

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 October 2024

Public Authority: UK Research and Innovation
Address: Polaris House
North Star Avenue
Swindon
SN2 1FL

Decision (including any steps ordered)

1. The complainant has requested a copy of an investigation report and electronic communications concerning the investigation between UK Research and Innovation ('UKRI') and the Department for Science, Innovation and Technology ('DSIT'). UKRI provided redacted copies of the requested information and relied on section 41 of FOIA (information provided in confidence) and section 40(2) of FOIA (third party personal information) to withhold the redacted information. It also relied on section 22 of FOIA (intended for future publication) to withhold draft social media guidance attached to one of the redacted copies of correspondence.
2. The Commissioner's decision is that UKRI was entitled to rely on sections 41 and 40(2) to withhold the redacted information. He also finds that UKRI was entitled to rely on section 22 to withhold the draft social media guidance. The Commissioner also finds that UKRI breached sections 10(1) and 17(1) of FOIA by failing to provide the requested information and to provide a refusal notice for withholding some of the requested information within 20 working days.
3. The Commissioner does not require further steps.

Request and response

4. On 5 March 2024, the complainant wrote to UKRI and requested information in the following terms:

"In issuing this FOIA 2000 petition, I refer to your communication from today: <https://www.ukri.org/news/outcome-of-investigation-research-england-edi-expert-advisory-group/>

My petition encompasses:

- 1.- Provision of the final "report" or "memorandum" (or equivalent term) that contains the details of the independent investigation conducted about this case.
 - 2.- Provision of electronic communications between members of the UKRI Board or UKRI Executive Team, directed to or received from DSIT representatives, which are related to this investigation (such as its closure, results, next steps) and the publication of the exoneration statement on your webpage. Only query communications that took place from the 15 February 2024 to the 5 March 2024."
5. UKRI responded on 9 April 2024 and advised that it was considering whether section 36 of FOIA (prejudice to effective conduct of public affairs) applied to the requested information and was seeking the opinion of the qualified person.
6. UKRI responded again on 11 July 2024 and confirmed it held the requested information. For part one of the request, it advised that it was relying on section 41 of FOIA to withhold the report. For part two of the request, it provided some information with redactions made under section 40(2) of FOIA and section 41 of FOIA. It also stated some of the requested information was intended for future publication, so it was being withheld under section 22 of FOIA.
7. The complainant wrote to UKRI on 12 July 2024 and requested an internal review.
8. During the Commissioner's investigation, UKRI advised that it had reviewed the request and intended to disclose a redacted version of the investigation report. It did this on 23 September 2024 and stated that it was relying on sections 41 and 40(2) of FOIA to withhold the redacted information.

Scope of the case

9. The complainant contacted the Commissioner on 12 August 2024 to complain about the way their request for information had been handled.
10. The Commissioner considers that the scope of his investigation is to determine whether UKRI was entitled to rely on the cited exemptions to withhold some of the requested information.

Reasons for decision

Background

11. The requested information in this case relates to UKRI's response to a letter from the Secretary of State for Science, Innovation and Technology to UKRI. The letter raised concerns about views expressed by members of a Research England advisory group on equality, diversity and inclusion in October 2023, following the attacks by Hamas on Israel; concerns about breaches to the group's terms of reference; and concerns about UKRI's overall approach to equality, diversity and inclusion. The Secretary of State's letter was published on 'X' and a response from UKRI's CEO was also posted on 'X' that outlined steps that would be taken to consider all the concerns.
12. The concerns resulted in UKRI undertaking an investigation into the issue. The outcome of the investigation, published on 5 March 2024, found no evidence in the public domain of support for a proscribed terrorist organisation or the sharing of extremist material, and no evidence of the advisory group's terms of reference having been breached.

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

13. Section 41(1) of FOIA states that information is exempt from disclosure if (a) the information was obtained by the public authority from any other person and (b) disclosing the information to the public would constitute an actionable breach of confidence.
14. In their complaint to the Commissioner, the complainant has explained that the investigation was very high profile, and it would be doubtful that the person who produced the report would expect their findings to be kept confidential. Due to high profile nature of the circumstances preceding the investigation and the investigation itself, the complainant has argued that there is an understandable expectation that the public would want to scrutinise the report. The complainant suggested that

UKRI could disclose a redacted version of the report with names and personal information removed.

Was the withheld information obtained from another person?

15. UKRI has explained that the investigation was conducted by a third party and the resulting report was provided to UKRI under an expectation of confidence. The report contains details of statements made by the people named in the Secretary of State's letter and the requested email correspondence contained information provided by DSIT staff.
16. UKRI added that it owes a duty of confidence to all individuals involved in the investigation irrespective of outcome, because it includes personal and other confidential data of a sensitive nature that could impact the health and wellbeing of those involved. For an investigation to be carried out effectively, those participating need to be confident that any responses and actions taken will not be published to the world. The requirement to respect confidentiality is more than trivial.
17. The Commissioner is satisfied that disclosing the withheld information in this case would mean disclosing information UKRI obtained from the investigating party, and the statements of those people subject to the investigation. Therefore, the test at section 41(1)(a) is met.

Would disclosure constitute an actionable breach of confidence?

18. When he's considering whether disclosing information would constitute an actionable breach of confidence, the Commissioner takes account of three tests.
19. First, the Commissioner is satisfied that the information in this case has the necessary quality of confidence because it's not trivial and it's not otherwise accessible.
20. Second, the Commissioner has considered whether the withheld information was imparted in circumstances importing an obligation of confidence. In its submission to the Commissioner, UKRI explained that it contracted the services of CMP Ltd to conduct an independent fact-finding investigation into the allegations made. The investigation was conducted under the terms of a contract between UKRI and CMP Ltd, for the supply of complex investigation services for Whistleblowing and complaints. UKRI explained that the contract addresses confidentiality, and the handling of confidential information shared between the parties, including CMP Ltd's duty of confidence to UKRI, and any third parties involved.

21. UKRI explained that CMP Ltd shared the report with UKRI only. UKRI summarised the findings of the report and published them in a public statement. The full report has not been disclosed into the public domain.
22. The Commissioner is satisfied that the UKRI obtained the requested information from CMP Ltd in confidence as per its conditions of contract. The Commissioner has viewed the withheld information and notes that the report is marked "Confidential" and "In confidence to".
23. Third, the Commissioner has considered whether unauthorised disclosure of the information would cause a specific detriment to either the party which provided it or any other party.
24. UKRI considers that there would be a reasonable likelihood of legal action resulting from the disclosure of confidential and personal information. This is based on legal action against the Secretary of State, Michelle Donelan, which is a matter of public record. UKRI has noted that the letter and related tweets have been removed from X (formerly Twitter) and other online sources, and it is understood this was at the request of the legal advisors of the individuals affected.
25. UKRI has explained that, as the report was provided in confidence, its disclosure could potentially expose UKRI to legal actions from others named by the investigator, and who could not be anonymised given information already publicly accessible. UKRI has considered whether consultation with the relevant stakeholders may provide a current view on the position, however, in view of the number of individuals named, and the different relationships and competing interests and expectations, UKRI considers that consultation would be complex and unlikely to achieve consensus.
26. Having considered the three tests above, the Commissioner is satisfied that, with regard to the redacted sections of the report and email correspondence, disclosing the information would constitute a breach of confidence.

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

27. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under FOIA). British courts have historically recognised the importance of

maintaining a duty of confidence, so it follows that strong public interest grounds would be required to outweigh such a duty.

28. The Commissioner is therefore required to consider whether UKRI could successfully rely on such a public interest defence to an action for breach of confidence in this case.
29. UKRI has acknowledged that there is notable public interest in the outcome of the independent investigation, given the visibility of the allegations made by the Minister, and the resulting media attention. It stated that the public and academic community have expressed their concerns that the allegations made and the conduct of the Minister and their choice to make this public, have raised questions and debate around the right to freedom of speech and the role government officials play in the operational decisions made public authorities such as UKRI. It added that it would maximise transparency in order to ensure the accountability of UKRI.
30. The Commissioner acknowledges that the complainant has a valid interest in information about the investigation and the findings of the investigation report. He recognises that the high-profile nature of the allegations and investigation would attract public interest, and that the nature of the allegations would illicit a strong response in some individuals.
31. However, the Commissioner notes that UKRI has already published the outcome of the investigation, and it has disclosed a redacted version of the report to the complainant. He considers that this can be seen to satisfy the public interest in this case.
32. The Commissioner is therefore satisfied that it would be an actionable breach of confidence for UKRI to disclose the withheld redacted information under FOIA. The Commissioner's decision is that the UKRI is entitled to rely on section 41(1) of FOIA to withhold the relevant sections of redacted information in the report and in the requested email correspondence.

Section 40(2) – personal information

33. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
34. Section 40(3A) of FOIA 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, as set out in Article 5 of the UK General Data Protection Regulation (UK GDPR).

Is the information personal data?

35. Section 3(2) of the Data Protection Act 2018 defines personal data as:

“any information relating to an identified or identifiable living individual.”

36. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

37. 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.

38. The complainant has requested information concerning an investigation report and related email correspondence between UKRI and DSIT. The Commissioner is satisfied that the requested information comprises a report containing the names and personal statements of people involved in, and subject to, the investigation, and email correspondence containing the names and contact details of UKRI and DSIT staff. He finds that the requested information both relates to and would identify the individuals concerned. He therefore considers that the requested information falls within the definition of ‘personal data’ in section 3(2) of the DPA.

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

39. In the case of a request under FOIA, 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.

40. 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.

41. 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 child¹"

42. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under 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.
43. 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

44. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.
45. UKRI has acknowledged that there is a legitimate interest in public bodies operating transparently and that this sometimes also involves revealing the names of senior public facing officials.
46. The complainant has argued that there is an extremely strong public interest in the requested information due to the high-profile nature of the circumstances surrounding the investigation, and their impact on the academic community and wider public. The complainant also pointed out

¹ 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".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) 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".

that the investigation and subsequent report was funded by a considerable amount of public money.

47. The Commissioner is satisfied that the complainant has a legitimate interest in the requested information. He notes however, that the complainant themselves suggested that personal information could be redacted from the report to allow for its disclosure.

Is disclosure necessary?

48. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
49. The Commissioner notes that UKRI has published the outcome of the investigation, and during the course of the Commissioner's investigation, it also disclosed a redacted copy of the investigation report. However, the Commissioner notes that, due to the nature of the investigation, the version of the report that has been disclosed to the complainant is heavily redacted in certain sections due to personal information and information provided in confidence. As the complainant requested the details of the investigation, the Commissioner considers that disclosing the requested report would be necessary to fulfil the request.
50. However, in terms of redactions made to email correspondence to remove personal information, the Commissioner is satisfied that it is not necessary to include staff names and email addresses to satisfy that part of the request. The Commissioner will therefore only go on to consider the balancing test for the personal information withheld in the inspection report.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

51. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
52. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
53. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
54. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
55. UKRI has explained that the individuals involved in the investigation may have had some expectation that some content of the investigation report may be disclosable under FOI, but they would not expect that their personal information would be disclosed, unless under exceptional circumstances.
56. UKRI explained that the reasons for the investigation related to a highly public, contentious and rapidly evolving situation and UKRI therefore considers that there was a heightened expectation that personal information of individuals would not be disclosed into the public domain as this may expose those involved. It added that the public debate concerning any decision making in this field (and the link to the conflict in the Middle East) is especially controversial, as individuals who are associated with a particular decision or event are likely to be heavily criticised by those holding contrary views.
57. In line with the reasons above, UKRI considers the consequences of disclosure of personal information would be that any individuals linked to the independent investigation may be exposed to risks of significant harassment or threats to their personal safety.
58. UKRI explained that it has recognised and given weight to the importance of transparency and the legitimate interest which the public have in understanding the outcome of the independent investigation. However, it stated that it balanced this against the particular intrusion which individuals would be at risk of as a result of having their personal information released.

59. The Commissioner appreciates that the complainant has a legitimate interest in this information, and although the outcome of the investigation is now publicly available, the detail of the investigation report would only be obtained through disclosing the requested information.
60. However, the Commissioner considers that the individuals named in this case would reasonably expect that their personal data would not be disclosed to the world at large under FOIA, and that disclosure would therefore cause those individuals harm or distress.
61. The Commissioner considers the wider public interest in transparency is satisfied through the investigation being carried out by an external investigator, and the report outcome being made public.
62. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that disclosing the requested information would be unlawful as it would contravene a data protection principle; that set out under Article 5(1)(a) of the UK General Data Protection Regulation.
63. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

Section 22 – intended for future publication

64. Section 22(1) of FOIA says that information is exempt information if:
 - (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not)
 - (b) the information was already held with a view to such publication at the time when the request for information was made, and
 - (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in (a).
65. For the exemption in section 22 to apply, the public authority must, at the time it received the request, have had a settled expectation that the information would be published at some future date, even if no precise date has been set.
66. Section 22 is a qualified exemption which means it is also subject to the public interest test.

67. UKRI explained that one of the letters provided in its response to the complainant referred to guidance for UKRI employees and office holders on the use of social media, which was being expanded, and that the draft guidance had been attached to the letter. UKRI explained that it had been expected that the guidance would be published in February 2024. However, at the time of the request (5 March 2024) the guidance had not yet been finalised and published so it was withheld under section 22 of FOIA.
68. UKRI considers that the guidance is not directly connected to the outcome of the investigation, which was the subject of the FOI request. In discussions relating to the FOI request, it was confirmed that once finalised, the social media guidance would be made available to staff through internal channels and would also be published on the policy pages of UKRI's website, making it publicly available.
69. At the time of the FOI request (5 March 2024) the timeline for finalising and publishing the guidance had changed from that indicated in the disclosed letter and was subject to further change due to the pre-election period.
70. UKRI added that the pre-election period provided UKRI with an additional opportunity to communicate further with stakeholders internally on the draft guidance and need for further feedback was subsequently identified, which is currently awaited.
71. UKRI confirmed that although it could still not confirm a date that the guidance would be published, it did intend to publish the guidance at a future date.
72. The Commissioner has considered UKRI's submissions and accepts that, at the time of the request, there was a settled intention to publish the social media guidance. He is also satisfied that, in the circumstances, it was reasonable for UKRI to withhold the guidance under section 22 of FOIA until the future publication date. He is therefore satisfied that the exemption under section 22 is engaged.
73. As the Commissioner is satisfied that section 22 applies to the requested information, he has gone on to consider the public interest test.

Public interest test

74. The exemption at section 22(1) is qualified by a public interest test. The Commissioner therefore has to consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosure at the time of the request.

Factors in favour of disclosure

75. UKRI has acknowledged that disclosure of the social media guidance would maximise transparency in order to ensure the accountability of UKRI.
76. UKRI also considers that, as the investigation deals with social media content, disclosure of the social media guidance would be of interest to the public.

Factors in favour of maintaining the exemption

77. UKRI has explained that due to the sensitive nature of the investigation subject and the publicity already attracted, it considers that it was important to ensure that final approved guidance is released rather than a draft that is subject to further changes.
78. UKRI considers it essential to be able to ensure that due diligence procedures are followed when preparing any information for public disclosure, especially where related to an incident that has the potential to reignite discussion and debate around these issues.

Balance of the public interest

79. The Commissioner acknowledges that given that the investigation included social media usage, UKRI's social media guidance would be of public interest.
80. However, the Commissioner notes UKRI's argument that the guidance is not directly connected to the outcome of the investigation report, which was the subject of the FOI request.
81. Having taken the arguments into account, the Commissioner finds that the balance of the public interest favours maintaining the exemption. He recognises that there is a general public interest in transparency but, in this case, that there is a greater public interest in allowing UKRI to finalise the draft guidance before publication.

Procedural matters

82. The Commissioner finds that UKRI breached sections 10(1) and 17(1) of FOIA by failing to provide the requested information and to provide a refusal notice for withholding some of the requested information within 20 working days. This is because UKRI originally advised it was relying

on section 36 of FOIA, and then later relied on sections 41, 40(2) and 22 to withhold some of the requested information.

Other matters

83. The Commissioner notes that UKRI failed to carry out an internal review within 40 working days. The Section 45 Code of Practice advises all public authorities to carry out internal reviews in a timely manner and within 20 working days. A total of 40 working days is permitted in particularly complex cases only.
84. UKRI is reminded of the requirements of the Code and of the importance of carrying out internal reviews in a timely manner and in accordance with the timeframes specified in the Code. The Commissioner has recorded this as part of his routine monitoring of public authorities.

Right of appeal

85. 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

86. 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.
87. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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