

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 June 2022

Public Authority: **Governing Body of the University of Oxford**
Address: **University Offices**
Wellington Square
Oxford
OX1 2JD

Decision (including any steps ordered)

1. The complainant has requested copies of any submissions made to Stonewall's Workplace Equalities Index and any feedback received on those submissions. The University of Oxford ("the University") provided its submissions, but relied on section 41 of FOIA (actionable breach of confidence) to withhold the feedback.
2. The Commissioner's decision is that the University is not entitled to rely on section 41 of FOIA to withhold the requested information.
3. The Commissioner requires the University to take the following steps to ensure compliance with the legislation.
 - Disclose, to the complainant, the information it has relied upon section 41 of FOIA to withhold.
4. The University 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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 24 May 2021 the complainant requested information of the following description:
 - “Please provide the University of Oxford’s annual submission to the Stonewall Workplace Equality Index – for 2020. Please include all attachments.
 - “Please provide the feedback that the University of Oxford received from Stonewall on the University’s 2019 submission to Stonewall’s Workplace Equality Index.
 - “Please provide the feedback that the University of Oxford received from Stonewall on the University’s 2020 submission to Stonewall’s Workplace Equality Index.”
6. On 22 June 2021, the University responded. It provided copies of its submissions but refused to provide the feedback it had received. It relied on section 41 of FOIA as its basis for withholding that information.
7. The complainant requested an internal review on 23 June 2021. The University sent the outcome of its internal review on 10 September 2021. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 11 September 2021 to complain about the way her request for information had been handled.
9. The Commissioner considers that the scope of his investigation is to determine whether or not section 41 of FOIA is engaged.

Background

10. Stonewall first published its Workplace Equality Index (originally known as the Corporate Equality Index) in 2005. Participation in the scheme itself is voluntary and free. Each member employer receives a score from Stonewall based on how well the organisation’s policies and general culture reflect Stonewall’s criteria for judging what an

organisation supportive of LGBTQ+¹ employees should offer. Stonewall publishes an annual list of the 100 employers who have received the highest ranking in that year's survey.

11. For those employers which sign up to the Diversity Champions Programme, Stonewall also provides detailed feedback on their applications, noting how the employer could better meet its criteria. Participants pay a fee to join the programme. The University is a member of the Diversity Champions Programme.
12. The scheme attracted controversy in 2021 when Ofcom decided to withdraw from the Diversity Champions Programme citing a "risk of perceived bias" arising from its membership. Documents disclosed under FOIA indicated that Ofcom had, in its submission, highlighted some of its regulatory decisions as part of its evidence of work it had done to "promote LGBT equality in the wider community."²
13. A number of public authorities such as Channel 4, Ofsted, the Cabinet Office and the Equalities and Human Rights Commission have also withdrawn from the Diversity Champions Programme saying that it no longer represents value for money.
14. Stonewall maintains that both the Index and the Diversity Champions Programmes are only intended to promote the rights of LGBTQ+ employees and make them feel welcome in the workplace.

Reasons for decision

15. Section 41(1) of the FOIA states that:

"Information is exempt information if—

- (a) it was obtained by the public authority from any other person (including another public authority), and

¹ The Commissioner has used the abbreviation LGBTQ+ (which stands for Lesbian, Gay, Bisexual, Transexual, Queer (or Questioning) and others (the "+") who do not consider themselves to fall within any of those categories, but do consider themselves part of this community) as this is the abbreviation used by Stonewall and is thus the definition most appropriate in this context. The Commissioner is aware that both longer and shorter abbreviations are used.

² <https://www.bbc.co.uk/news/uk-58917227>

- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”
16. The Commissioner’s guidance states that, in order for this particular exemption to apply, four criteria must be met:
- the authority must have obtained the information from another person
 - its disclosure must constitute a breach of confidence
 - a legal person must be able to bring an action for the breach of confidence to court
 - that court action must be likely to succeed
17. Clearly, the first and third criteria are met: the University has received the feedback from Stonewall so the information has been received from another person. That “person” (Stonewall) is a legal person, capable of bringing an action for a breach of confidence.
18. Turning to the second criterion, in determining whether the conditions for breach of confidence exist, the Commissioner applies the three-step test set out by Judge Megarry in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415:
- the information must have the necessary quality of confidence,
 - it must have been imparted in circumstances importing an obligation of confidence, and
 - there must have been an unauthorised use of the information to the detriment of the confider.
19. Information will have the necessary quality of confidence if it is not already in the public domain and it is not trivial. The Commissioner does not consider that the information in question is trivial in nature as it concerns the manner in which the University’s policies apply to its LGBTQ+ staff and students. Clearly, this information is also not in the public domain.
20. Turning to the next step, the University supplied the Commissioner with a copy of Stonewall’s Terms and Conditions for membership of the Diversity Champions Programme. The terms make clear that information provided to a member, by Stonewall, “by virtue of its Membership Benefits or otherwise, which may be of a confidential nature” should not

be disclosed to any other person. The University confirmed that Stonewall had advised that it did consider this information to be “of a confidential nature.”

21. The Commissioner considers that any reasonable person, aware of the wording set out in Stonewall’s Terms and Conditions for membership, would be aware that information of this type was likely to have been provided with an expectation of confidence. He is therefore satisfied that the information was imparted in circumstances importing a obligation of confidence.
22. The final step of Judge Megarry’s test is that, in order for an action for a breach of confidence to be brought, it must be demonstrated that the confider of the information has (or will) suffer detriment as a result of the confidence being broken. Where an organisation is the confider, it must demonstrate that it has or would suffer some form of reputational or other commercial detriment.
23. The University explained that Stonewall operates in a competitive marketplace alongside a variety of other providers that offer various forms of diversity training and guidance. Disclosing the withheld information, which Stonewall has invested time and effort producing, would enable employers to enjoy the benefits of the Diversity Champions Programme without having to pay for it. Those who currently participate would be less likely to pay to do so in future and those who do not currently participate will have even less reason to do so. That in turn would restrict Stonewall’s ability to generate revenue from its intellectual property and thus fund its wider activities.
24. The Commissioner recognises that Stonewall is entitled to seek a financial reward for its intellectual property and that its ability to reap that reward would be harmed if it were effectively to give away its “product” free of charge. Therefore Stonewall would suffer detriment if this information were to be disclosed and thus all three steps of Judge Megarry’s test for establishing a breach of confidence are met.

Would the breach be an “actionable” breach?

25. Having accepted in theory that the conditions for a breach of confidence action exist and that Stonewall is a legal person capable of bringing such an action, the Commissioner must next consider whether such an action would, in the real world, be likely to succeed.
26. As Lord Falconer (the promoter of FOIA as it was passing through Parliament) said during the debate on the legislation:

“the word “actionable” does not mean arguable...It means something that would be upheld by the courts; for example, an action that is

taken and won. Plainly, it would not be enough to say, 'I have an arguable breach of confidence claim at common law and, therefore, that is enough to prevent disclosure'. That is not the position. The word used in the Bill is 'actionable' which means that one can take action and win."

27. The Commissioner therefore considers that it is not sufficient to merely claim that a breach of confidence might be brought. In order to rely on this exemption, any action must be likely to succeed.
28. To determine whether an action would be likely to succeed, the Commissioner must assess whether the University might be able to put forward a public interest defence.
29. A public interest defence is not the same as the public interest test that would be applied in the case of a qualified exemption. The English courts have traditionally recognised a strong interest in preserving confidences and therefore there must be an even stronger public interest in disclosure in order to override the duty of confidence.
30. The Court of Appeal in *HRH Prince of Wales v Associated Newspapers Limited* [2008] Ch 57 set out its view on public interest considerations thus:

"Before the Human Rights Act came into force the circumstances in which the public interest and publication overrode a duty of confidence were very limited. The issue is whether exceptional circumstances justified disregarding the confidentiality that would otherwise prevail. Today the test is different. It is whether a fetter of the right of freedom of expression is, in the particular circumstances, 'necessary in a democratic society'. It is a test of proportionality."
31. Having considered the matter carefully, the Commissioner is of the view that, in the event of Stonewall bringing an action for a breach of confidence, the University would have a public interest defence on which it could rely.
32. Firstly, the Commissioner notes that, whilst Stonewall is a charity, it is a charity with an agenda to promote. Whilst many may well agree with that agenda, it is not one that is universally accepted. Moreover, even those organisations which do enjoy broad support should not expect their actions to go free from scrutiny.
33. The Diversity Champions Programme is (to both its supporters and its detractors) fundamentally a scheme which aims to influence the policies, process and actions of the employers which take part in the scheme. Stonewall might gain some financial reward for the scheme, but its fundamental basis is to improve (in Stonewall's view) the policies of

employers and to raise awareness of the issues faced by LGBTQ+ employees.

34. However, where those employers are public authorities, there is a strong public interest in such a scheme being transparent so that it is clear how the scheme operates and what effect it is having on the organisations concerned. Organs of the state must take care to ensure that they are not seen as promoting political campaigns.
35. Stonewall has an established track record of campaigning on behalf of the LGBTQ+ community and it is a well-known brand both inside and outside that community. Whilst the Commissioner recognises that there are many other organisations offering training, guidance and even accreditation, none of these organisations come with the same brand reputation as Stonewall. Stonewall's track record as an advocate for LGBTQ+ rights (especially during its early years, when the rights of LGBTQ+ people were not widely recognised or respected) is its unique selling point. Therefore when organisations choose to sign up to Stonewall's schemes, they are not only signing up to bring their policies into line with Stonewall's targets, they are signing up to associate themselves with Stonewall's influential brand. Associating with that brand (Diversity Champions members are permitted to use the Stonewall-associated logo on their promotional materials) may give employers an advantage when recruiting and retaining staff – particularly staff within the LGBTQ+ community.
36. By associating themselves with Stonewall's brand, employers are bound to chase its approval – if their policies do not match up with Stonewall's expectations, they will achieve a lower score and hence a lower ranking. That means that Stonewall is able to exercise, through its Index and its Diversity Champions Programme, a significant degree of influence over the policies that participating members operate. Such influence can be used for good and for bad.
37. That is not to say that the Commissioner has identified, within the information that has been withheld, any clear example of Stonewall abusing its position or attempting to exercise undue influence. However, the potential clearly exists for such a system to be abused if it is not transparent.
38. Such is the potential for a scheme to be misused as a campaigning tool, the Commissioner considers that there is an unusually strong public interest in transparency. Given the number of high profile organisations that have withdrawn from the Diversity Champions programme – particularly the UK's equality regulator (the Equalities and Human Rights Commission) – the Commissioner considers that concern about the

operation of the schemes goes beyond a few disgruntled individuals or campaigning groups that might be expected to clash with Stonewall.

39. The Commissioner recognises that Stonewall does publish an array of guidance to assist employers looking to improve their Index score. However, the withheld information goes beyond this guidance – it shows exactly what sort of policies Stonewall is likely to give high scores to and what policies will generate score marks. In the Commissioner's view, there is a strong public interest in understanding how this scoring scheme works.
40. For example, in the University's submission (which it has disclosed), one area Stonewall seeks evidence on is the extent to which the University has "utilised its social media accounts and online presence to demonstrate its commitment to LGBT Equality." On the face of it, this seems like a fairly benign requirement but, when it is recognised that Stonewall's definition of "LGBT equality" is not one which is universally accepted, the potential exists for such a provision to be misused. Stonewall has recently clashed with women's rights groups over the recognition and rights of transgender people – therefore there would be a public interest in knowing whether an organisation simply needs to signal that it is welcoming of members of the LGBTQ+ community or whether it needs to go further and denounce those whose views do not mirror those of Stonewall. The Ofcom disclosure indicates that a public authority can get itself confused between its functions – which are supposed to be carried out neutrally and independently – and its desire to score highly. That is not to say that Stonewall, through its schemes, encourages such behaviour, but there is a public interest in understanding how Stonewall would score such actions.
41. Disclosing this particular withheld information may not necessarily reveal any attempt on Stonewall's behalf to exercise undue influence – but it would provide reassurance to the public that the Index is operating fairly and that no undue influence is being exercised. It may even allay some of the concerns that have been raised about the scheme.
42. Secondly, the Commissioner notes that the 2020 feedback form contains numerous advertisements pertaining to various training and workshop opportunities that Stonewall offers – most of which appear to involve a fee. The Commissioner considers that the selection and placement of these advertisements give the strong inference that there is a link between participation in such events and next year's index score. The Commissioner considers that this amounts to lobbying correspondence which would again increase the public interest in transparency.

43. The Commissioner recognises that there are some public interest arguments in favour of withholding the information. The University argues that disclosing areas of weakness might dissuade employers from participating in the scheme in the first place. The Commissioner recognises that this is a possibility but it is not one that is persuasive.
44. Public authorities which participate in the scheme should be robust enough to cope with negative feedback. Furthermore, if the organisation's score has fallen or remained static between years, there may well be a public interest in understanding why that is. If there are specific factors preventing the University (or indeed any other public authority) from achieving a higher score from Stonewall and the University has been made aware of these factors, its employees may wish to hold the University to account to understand why no progress has been made. Conversely, disclosing the feedback may raise awareness of any positive progress the University might have made.
45. Whilst the Commissioner recognises that there will be some commercial detriment arising from disclosure, he considers that Diversity Champion participants participate for more than just the feedback. Furthermore even if Stonewall is required to give its "product" away for free, if that product encourages more employers to adopt more policies that are sympathetic to the needs of LGBTQ+ people, that assists Stonewall in achieving its objectives – as well as providing wider benefits to society.
46. Finally, the complainant has noted that the University had previously disclosed the feedback it had received in response to its 2017 and 2018 submissions to the Index. The Commissioner put this point to the University and invited it to comment on why it was able to disclose this information – apparently without detriment or without attracting an action for breach of confidence.
47. The University responded to say that:

"this does not mean that no detriment occurred or that detriment would not be caused by disclosure of the 2019 and 2020 feedback. It would seem inappropriate to take a decision based on speculation on what might have happened or might not have happened as a result of the previous disclosure, rather than basing it solely on the facts of this case."
48. The Commissioner agrees that his decision should be based on facts and not speculation. He notes that it appears to be a fact that Stonewall did not successfully bring a confidence action against the University and a fact that its Diversity Champions Programme does not appear to have suffered unduly from a previous disclosure. In contrast, the University's

submission is largely based on speculation about what Stonewall might or would be able to do in a hypothetical scenario.

49. Whilst his decision is finely balanced, the Commissioner considers that, in the circumstances of this case, breaching the confidence of Stonewall may be a proportionate means of achieving a legitimate aim – bringing transparency to the workings of the Workplace Equality Index and Diversity Champions Programme. The Commissioner therefore considers that Stonewall could not guarantee that any action it brought for a breach of confidence would succeed. The Commissioner is therefore not satisfied that any breach would be an actionable breach.
50. As the Commissioner is not satisfied that an actionable breach would occur, it follows that section 41 of FOIA is not engaged.

Other matters

51. There is no statutory time limit within FOIA for a public authority to complete an internal review. However, the Commissioner considers that an internal review should take no longer than 40 working days.
52. The Commissioner notes that the internal review of this request took around 11 weeks to complete. He considers this to be poor practice.

Right of appeal

53. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

54. 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.
55. 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

Roger Cawthorne
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