



Decision Notice 180/2024

Two UCEA documents

Authority: Edinburgh Napier University
Case Ref: 202400012

Summary

The Applicant asked the Authority for two UCEA guidance documents. The Authority withheld them, saying that disclosure would breach confidentiality agreements. The Commissioner investigated and during his investigation the Authority applied a number of new exemptions. The Commissioner required the Authority to issue the Applicant with a new review outcome in which it notified him of all the exemptions it is now relying on.

Background

1. On 17 August 2023, the Applicant made a request for information to the Authority. He asked for digital copies of two documents:
 - (i) Document A, “The UCEA Members Guide to Negotiations in Higher Education”; and
 - (ii) Document B, “The UCEA Guidance on FOI requests for UCEA documents.”UCEA is the Universities and Colleges Employers Association.
2. The Authority responded on 14 September 2023. It withheld both documents under section 36(2)(b) of FOISA, arguing that disclosure would breach confidentiality agreements and was likely to have a detrimental effect on the Authority’s relationship with UCEA. The Authority referred to a weblink, contained within Document B, to a document which was publicly available via the National Archives. It provided the Applicant with this link, but notified him, under section 25(1) of FOISA, that the information was otherwise accessible other than by requesting it under FOISA.
3. On 21 October 2023, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with its decision to withhold the information as

he did not agree that the exemption applied and he did not accept that any actionable detriment would result from disclosure of the information.

4. The Authority notified the Applicant of the outcome of its review on 16 November 2023, fully upholding its original decision.
5. On 4 January 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority's review because it had not addressed any of the points he raised in his requirement for review. He questioned whether the quality of confidence applied and stated that the Authority was relying on "catch-all" provisions to prevent disclosure of any UCEA documents.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 29 February 2024, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments.
8. The Authority was also asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was subsequently allocated to an investigating officer.

Commissioner's analysis and findings

9. During the investigation, in its submissions to the Commissioner the Authority stated that, as well as withholding both documents under 36(2)(b) of FOISA, it was also relying on the exemptions contained in sections 30(b)(i) and (ii), 30(c) and 33(1)(b) of FOISA to withhold the information.
10. The grounds of dissatisfaction set out in the Applicant's application is restricted to his disagreement with the Authority's reliance on section 36(2)(b) of FOISA. The Applicant did not know, at the time of making his application to the Commissioner, that additional exemptions were being relied on, and therefore he did not have the opportunity to consider these exemptions and challenge them in his application.
11. Given this, the Commissioner requires the Authority to provide the Applicant with a revised review outcome, which lists all of the exemptions that the Authority is now seeking to apply, and which explains, in detail, why the Authority considers these exemptions to be relevant. This will enable the Applicant to make a new application in which he can fully challenge the Authority's reasons for withholding information from him.
12. The Commissioner notes that during the investigation, the Authority referred to the third-party views of UCEA which the Authority had sought in relation to the application. Section 7 of the [Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information \(Scotland\) Act 2002 and the Environmental Information \(Scotland\) Regulations 2004](#)¹ (the Section 60 Code) gives guidance on when

¹ <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>

authorities should seek third party views, and the Commissioner is satisfied that consulting UCEA was appropriate in this case.

13. However, the Commissioner wants to make clear that the handling of an information request, and the decisions on what exemptions may or may not be applied, must be made by the authority to which the request is made, on a case by case basis. He notes that an authority's responsibility for any such request cannot be delegated. That means that while the authority may take advice, or confer with peers, on the handling of a request, it is not for anyone else, even a representative body, to direct how any given request should be handled by the authority.
14. The Commissioner also notes that, unless there is an absolute exemption which genuinely fits the request and its circumstances, the public interest needs to be fully considered in any decision to withhold requested information. In this case, for example, and while noting that it would be inappropriate to comment in detail on the substance of the withheld information or to pre-empt any future appeal, the Commissioner considers that it is not inconceivable that there may be a genuine public interest in understanding the general guidance given to member public authorities by a representative body on handling information requests.
15. It is also important that a public authority considers very carefully whether an obligation of confidentiality can truly be said to exist in relation to any given set of information. The circumstances in which such an obligation can be said to arise inherently from a relationship, between the authority and a given third party will be relatively few – and, of course, will need, fully reasoned justification, specific and relevant to the case under consideration.
16. The Commissioner's view is that the Authority must issue the Applicant with a new review outcome that fully explains its new position with regard to the withheld information. In doing so it should consider carefully the points made by the Commissioner at paragraphs 11 to 15 above (and, where appropriate, reconsider its previously expressed position in relation to the information).

Decision

The Commissioner finds that the Authority failed to comply fully with Part 1 (and in particular section 16) of FOISA, in failing to provide the Applicant with adequate justification for its refusal to disclose the requested information. He requires the Authority to provide a new response to the Applicant's requirement for review, in terms of section 21(4)(b) of FOISA by 14 October 2024.

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

Euan McCulloch
Head of Enforcement

29 August 2024