

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

### **Decision notice**

**Date:** 24 March 2024

**Public Authority:** The Governing Body of the University of Oxford

**Address:** University Offices, Wellington Square, Oxford, OX1 2JD

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

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1. The complainant has requested the University of Oxford (the University) to disclose communications sent and received to the Vice Chancellor in relation to a Pay and Conditions Report. The University disclosed some information but withheld the remainder citing sections 36(2)(b)(i) and (ii), 40(2) and 42 of FOIA.
2. The Commissioner's decision is that the University is entitled to rely on sections 36(2)(b)(i) and (ii), 40(2) and 42 of FOIA. He has also decided that on the balance of probabilities, the University does not hold any further recorded information. He has however recorded breaches of section 1, 10 and 17, as a result of the manner in which the request was handled.
3. The Commissioner does not require further steps.

### **Request and response**

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4. On 9 June 2023, the complainant wrote to the University and requested information in the following terms:  
  
"Please send me a copy of all the (a) sent and (b) received communications of the Vice-Chancellor (Professor Irene Tracey) that

are related to so-called Pay and Conditions Report (also referred to as Pay and Conditions Review). For the avoidance of doubt, I refer to those communications related to this matter:

<https://hr.admin.ox.ac.uk/pay-and-conditions-report>. Please limit the scope of the search and disclosure to communications that took place after the 1st of January 2023. Please note that this request includes all information related to this Pay and Conditions Report (or Review) regardless of whether the communication is tangentially related to it, and regardless of whether it was sent through a corporate or non-corporate channel. As shown by precedent, this request includes the appropriate communications regardless of the nature of the messaging platform or medium. This includes, but it is not limited to e-mails, Teams Chat, other messaging services, etc.

2.- Please send me the exact same information requested in (1), except that this point refers to the communications of the People and Digital Pro-Vice-Chancellor (Professor Anne Trefethen).

3.- Please send me the exact same information requested in (1), except that this point refers to the communications of the Emeritus Professor of Genetics (Professor Kay Davies)."

5. The University responded on 31 July 2023. It disclosed some information and but withheld the remainder, citing sections 36(2)(b)(i) and (ii), 40(2) and 42 of FOIA.
6. The complainant requested an internal review on 11 September 2023.
7. The University carried out an internal review and notified the complainant of its findings on 16 October 2023. It upheld its initial application of the exemptions cited. It did however identify one further piece of information at this stage and advised the complainant that it was exempt under section 36(2)(b)(i) and (ii) of FOIA.

## **Scope of the case**

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8. The complainant contacted the Commissioner to complain about the way their request for information had been handled. The complaint was accepted for full investigation on 3 November 2023.
9. In correspondence to the Commissioner the complainant stated that they required the Commissioner to make a determination of the following matters:
  - a) The University's late response.

- b) Their belief the University has not identified all the recorded information which falls in scope of the request.
  - c) The University's application of section 36(2)(b)(i) and (ii) of FOIA.
  - d) The University's application of section 40(2) of FOIA.
  - e) The University's application of section 42 of FOIA.
10. The Commissioner's investigation has focussed on the matters listed above a) to e) and he will now address each one, outlining his decision.

## **Reasons for decision**

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

11. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, disclosure of the information –
- (b) would, or would be likely to, prejudice-
    - (i) the free and frank provision of advice, or
    - ii) the free and frank exchange of views for the purposes of deliberation, or
  - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
12. The University confirmed that it obtained the opinion of the qualified person – its Vice Chancellor – on 31 July 2023. In the qualified person's opinion disclosure would be likely to prejudice the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation and therefore section 36(2)(b)(i) and (ii) were engaged. The qualified person had sight of the main pieces of withheld information and submissions detailing the request itself and concerns over the disclosure of the withheld information.
13. The Commissioner must first consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy himself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.

14. The University explained that the Pay and Conditions Report Steering Committee was at a relatively early stage of its review at the time of request and it was not expected to complete its report until the end of Michaelmas Term 2023. It was therefore very much live, ongoing and subject to ongoing consideration. It is the qualified person's opinion that disclosure, together with consequent publicity, would be likely to inhibit the frankness of advice given to the Steering Committee, by making that advice more cautious and less candid than it would otherwise be. They also decided that disclosure would also be likely to inhibit the frankness of the views expressed by those involved in the committee's deliberations, by making them less willing to express their views openly and honestly. In turn, it was the qualified person's opinion that, this inhibition would then be likely to impair the value of the advice and views provided.
15. For these reasons, it is the qualified person's opinion that sections 36(2)(b)(i) and (ii) are engaged.
16. The Commissioner is satisfied that the qualified person's opinion was sought and obtained prior to its formal response to the complainant on 31 July 2023. The qualified person had sight of much of the withheld information and while concerns were legitimately raised over the disclosure of the withheld information in the University's submissions to them, it was the qualified person with the expertise and experience they have that authorised the application of this exemption. The Commissioner therefore has no concerns over the manner in which the qualified person's opinion was obtained.
17. Given the circumstances at the time of the request, the Commissioner considers it is a reasonable opinion to hold that disclosure of the withheld information would be likely to have the effects the University has described. He notes that the Pay and Conditions Report Steering Committee was at a very early stage and that the request was made to the University before that committee had held its first meeting. It is a reasonable opinion to hold that disclosure would be likely to hinder the provision of advice, exchange of views for the purpose of deliberation and therefore the ability of the University to consider the matters at hand thoroughly and effectively.
18. As the Commissioner is satisfied that the qualified person's opinion is a reasonable one, he has concluded that section 36(2)(b)(i) and (ii) of FOIA is engaged. He will now go on to consider the public interest test.

### **Public interest test**

19. The University recognises the public interest in the disclosure of the withheld information. It said that generally there is an interest in

openness and transparency in the conduct of the University's affairs. More specifically, there is an interest in the University's review of pay and conditions and the multiple issues it raises, not least its ability to recruit and retain staff of the appropriate calibre.

20. However, in this particular case, it considers that these interests are outweighed by the public interest in maintaining the exemption and an effective decision-making process. It argued that such a process requires a private thinking space where the University can access free and frank advice and engage in free and frank exchange of views. It said a less effective decision-making process would increase the risk that the University would take less well-informed and less-well founded decisions.
21. The University also advised that it felt the public interest was largely met by the extensive information provided regarding the review/report through the report website and the extensive consultation it had and will continue to conduct with all relevant parties.
22. The Commissioner considers the public interest test considerations under section 36 of the FOIA require him to consider the extent, severity and frequency of the inhibitions claimed by the public authority.
23. The Commissioner considers there are public interest arguments in favour of disclosure. Disclosure would promote openness and transparency and allow members of staff and the general public to see its early thoughts and deliberations on the matter.
24. However, in this case due to the circumstances at the time of the request the Commissioner has decided that the public interest rests in maintaining the exemption. This is because the Pay and Conditions Report Steering Committee was at a very early stage and the committee had not even held its first meeting. It was very much live and the University required (and should be afforded) the safe space to exchange advice and views, deliberate and discuss, free and frankly, the issues at hand and the options available before these are relayed to its staff and more widely. Disclosure at this point would have distracted the University away from this process and would have been likely to inhibit the ability of the University to exchange advice and views and openly and candidly discuss all relevant issues and options. Sound decision making is dependent on this safe space and the ability of those involved to robustly discuss and evaluate all options. It is not in the interests of staff and the wider public to cause such inhibitions.

## **Section 40 – personal data**

25. The University confirmed that it has disclosed all information except the personal data of junior staff or third parties, whose involvement in the review it not already publicly known. It has also withheld the email addresses for senior members of staff.
26. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
27. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
28. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
29. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

### **Is the information personal data?**

30. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

31. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
32. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

33. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
34. The names and contact details of staff and third parties is information from which they can be identified. The Commissioner is therefore satisfied that the information falls within the definition of 'personal data' in section 3(2) of the DPA.
35. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
36. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

37. Article 5(1)(a) of the UK GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

38. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
39. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

### **Lawful processing: Article 6(1)(f) of the UK GDPR**

40. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"<sup>2</sup>.

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<sup>2</sup> Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

41. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
  - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
42. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

### **Legitimate interests**

43. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
44. The complainant has said that disclosure of the email addresses of senior staff would enable them to go through the disclosed information to establish if any information has been missed by the University and
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However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".



enable them to see if adequate searches for all information have been carried out. Other than this argument, no submissions have been made by either side on this point. The remainder of the complainant's arguments focus on why the University has not sought the consent of every individual whose details have been redacted and how they believe the email addresses of senior staff is trivial information, considering the format of a University email address is the same for everyone.

45. Considering the information already disclosed (the names and departments of senior members of staff; those more likely to be responsible for the decision making taking place), the Commissioner considers any legitimate interests in the disclosure of the remaining withheld information are very limited. This is supported by the lack of submissions on this point from both the complainant and the University. There is however the legitimate interest in the general and overall openness and transparency of public authorities.

### **Is disclosure necessary?**

46. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
47. The Commissioner considers the legitimate interests are in the disclosure of the content of the withheld information and the names and job titles of those senior members of staff who are responsible and accountable for the Pay and Conditions Report. These legitimate interests have been met, so far as is possible without disclosing otherwise exempt information (section 36(2)(b) and 42 of FOIA), by the information already disclosed. The necessary accountability and transparency of the progress is met by the disclosure of the senior members' of staff details. This is a University exercise/review of its Pay and Conditions. It may involve third parties and junior staff but these are not generally accountable or indeed responsible for the final decisions that are made. The disclosure of this information and the email addresses of senior staff does not therefore add anything further in terms of accountability and transparency.
48. There is no requirement for the University to seek out each and every individual's consent on disclosure, when in receipt of an information request. And the alleged triviality of the email addresses of senior staff is not a relevant consideration, when considering if disclosure is necessary to meet the legitimate interests identified in disclosure. If the

Commissioner decides that disclosure is not necessary in a given case, this is where the consideration of section 40 of FOIA ends.

49. The Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interests in disclosure. He has therefore not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
50. The Commissioner has therefore decided that the University was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

### **Section 42 – legal professional privilege**

51. This exemption has been applied to advice given by a member of the University's Legal Services Office to the Registrar. The University has applied section 42 on the basis that advice privilege applies.
52. The Commissioner has reviewed the withheld information and he is satisfied that it is a confidential communication between lawyer and client for the purposes of seeking and the provision of legal advice. It is therefore subject to legal professional privilege (LPP). Section 42 of FOIA therefore applies.

### **Public interest test**

53. The University advised that it recognises the public interest in openness and transparency in the conduct of its public affairs. More specifically, the public interest in the University's compliance with employment law. However, it is the University's decision that the public interest rests in maintaining the exemption. It said there is a strong in-built public interest in maintaining legal professional privilege and in protecting the ability of a public authority to communicate candidly and freely with its legal advisers and to make fully informed decisions on the basis of legal advice. The University considers the public interest rests in safeguarding openness in all communications between client and lawyer to ensure access to, and receipt of, full and frank legal advice.
54. The Commissioner again recognises the public interest in openness and general transparency. He also acknowledges the public interest in the pay and conditions review that is underway and how access to the withheld information would provide staff and the general public with a better understanding of the issues under discussion and what legal advice has been received by the University.
55. However, in this case the Commissioner agrees with the University that the public interests rests in maintaining the exemption. There is no

public interest arguments in favour of disclosure that outweigh the public interest in protecting the long standing principle of LPP and the ability of the University to seek and obtain candid legal advice. The ability to seek and obtain free and frank legal advice is crucial – it enables the University to consider and explores its options fully and ensure the decisions it makes are compliant with employment law.

### **Is further recorded information held?**

56. The complainant believes the University has not disclosed all the recorded information it holds, which falls within the scope of their request. They suggested different search terms during the internal review process and these have been ignored. The internal review also identified one additional email exchange and the complainant believes this brings into question the thoroughness and adequacy of the University's searches.
57. The University explained that it carried out searches prior to its refusal notice and additional searches prior to its internal review response, in light of the concerns the complainant raised at this point. It identified one additional email exchange as a result of the second search but informed the complainant that this was exempt under section 36(2)(b)(i) and (ii) of FOIA.
58. It advised how the vast majority of the information covered by the request was contained in three email accounts belonging to the Vice-Chancellor and the email account of another two employees. All accounts were searched by IT services using appropriate search terms so as to locate all relevant information held. One member of staff also chose to search their own email account, as is their right and the result of that was that they held far fewer relevant emails. That staff member only became involved in the pay review when they confirmed their willingness to chair the review in early May 2023.
59. The University stated that the use of the words 'pay' and 'conditions' as search terms, both singly and together, are sufficiently broad to capture the information covered by the request (as well as a large amount of irrelevant information). The search returned well over 3000 emails, the vast majority of which were outside the scope of the request. It said how this was not surprising considering the people involved correspond regularly on HR matters and many of the communications will include the word 'pay' that relate to matters like strike action, national pay negotiations or senior appointments. The same applies for the word 'conditions'.
60. It commented further that many of the email chains in scope also included the word 'review' or 'report', as well as the word 'pay'. It

considered it was very unlikely that a search just using the words 'review' or 'report' would have returned any emails in scope that were not captured by the actual search. However, it seems likely on the other hand that such additional searches using just those words would have returned a substantially increased number of emails, which would not be in scope, considering the general nature of those words and their frequent use in correspondence on policy matters.

61. In terms of all platforms, the University confirmed that all possible platforms for communication were considered as part of this request and the searches undertaken.
62. The Commissioner considers the University has carried out adequate and appropriate searches, using the most efficient search terms available. It has explained how further searches using just the words 'review' and 'report' would simply return a significant amount of communications irrelevant to this request. The University has carried out two separate searches too to ensure that all information held is identified. On the balance of probabilities, the Commissioner is satisfied that the University does not hold any further recorded information.

### **Procedural matters**

63. The Commissioner has found the University in breach of section 1, 10 and 17 of FOIA, for failing to respond to the request and issue a refusal notice for the withheld information within 20 working days, and for also failing to identify recorded information held until the internal review stage and issuing a refusal notice for that information.

## Right of appeal

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

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

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

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

65. 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.
66. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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