

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 July 2021

Public Authority: The Council of Imperial College
Address: South Kensington Campus
London
SW7 2AZ

Decision (including any steps ordered)

1. The complainant requested copies of training material on unconscious bias. The Council of Imperial College ("the College") provided some information but withheld the remainder and relied on section 43(2) of the FOIA (commercial interests) to do so.
2. The Commissioner's decision is that Imperial College has correctly applied section 43(2) of the FOIA to the withheld information and that the balance of the public interest favours maintaining the exemption.
3. The Commissioner does not require further steps.

Background

4. On 28 July 2020, the complainant requested information about the processes and procedures the College had in place to "ensure that conscious and unconscious bias do not affect decision-making...[in] staff recruitment."
5. The College responded to this request on 26 August 2020 and provided some information. As part of its response, it stated that:

"The College also offers Unconscious Bias Training which is available to all staff at the College and is coordinated via the Equality, Diversity and Inclusion Centre (EDIC). There is a core module within the course around recruitment and selection"

Request and response

6. On 28 August 2020, referring to the paragraph highlighted above, the complainant made a fresh request for information of the following description:

"by way of a new FOI request, I require full access to your stored information re the core module mentioned in your response:

"Presumably this can be provided by way of a login."

7. On 28 September 2020, the College responded. It provided some information within the scope of the request but refused to provide the remainder. It relied on section 43(2) of the FOIA to withhold the information.
8. The complainant requested an internal review on the same day. The College sent you the outcome of its internal review on 26 October 2020. It upheld its original position.

Scope of the case

9. The complainant contacted the Commissioner on 27 October 2020 to complain about the way his request for information had been handled. He felt that the exemption had not been properly justified.
10. The Commissioner considers that the scope of her investigation is to determine whether the withheld information engages section 43(2) of the FOIA and, if it does, whether the balance of the public interest does (or does not) favour maintaining the exemption.

Reasons for decision

Section 43 – Commercial Interests

11. Section 43(2) of the FOIA states that:

Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

12. The exemption can be engaged on the basis that disclosing the information either "would" prejudice commercial interests, or the lower threshold that disclosure only "would be likely" to prejudice those

interests. For the Commissioner to be convinced that prejudice “would” occur, she must be satisfied that there is a greater chance of the prejudice occurring than not occurring. To meet the threshold of “would be likely to” occur, a public authority does not need to demonstrate that the chance of prejudice occurring is greater than 50%, but it must be more than a remote or hypothetical possibility.

13. In the Commissioner’s view it is not sufficient for a public authority to merely assert that prejudice would be likely to occur to another party’s commercial interests to engage the exemption. Nor is it sufficient for the other party to assert that such prejudice would be likely to occur. The public authority must draw a causal link between disclosure of the information and the claimed prejudice. It must specify how and why the prejudice would occur.

The complainant’s position

14. The complainant felt that the College had cited the exemption without having provided sufficient evidence or explanation. In particular, he drew attention to the Commissioner’s guidance, which encourages public authorities relying on this exemption to consult with any third parties whose commercial interests might be affected. The complainant noted in his request for an internal review that the College did not appear to have done this.

The College’s position

15. The College explained that the withheld information had not been produced by the College, but had been commissioned from a company called Cerulean. The module had consisted of a delegate pack and Powerpoint slides which were delivered by Cerulean employees. It was not an online module.

16. The College went on to explain that:

“Cerulean is a commercial enterprise whose revenue is derived from the sale of training services to organisations. The company’s ability to profit from the service they provide would be prejudiced if the training and associated material that they provide to organisations for a fee were to be disclosed to the public.”

17. The College noted that it had in fact consulted Cerulean about the request and sought its views on disclosure. Although the consultation (a copy of which was provided to the Commissioner) appears to have taken place after the College completed its internal review, Cerulean did confirm that its commercial interests would be affected by disclosure.

18. Whilst Cerulean noted that it had not delivered this particular module recently, it may do so in the future. It also noted that parts of the withheld information were replicated in its current output.

The Commissioner's view

19. The Commissioner considers that disclosure of the withheld information would prejudice Cerulean's commercial interests.
20. The withheld information in this case is the training material commissioned, by the College, from Cerulean. It is Cerulean's intellectual property and the company is entitled to exploit it for commercial gain.
21. Disclosure under the FOIA is disclosure to the world at large. Once a public authority discloses information under the FOIA it relinquishes any right or ability to restrict further dissemination of that information.
22. If the College were to disclose the withheld information, neither it nor Cerulean would be able to prevent anyone who wished to do so from copying Cerulean's intellectual property and using it for themselves. This would prevent Cerulean from continuing to make money from the intellectual property they have created. Other organisations would be unlikely to pay to receive training which they can already largely access for free.
23. The Commissioner is therefore satisfied that the College has explained a causal link between disclosure and a commercial detriment. She also agrees that it is more likely than not that this detriment would occur in the event of disclosure. She is thus accepts that section 43(2) of the FOIA is engaged.

Public interest test

24. Section 43(2) of the FOIA is a qualified exemption, which means that, even when the exemption is engaged, the public authority is still required to disclose the information – unless it can demonstrate that the public interest in maintaining the exemption outweighs the public interest in disclosure.
25. The complainant did not put any forward any reasons to suggest why disclosure would be in the public interest.
26. Although there is always a general interest in transparency, the Commissioner also recognises that there may also be a particular interest in material relating to unconscious bias training.

27. On 15 December 2020, the Cabinet Office announced that, following a review, it would be phasing out unconscious bias training in the civil service. This was based on a review of the available research which indicated a lack of evidence that such training had any long term effects – and could, in some circumstances, reinforce the stereotypes it sought to challenge. The Cabinet Office's statement to Parliament noted that:

"there is no recognised way of assuring the quality of unconscious bias training and multiple interventions of variable content may be given that label. This has serious implications for organisations, who risk putting funding into poor quality and ineffective training...

"...the government expects other parts of the public sector, including local government, the police, and the NHS, to review their approaches in light of the evidence and the developments in the Civil Service."¹

28. On the other side of the argument, the College argued that the primary public interest was in understanding whether or not the College was requiring staff and students to participate in unconscious bias training – which it had already addressed.
29. The College argued that disclosure of the training material itself would add little to any debate about whether the training was appropriate whilst simultaneously undermining the ability of Cerulean to pursue its legitimate commercial interests. Therefore the public interest should favour maintaining the exemption.
30. Having considered the matter carefully the Commissioner is not persuaded that the public interest in disclosure is sufficient to outweigh that in maintaining the exemption in the circumstances of this case.
31. The Commissioner notes that the request in question was both submitted and responded to several months before the Cabinet Office's statement. Had the request been submitted several months after the Cabinet Office's statement, there might have been a public interest in understanding why the College had decided not to follow the Cabinet Office's guidance and whether the material being used was appropriate. However, at the time of the request, the College was probably unaware that the Cabinet Office even intended to make a statement, let alone have time to consider the implications and react accordingly. Although

¹ <https://questions-statements.parliament.uk/written-statements/detail/2020-12-15/hcws652>

the civil service began to phase out such training over the course of 2020, the College was far from the only organisation offering it at the time the request was made.

32. More pertinently, the Commissioner recognises that Cerulean has a right to seek to make money from its intellectual property. It can only do so if it is able to protect its "product" from being replicated and used without permission.
33. Numerous public sector organisations use third parties to deliver some of their training needs and benefit from the specialisms of those providers. There is a strong public interest in allowing those third parties to offer their wares to the public sector – which they are unlikely to do if they fear losing the rights to keep control of their intellectual property.
34. There is a clear public interest in preventing Cerulean (and other firms in similar situations) from incurring loss of future earnings because their work has been made freely available to anyone who wishes to access it.
35. The Commissioner therefore considers that, in the circumstances of this case, the balance of the public interest favours maintaining the exemption.

Right of appeal

36. 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

37. 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.
38. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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