

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

### **Environmental Information Regulations 2004 (EIR)**

#### **Decision notice**

**Date:** 7 September 2018

**Public Authority:** UK Research and Innovation  
**Address:** Polaris House  
Swindon  
SN2 1FL

The complainant made his request to the Engineering and Physical Sciences Research Council (EPSRC). However from 1<sup>st</sup> April 2018 the seven UK Research Councils (including the 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 the legal entity for complying with FOIA and therefore this Decision Notice is served against that organisation. However, in the decision notice the Commissioner has referred to the EPSRC as if it was the public authority.

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

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1. The complainant made a request for information to the EPSRC for information on mid-term reviews of Centres for Doctoral Training ('CDT') including the scores awarded and any feedback provided. EPSRC confirmed it held scores, letters to the institutions confirming the scores as well as more detailed emails to individual researchers but considered this information should be withheld on the basis of section 40, 41 and 36(2) of the FOIA.
2. The Commissioner's decision is that EPSRC is entitled to rely on section 36(2)(c) in relation to the emails to researchers and the public interest favours maintaining the exemption. EPSRC is entitled to rely on sections 36(2)(b)(i), (ii) and (c) in regard to the scores and feedback letters to institutions but the public interest favours releasing the information. EPSRC is not entitled to rely on section 41 in relation to this information.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the scores and feedback letters to the institutions it has withheld under sections 36(2)(b), 36(2)(c) and 41 having redacted any third party personal data.
4. The public authority must take these steps 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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Request and response**

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5. On 15 August 2017 the complainant made a freedom of information request to the EPSRC which read as follows:

*I write to make a request under the Freedom of Information Act (2000) concerning the mid-term review for Centres for Doctoral Training. This was summarized here:*

*<https://www.epsrc.ac.uk/newsevents/news/cdtreview/>*

*In respect of that exercise, I ask for:*

- 1. The scores of each institution (including their meaning, e.g. if they were scored based on 1-5, then an indication of which was lowest or highest).*
  - 2. The entire spreadsheet that contains said scores (if it exists)*
  - 3. The feedback provided to each institution or centre from this exercise.*
6. The EPSRC responded to the request on 11 September 2017 when it explained that whilst it did not hold the information in parts 1 and 2 of the request for each institution, it did hold scores for each CDT and that it did hold the information for part 3. The EPSRC confirmed that the information was being withheld under the exemptions in section 36(2)(c) (prejudice to effective conduct of public affairs) and section 41 (information provided in confidence).

7. The complainant subsequently asked the EPSRC to carry out an internal review and in doing so challenged its interpretation of his request and its reasons for refusing to disclose the withheld information. The EPSRC presented its findings on 18 October 2017 and upheld the initial response to the request.

## **Scope of the case**

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8. On 23 October 2017 the complainant contacted the Commissioner to complain about the EPSRC's decision to withhold the information he requested.
9. During the Commissioner's investigation the EPSRC clarified it considered section 36(2)(b) and (c) applied to the information it was withholding as well as section 41 and 40(2) where the information constituted personal data.
10. The Commissioner considers the scope of her investigation to be to consider whether the EPSRC has correctly applied any of the exemptions it is relying upon to withhold the information it holds on scores and feedback for each of the CDT's.
11. During the course of the Commissioner's investigation the complainant also suggested that some of the withheld information may constitute environmental information and that therefore the EIR is the correct access regime to apply. Therefore the Commissioner will also need to consider whether the EIR applies to any of the withheld information and whether any of the exceptions under this legislation might also apply.

## **Reasons for decision**

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### **Environmental information**

12. During the course of the Commissioner's investigation the complainant said that he thought some of the withheld information would be environmental information. In order to understand this the Commissioner considers some background to the EPSRC funding of CDT's is needed.
13. The EPSRC is the UK's main agency for funding research in engineering and the physical sciences. EPSRC invests millions of pounds in research and postgraduate training. The request relates to Centres for Doctoral Training (CDTs). These are one of the main ways the EPSRC provides

support for doctoral training and these EPSRC-funded centres bring together experts in different areas to tackle issues and challenges. Students are funded for four years and this includes training and research. Throughout the funding the EPSRC monitor and evaluates the CDTs to determine if sufficient progress is being made to continue with the funding.

14. The Commissioner has viewed all of the withheld information and notes that it can be broadly split into categories:
  - The scores given to each of the CDTs which are either "GOOD", "SATISFACTORY", or "INTERVIEW";
  - Feedback letters to each institution which states what the scores were; and
  - In some cases, separate emails to lead researchers providing information including if they need to take any action before the EPSRC releases further funds.
15. The complainant has pointed to three main priority areas identified by the EPSRC – nuclear, water and sustainable built environments – and argued that, for example, in the nuclear area the EPSRC claims there is a shortage of people able to build new power plants and ensure radioactive material is disposed of properly and CDTs are being expressly funded to fill that gap.
16. The EIR states that environmental information is information on –
  - (a) the state of the elements of the environment such as air, water, land etc
  - (b) factor such as energy, noise, radiation, radioactive waste and releases into the environment that affect any of the elements at (a)
  - (c) measures such as policies, legislations, plans, programmes and activities likely to affect the elements and factors at (a) and (b) as well as measures and activities designed to protect those elements.
17. The complainant is of the view that any CDTs within these priority areas, and other similar areas, are deliberate "measures" under (c) intending to "affect or likely to affect the elements and factors referred to in (a) and (b)". He further argues they are also "measures or activities designed to protect those elements" and the performance of the CDTs is therefore information "on" these measures.
18. The EPSRC countered these arguments by stating that it still maintained the information was not environmental as it relates to the peer review

process employed in the CDT mid-term review exercise and specifically the mechanism for allocating funding rather than measures affecting the elements of the environment or factors affecting or likely to affect the environment.

19. Having considered both arguments and the specific withheld information the Commissioner is of the view the information is not environmental information and that the EPSRC were correct to consider the request solely under the FOIA.
20. This is because whilst the areas identified by the EPSRC might seem to be areas with environmental impact the actual information that has been withheld relates to the funding of the CDTs and the mid-term reviews of the CDTs. This information is not in and of itself environmental as it is information about funding and any concerns around progress and performance. That being said, the Commissioner notes the complainant's point that information on measures such as plans and programmes can be environmental information. She accepts that information on the CDTs in some of the priority areas, such as radioactive waste, could be environmental information as some of the CDTs are programmes designed to protect elements of the environment. However, this would only be the case where the specific withheld information related to the research or planning on tackling radioactive waste. The information solely on the funding of the programme is not directly information on measures or activities affecting an element of the environment and is one step removed from the information described at (c).
21. For this reason, the Commissioner is satisfied the Freedom of Information Act was the correct access regime to consider the request under.

### **Section 36 – prejudice to the effective conduct of public affairs**

22. EPSRC has withheld the following information under section 36(2):
  - The scores given to each of the CDTs which are either "GOOD", "SATISFACTORY", or "INTERVIEW";
  - Feedback letters to each institution which states what the scores were; and
  - Any separate emails to lead researchers providing information including if they need to take any action before the EPSRC releases further funds.

23. 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).
24. 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.
25. 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.
26. 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.
27. 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.
28. 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.
29. EPSRC has told the Commissioner that the qualified person in this case was the EPSRC Chief Executive, Prof Phillip Nelson. The qualified person had access to all the information being withheld under section 36 and 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.
30. 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.
  31. 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'.
  32. 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, in relation to the peer review process.
  33. 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).
  34. 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.
  35. 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.

36. 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.
37. 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 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.
38. 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.
39. 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 and financial matters.
40. 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.
41. 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.
42. 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, i.e. 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 arguments in favour of disclosing the information*

43. EPSRC has referred to the general public interest in disclosing the information in order that it is shown to be open and transparent.
44. The complainant argues there is no evidence to support the position of the EPSRC and states that UKRI provides around a quarter of the funding to Higher Education Institutions in the UK and that their league tables are based on the funding provided so it is unlikely they would be prejudiced by disclosure.
45. The complainant points to the Research Excellence Framework<sup>1</sup> (REF) which is a similar scheme but that publishes results. REF involves peer reviewing of funded research and rankings are compiled based on the published results and the complainant argues there has been no negative impact from this more transparent approach.
46. The complainant further argues there is no evidence of a 'chilling effect' and the arguments by the EPSRC is based on a misrepresentation of how the arrangement works. He argues that academics are not involved in this process voluntarily but must engage with the EPSRC to secure continued funding.
47. A further argument is that some of the information is already publicly available. This is demonstrated by a number of institutions announcing the scores they have been awarded in their mid-term reviews.
48. The complainant also states that the CDT scheme has negative implications as it consolidates fund on a small number of academics and is used as justification for further consolidation by EPSRC of funds. He states that assertions that the CDTs are performing to a high standard cannot be proved true without disclosure of the raw data that show this and allows for external analysis of the scheme.

*Public interest arguments in favour of maintaining the exemption*

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<sup>1</sup> <http://www.ref.ac.uk/about/whatref/>

49. EPSRC state that the releasing the scores and feedback will breach the duty of confidence to all parties (the CDTs, the institutions, the reviewers and the EPSRC). This would have an adverse effect on EPSRC's ability to meet its wider objectives and an adverse effect on a CDTs ability to meet its wider objective.
50. EPSRC has drawn the Commissioner's attention to her decision in FS50074593<sup>2</sup>, 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.
51. EPSRC also argues it is imperative to the proper functioning of a peer review process that there be permitted the free and frank provision of views and advice. It needs to do so through a free flow of relevant information – including information provided to the EPSRC in confidence – from independent institutions and experts. It is vital that this happens in an appropriate confidential and "soft space".
52. Disclosure of the requested information would undermine that confidential space. There would be a real likelihood that, when the need for such input from institutions arises in the future, the institutions would be reluctant to provide such detailed and sensitive information. Especially if it could harm third parties in the form of students or others participating in the process such as respected academics and leaders in their respective fields, recognized both nationally and internationally.

*Balance of the public interest arguments*

53. 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.
54. The Commissioner's previous decision FS50074593 dates from 2008 and concerned a request to the Medical Research Council (MRC) for evidence that supported its refusal to fund particular funding applications between

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<sup>2</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2008/442694/FS\\_50074593.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2008/442694/FS_50074593.pdf)

2002 and 2005, including the reports that independent experts who had reviewed the application on behalf of the MRC had provided.

55. 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 produced more limited reviews of applications under consideration, which in turn would be detrimental to the quality of feedback that applicants receive on their applications.
56. 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.
57. From its submission the EPSRC 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.
58. The Commissioner considers that the timing of a request and the continuing relevance of the information will have some bearing on whether it can be accepted there is a potential chilling effect on future submissions and engagement. In considering this the Commissioner has taken note of the specifics of the CDT mid-term review process.
59. The mid-term review process takes place part way through the lifetime of the doctoral training awards and is used to assess progress rather than to allocate additional funding. The original awards were funded for nine years to recruit five cohorts of doctoral students. Each doctoral student takes four years to complete a PhD and at the time of these reviews three cohorts of students had been recruited. Some were nearly three years into completing their doctoral studentship and others were only six months in. It is argued by EPSRC that the ongoing nature of the funding is important as public disclosure of the progress of the CDTs could impact on the students that were part way through their studies and their potential employment opportunities should information about the performance of their doctoral college be disclosed.
60. EPSRC states that last cohort of students will be recruited in October 2018 and the process for renewing and establishing new CDTs is

underway. Whilst EPSRC states that mid-term reviews will play no part in the assessment of new proposals, seemingly undermining some of the arguments presented by EPSRC against disclosure; it states that disclosing the mid-term review information would potentially allow peer review members to access this and be influenced by this when assessing new proposals.

61. The Commissioner acknowledges that this demonstrates that the information that has been requested is still of relevance as the CDTs are still ongoing. However, this does not mean that it has to be accepted there would be a chilling effect i.e. an unwillingness by individuals to engage in the mid-term review process, or an impact on the EPSRC's ability to conduct its public affairs if the information were to be disclosed.
62. In analysing if there is any weight to these arguments by the EPSRC the Commissioner has looked at the different types of information identified by the EPSRC.

The scores given to each of the CDTs which are either "GOOD", "SATISFACTORY", or "INTERVIEW" and Feedback letters to each institution which states what the scores were

63. 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.
64. 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.
65. 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.
66. The Commissioner does not find EPSRC's public interest argument for withholding the scores or the accompanying letters to be compelling. Whilst the mid-term scores were by their very definition, scores given

whilst the CDTs were ongoing, it is difficult to understand from the EPSRC's arguments how disclosing the scores would lead to any kind of chilling effect on the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation. The provision of the scores in itself is not the provision of advice or even the exchange of views *for the purposes of deliberation*.

67. EPSRC argues that revealing that some institutions have been given a score of "INTERVIEW" is misleading as it might imply there is an issue when in fact this may not be a negative rating but just require further discussions with the CDT to understand the progress. It could be argued that the awarding of "INTERVIEW" is the provision of a view with the intention of some deliberation in the form of future discussions. However, even in this case it is difficult to see how any chilling effect would occur from disclosure of this information as the peer reviewers would still be required as part of their job to provide these scores. Institutions understand as part of the funding award process that they are required to be assessed and cannot opt-out of this process. The Commissioner's view is that academics are used to having their work peer reviewed and scrutinised – often publicly through journals – and this is accepted as part of the academic research process. Peer reviewers are all professional and specifically appointed to review the CDTs. It is hard to accept they would refuse to take part if the scores of individual institutions were disclosed, particularly if the scores are not attributable to any reviewer or individual and the EPSRC has proposed redactions under section 40(2) to any personal data in the requested information.
68. It also seems speculative to suggest that disclosing the scores would lead to a reluctance by institutions to apply for new funding awards. The EPSRC (now UKRI) is a major source of funding for scientific research projects and therefore requests for future funding will always be necessary and are unlikely to be inhibited by disclosure of mid-term scores.
69. The EPSRC had also suggested that students themselves would be impacted by disclosure of the information but it is very unclear how, if students were impacted in their future opportunities by disclosure of the fact they were involved in a CDT not achieving a "GOOD" score (an argument the Commissioner is very sceptical of), this would inhibit the free and frank provision of advice or exchange of views given that the students themselves are not directly involved in the mid-term review.
70. The Commissioner also notes the arguments provided by the complainant regarding the public interest in transparency to allow for external scrutiny of the CDTs and funding awards to ensure they are achieving their intended outcomes. This, alongside the fact that it is

noted some institutions do publish their scores is enough to outweigh any very slight public interest in withholding the scores and their accompanying letters on the basis of section 36(2)(b)(i) or (ii).

71. With regard to section 36(2)(c), the Commissioner has not been convinced that disclosing the scores or accompanying letters 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 this material 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). EPSRC considers disclosure would prevent it from careful analysis of research proposal review and mid-term reviews of doctoral training colleges but given the limited amount of information (a one-word score and a letter confirming this) the Commissioner cannot see how disclosure would have this affect.
72. To summarise, 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 scores and accompanying letters to the institutions will provide greater transparency of the funding awards and the scrutiny processes to show the money is being well used. She finds there is no compelling reason to withhold this information and the general public interest in public authorities being transparent and accountable is of sufficient weight to tip the balance in favour of disclosure of the scores and their accompanying letters.
73. However, as EPSRC also considers section 41 provides a basis for withholding this information the Commissioner will go on to consider these later in this notice before reaching a decision on whether the scores and accompanying feedback letters should be disclosed.

#### Emails to lead researchers providing information following interviews

74. The EPSRC considers that the emails sent to lead researchers should also be withheld for all of the same reasons as discussed in relation to the scores and feedback letters. The Commissioner does not intend to go over these arguments again but there are additional arguments to consider in respect of the emails.
75. The information in these emails contains more detailed feedback and is sent to individual researchers. As the information is more detailed there is a more substantial argument for saying that there may be a chilling effect on future communications if it were to be disclosed. Peer reviewers may be more guarded in giving their feedback if they think this might be disclosed. Whilst they will have to still provide feedback as part of their role as peer reviewer it is not unreasonable to assume they may be less frank in their feedback out of professional courtesy.

76. This provides a more compelling argument than those presented in relation to the scores and accompanying feedback letters. Given that the mid-term reviews by their very nature show that the funding awards are ongoing suggest there is still a 'live' interest in the information and the Commissioner would accept there could be a chilling effect if the emails were disclosed. It is accepted that the potential for a chilling effect to occur is not in the public interest as it may impact on the quality of future feedback and therefore the review process.
77. However, in determining the weight that this argument should be given the Commissioner must consider not just the likelihood of this prejudice occurring but the severity and extent of this.
78. One of the key arguments presented by EPSRC relates to the confidential nature of the review process and they have explained that expert reviewers are advised that their comments are given in confidence. It further explained that each score goes to an oversight panel made up of external experts who have undertaken to treat proposals with confidentiality. The panel either confirm the grade and feedback or in some cases add their own feedback.
79. One of the "grades" given to proposals was "INTERVIEW" and this grade was included in the feedback to institutions and centres. Members of the oversight panel then interviewed selected centres. The outcomes of these interviews varied with some being satisfactory and others getting more detailed feedback on how to improve the student experience. EPSRC states that in some cases discussions are still ongoing and disclosing the feedback from the interviews would undermine the process.
80. EPSRC argues the whole purpose of the feedback is to encourage centres to improve the experience they are giving to students over the remaining lifetime of the grant and this is an important and valuable process that provides public benefit in the learning and research experience.
81. In terms of sections 36(2)(b)(i) and (ii) the Commissioner accepts there is an argument that disclosing the emails with the detailed feedback would be likely to have a chilling effect and cause a degree of inhibition to the free and frank provision of advice. It is reasonable to state that reviewers may be more guarded in their comments if they believe they will be made publicly available. That being said, if the feedback in the emails was not able to be attributed to individual reviewers then this argument would carry very little weight. It has already been established that neither the complainant nor EPSRC considers it appropriate to disclose personal data of the reviewers/students where this may impact on the individuals concerned.

82. Therefore the Commissioner is of the view that if the feedback in the emails was not attributable to the reviewers then the likelihood of the chilling effect occurring would be extremely low and, as with the scores and letters, the public interest in transparency and accountability is of sufficient weight to tip the balance in favour of disclosure of the emails.
83. Turning to section 36(2)(c); the Commissioner found that there was no convincing argument for withholding the scores as it was unclear how this information would disrupt the EPSRC's resources and its ability to offer an effective public service. In the case of the emails there is a more coherent argument for this. The EPSRC has explained exactly how the information in the emails is used and what it is intended for and it is clear that this is intended to assist institutions and centres improve the research programmes for students.
84. The key aim of EPSRC (and UKRI) is to ensure research and innovation continues to flourish in the UK by investing wisely and supporting researchers. It would not be in the public interest to disclose information which may undermine these key aims. EPSRC has stated that in some case the discussions following the feedback are ongoing and, even in the cases where it is not, it seems that the nature of the feedback should it be disclosed may have an impact on EPSRC being able to continue supporting and encouraging centres and institutions. This is because the undue scrutiny these institutions may find they are under following disclosure would not be conducive to the centres and institutions making improvements and continuing to have open dialogue with EPSRC and the review process.
85. The Commissioner again recognises the public interest in transparency and accountability and the disclosure of information which would provide an insight into the review process. However, unlike with the scores where the Commissioner was not persuaded the prejudice would be likely or severe, there is a more compelling reason to withhold the more detailed feedback in the emails to the lead researchers. The prejudice claimed by EPSRC is likely; the institutions and CDTs will be subject to greater scrutiny from the disclosure of information not otherwise publicly known and consequently this will impact on ongoing and future discussions with the EPSRC to continue improving the research programmes.
86. As such the Commissioner finds there is sufficient weight to tip the balance in favour of withholding the information in these emails on the basis of section 36(2)(c).

#### **Section 41 – information provided in confidence**

87. The Commissioner has considered the application of section 41 in relation to the scores and the associated letters to institutions and centres.
88. In its submission to the Commissioner, EPSRC has explained that information is provided to EPSRC in confidence. Participants are offered this confidentiality when they sign up to the process. Peer reviewers are usually expert members of the research community who are asked to undertake a confidential review process.
89. EPSRC has previously provided the Commissioner with a copy of 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*".
90. 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.
91. 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.

*Was the information obtained from another person?*

92. The Commissioner was concerned that the information was information that had been generated by itself and not information obtained by another person, particularly in the case of the letters sent by EPSRC to the institutions. She queried this with EPSRC who argued that the scores were information provided to EPSRC as they go to an oversight panel made up of external experts who sign on to a website to view the proposals and either confirm the grading and the feedback or substitute the score and add their own feedback. EPSRC therefore considers the scores (and feedback) are not just internal to EPSRC but are made up of confidential input from external reviewers
93. However, the Commissioner does not agree that this means the information is obtained from another person. From the explanations given by EPSRC it seems the information is generated by EPSRC and is sent to the oversight panel. Whilst it may be the case that some of the scores are formed as a result of input from the external reviewers it is not possible to know which scores have remained unchanged and which have been altered following external review. In any event, the scores are initially formulated by EPSRC and the information is not obtained from another person.

94. The Commissioner further notes that if it were possible to identify which scores were provided following input from the oversight panel and separate these from the scores that remained unchanged following oversight there would be no obvious detriment to the confider from disclosing the scores and feedback letters as they are not attributable to external reviewers.
95. The Commissioner therefore finds that EPSRC has not shown that the scores and letters confirming the scores to the institutions engage the section 41 exemption. As the Commissioner has also found that this information cannot be withheld under section 36(2)(b)(i), (ii) or (c) she requires EPSRC to now disclose this with appropriate redactions under section 40(2) for personal data.

## Right of appeal

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11. 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](mailto:GRC@hmcts.gsi.gov.uk)

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

12. 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.
13. 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 .....**

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