree that it could not continue to offer an effective public service. Nor is she persuaded that disclosing material of this age would adversely affect its ability to offer such a service in the future (because individuals would be less likely to engage in a peer review process).
52. To summarise, given the age of the material, and that processes, staff, organisations and bodies are likely to have changed in the interim 13 years, the Commissioner has not been persuaded that the prejudice that EPSRC claims would occur would be likely or severe. In the Commissioner's view the information in question is of little wider public interest but because she finds there is no compelling public interest reason for withholding the information, she finds that the general public interest in public authorities being transparent and accountable is of sufficient weight to tip the balance in favour of disclosure on this occasion.

Section 41 – information provided in confidence

53. In its submission to the Commissioner, EPSRC has explained that the fundamental principle of participants to a grant process is that they provide information to EPSRC in confidence. Participants are offered this confidentiality when they sign up to the process. Proposals to fund research grants were submitted to EPSRC for peers to assess. Peers are usually expert members of the research community who UKRI asks to undertake a confidential review process.
54. EPSRC has provided the Commissioner with a copy its general guidance material on the Peer Review process in which it is stated that *"...proposals are treated in confidence and we ask those who advise us to do the same"*.
55. In addition to the Referees Assessment(s) and Speakers Reports forms discussed earlier EPSRC has withheld the following information under section 41:

- (i) From a 'Standard Report' proforma document:
 - The value of individual funding elements awarded to Durham University
 - The main objectives of the research
 - Beneficiaries
 - Staff Destinations
 - Project Partners
- (ii) From a 'Final Statement of Expenditure' document:
 - The value of individual expenditures including staff and equipment
- (iii) From a 'Final Statement of Expenditure' document:
 - The value of individual expenditures including staff and equipment
- (iv) An 'EPSRC Research Final Report' document
- (v) From an 'Offer Letter' document:
 - The value of individual funding elements awarded to Durham University and grant information related to associated staffing
- (vi) From a letter dated 22 July 2008 regarding final expenditure reconciliation:
 - The value of individual expenditures
- (vii) Referees' Assessments (also discussed in the section 36 analysis)
- (viii) Collaboration Letters
- (ix) From an 'Offer Letter' document:
 - The value of individual funding elements awarded to Durham University and grant information related to associated staffing
- (x) From a 'Final Expenditure Statement Reconciliation Checklist' document:
 - A table of financial sums
- (xi) Speaker's Report forms (also discussed in the section 36 analysis)
- (xii) Referee's Assessment (also discussed in the section 36 analysis)

- (xiii) From a 'Research Proposal' document:
 - Information relating to 'Other commitments'
 - Information relating to Objectives'
- (xiv) A 'Grant Application Form' document (also discussed under the section 43 analysis)
- (xv) A 'Case for Support' document

56. Section 41 of the FOIA says that information is exempt information if (a) it was obtained from any other person and (b) disclosing the information to the public (otherwise than under the Act) would constitute a breach of confidence actionable by that or any other person (ie the aggrieved party would have the right to take the authority to court as a result of the disclosure and the court action would be likely to succeed).
57. Although section 41 is an absolute exemption and is therefore not subject to a public interest test under the FOIA, the common law duty of confidence contains an inherent public interest test.

41(1)(a) – Was the information obtained from another person?

58. The information withheld under section 41 has been listed above. To the Commissioner it appeared that at least some of the above material had been provided by EPSRC to another person, rather than provided to EPSRC. She queried this with EPSRC and it confirmed that all the information to which it has applied section 41 was provided to it by another person: that is, the Principal Investigator and Co-Investigators. The Commissioner accepts that the withheld information was provided to EPSRC by another person

41(1)(b) – Would disclosing the information be an 'actionable' breach of confidence?

59. When determining if disclosure would constitute a breach of confidence, a public authority will usually need to consider:
- whether the information has the quality of confidence
 - whether it 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.

Does the information have the necessary quality of confidence?

60. Information will have the necessary quality of confidence if:

- it is more than trivial; and
 - not otherwise accessible.
61. The Commissioner is satisfied that the withheld information is more than trivial. This is because the information is associated with the awarding of a research grant and the individuals involved are likely to attach some importance to that information.
62. The matter of the information's accessibility is not altogether clear from EPSRC's submission. However, it appears that EPSRC uses an extranet hosted by what was formerly Biotechnology and Biological Sciences Research Council to manage its Peer Review process. Peer Reviewers must have the status of invited members in order to access this website. As such, the Commissioner understands that EPSRC's position is that the specific information in question is not accessible to the wider general public.
63. The complainant argued in his request for an internal review that the Grant Objectives [paragraph 55(i)] are already in the public domain and that other Individual Grant Reviews (IGR) are also already published. The Commissioner has reviewed the Grant Objectives to which the complainant has referred and notes that they were published by the University of Durham, in a job description. While not repeating word for word the Grant Objectives that EPSRC has withheld, in the Commissioner's view it seems likely that it might be deduced what those objectives broadly are, from the published job description. The Commissioner is therefore inclined to the view that the Grant Objectives are otherwise accessible and therefore do not have the necessary quality of confidence.
64. With regards to the complainant's point about other IGRs being published, EPSRC has noted that other institutions might well routinely publish IGRs and that is a matter from them. EPSRC confirmed that it does not – and historically never has – published IGRs on the internet. Moreover, EPSRC says it does not have IGRs anymore as the grant system changed in 2008. EPSRC has explained to the Commissioner that it expects the review process to take place confidentially; that the reviews are the property of the reviewers and it is up to them to publish them, or not to publish them, as they choose.
65. On the basis of this explanation, the Commissioner is prepared to accept that the IGR in this case and the remaining material (apart from the Grant Objectives) are not otherwise accessible and have the necessary quality of confidence.

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

66. EPSRC has told the Commissioner that the grant in question was awarded in 2004 and completed in 2008. All the research findings and the total grant award and expenditure related to this grant and project is in the public domain. EPSRC has explained that what it is protecting through its application of section 41 is the process of deciding what projects to award funding to. It says this process is open and transparent but where necessary, certain information is withheld – such as identities and elements of their assessment – in order to engage and get the assistance of academics and leaders in their fields.
67. In its submission EPSRC has indicated that those engaging in the Peer Review process associated with the research in question would have had an expectation from past experience that information provided by the reviewers would be treated in confidence by EPSRC and by the expert reviewers completing the process. It says that Oversight and Interview Panels would have participated in the expectation of confidentiality being respected and preserved by EPSRC.
68. The Commissioner is prepared to accept that the information in question was imparted in circumstances importing an obligation of confidence.

Would disclosure be an unauthorised use of the information to the detriment of the confider?

69. With regards to detriment, EPSRC has told the Commissioner that if the withheld information was to be disclosed, it could damage the confiders' academic reputations and could make public commercially sensitive information or intellectual property rights.
70. EPSRC has again referred the Commissioner to her decision in FS50074593, which was upheld at appeal. That case concerned a request submitted in 2005 to the Medical Research Council (MRC) for reviewers' reports and its Research Board's assessments for applications for funding into research into ME. The Commissioner found that MRC could rely on section 41. She notes that the grant applications in that case were recent: being from 2002 to the time of the request.
71. The information withheld in this case cannot be categorised as personal or private information. Such information requires its own particular approach under section 41. The Commissioner notes in her published guidance on section 41 that if the requested information is commercial in nature than its disclosure would only constitute a breach of confidence if it would have a detrimental impact on the confider.

72. According to the guidance it therefore follows that, for commercial information, the authority will be expected to put forward an explicit case for detriment. Usually the detriment to the confider in such cases will be a detriment to the confider's commercial interests. EPSRC has indicated that as well as damaging a confider's academic reputation (which might impact on their commercial interests), releasing the information could make public commercially sensitive information or intellectual property rights. Because it has not made any strong or specific supporting arguments, the Commissioner does not find that EPSRC has made a compelling case for detriment and notes that EPSRC has applied section 43 to other information that it considers to be commercially sensitive.
73. The grant in question in this case was awarded in 2004 – 13 years prior to the date of the request – and the grant funded project was completed in 2008 – nine years prior to the date of the request. EPSRC has not put forward a compelling argument as to why releasing the information in question so long after the grant was awarded and the project was completed would nonetheless potentially damage the confiders' reputations and so cause detriment to the confider. Nor has it put forward a compelling case for detriment caused by releasing commercial information so long after the project completed. The case for detriment was more credible in the circumstances of FS50074593. The Commissioner considers each case on a case by case basis and on this occasion she has not been persuaded that releasing the information in this case would be an 'actionable' breach of confidence because she has not been convinced that its disclosure would, at this point, cause a reputational or commercial detriment to the confiders involved.
74. The Grant Objectives are otherwise accessible and therefore do not have the necessary quality of confidence. The remaining information has a quality of confidence and has been imparted in circumstances importing an obligation of confidence. However, EPSRC has not persuaded the Commissioner that the individuals concerned would be subject to detriment if this information was to be disclosed.
75. The Commissioner acknowledges that since the FOIA came into force, third parties should be aware that any information provided to public authorities can be subject to disclosure. She accepts that in certain cases information should be protected by confidentiality. Clearly, this is the provision which the exemption contained within section 41 provides.
76. However, in this case the Commissioner finds that EPSRC has not shown that disclosing the information in question would result in detriment to the confiders concerned. She has, therefore, concluded that section 41 is not engaged in this case and it has not been necessary to consider the public interest aspects.

Section 43 – commercial interests

77. Section 43(2) of the FOIA says that information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
78. Section 43 is subject to the public interest test.
79. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met. Firstly, 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 the applicable interests within the relevant exemption.
80. Second, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice that is alleged must, be real, actual or of substance.
81. Third, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – eg disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
82. From her review of the material EPSRC has provided to her, the information EPSRC has withheld under section 43(2) appears to comprise:
 - Financial information associated with reductions to the grant award
 - A payment schedule
 - A breakdown of EPSRC financial resources required for the project, and
 - Financial information in a Grant Application Form
83. EPSRC has confirmed in its submission that it has withheld under section 43 information that relates to payments to sub-contractors and which it considers to be the commercially sensitive information of the sub-contractors. It also redacted university funding models that it considers

is commercially sensitive to the universities concerned. The Commissioner is satisfied that the first criteria is therefore met because the harm EPSRC alleges is a commercial harm and therefore relevant to the section 43 exemption.

84. With regard to the second criteria, in its submission to the Commissioner EPSRC argues that the categories of requested funding give an indication of the nature of the requests. It says that given the specialist nature of research proposals, there would be a limited number of sources from which to procure consumables/equipment etc. EPSRC says it is highly likely for someone to infer that single source, given the nature of this project. Finally EPSRC has told the Commissioner that it is highly likely that it would be possible to infer individuals' salaries and other aspects of the university's operational model from this particular information. By releasing this information EPSRC says that there is a strong potential to infer commercially sensitive information. In EPSRC's view, disclosure would therefore be likely to prejudice the commercial interests of the contractors and the university.
85. In addition, EPSRC has argued that disclosure would make it less likely that universities and individuals would provide it with commercially sensitive information in the future. This would consequently undermine the ability of the EPSRC to fulfil its public role.
86. In the Commissioner's view these arguments are not particularly clear or compelling. She first notes that EPSRC has released a number of 'Total' costs included in the material in question. Second, she has again considered the age of the material in question: 13 years. In his request for an internal review, the complainant noted that the project had finished nine years ago and that any industrial partners associated with the project "no longer exist".
87. EPSRC has not provided a clear explanation as to why releasing figures that are some 13 years old, associated with a project that concluded nine years ago, would harm the relevant institutions' commercial interests at this point, or at the time of the request. Nor has she been persuaded that, given the discreet circumstances of this particular request, disclosing the requested information would inhibit future universities and individuals from providing EPSRC with commercial information. They must surely *have* to provide appropriate financial information to EPSRC in order for applications to be eligible for consideration.
88. EPSRC has not convinced the Commissioner that the second of the above criteria has been met ie EPSRC has not demonstrated sufficiently robustly any causal relationship between the disputed information being released and any harm coming to the commercial interests of particular

universities or to EPSRC itself. Regarding the third criteria, EPSRC says such harm would be likely to occur. The Commissioner disagrees; she does not consider there to be a real or significant risk of commercial prejudice to universities or to EPSRC being likely to occur.

89. Since two of the above three criteria have not been met, the Commissioner finds that section 43(2) is not engaged. And because she has found that this exemption is not engaged, it has not been necessary to consider any public interest arguments.

Section 10 – time for compliance

90. Under section 1(1) anyone who requests information from a public authority is entitled (a) to be told if the authority holds the information and (b) to have the information communicated to him or her (if it is not exempt information).
91. Section 10(1) of the FOIA says that a public authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of the request. EPSRC exceeded the 20 working days on this occasion and therefore breached section 10(1).

Right of appeal

92. 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

93. 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.
94. 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

Andrew White
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