

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 March 2012

Public Authority: The University of Manchester
Address: Oxford Road
Manchester M13 9PL

Decision (including any steps ordered)

1. The complainant made a request to the University of Manchester (the University) for details of the salary agreed between the University and Professor Colm Toibin, Professor of Creative Writing at the University's Centre for New Writing. The University withheld all salary information relating to Professor Toibin using the exemption in section 40(2) (personal information) and, latterly, the exemption section 43(2) (commercial interests).
2. The Information Commissioner's decision is that the University incorrectly applied both the section 40(2) exemption and the section 43(2) exemption to the information in this case. The complaint is therefore upheld.
3. The Information Commissioner (the Commissioner) requires the University to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant the amount of Professor Toibin's salary to within the nearest £5,000.
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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 2 February 2011, the complainant wrote to the University and requested information in the following terms:

'Details of the salary agreed between the University and Colm Toibin for taking on his role at the Centre for New Writing;

Details of any potential and/or likely expenses claims which will apply to Toibin;

All correspondence between members of the University (most likely from the Centre for New Writing) and Toibin;

Details of all expenses claimed to date by Martin Amis whilst employed at the University'.

6. The University responded on 21 February 2011. It stated that it was withholding the information requested by virtue of section 40(2). It also told the complainant that under the FOIA, it only disclosed expenses claimed by the most senior officer of the University, the President and Vice-Chancellor.
7. Following an internal review, the University upheld its original decision to withhold the requested information under section 40(2) and confirmed that it did not hold any information concerning possible future expense claims of Professor Toibin.

Background

8. The Centre for New Writing (the Centre) at the University runs two MA programmes (Creative Writing and Contemporary Literature and Culture). The University describes its Creative Writing MA as *'one of the most popular and exciting in the country'*. The novelist Martin Amis was appointed in 2007 as the University's inaugural Professor of Creative Writing and remained in post for four years. His appointment led to a considerable increase in applications to the Centre's courses. Professor Toibin was appointed as his successor in 2011. Noting in 2011 that the presence of Martin Amis had drawn high calibre students to the Centre, the University announced that, *'Colm Toibin, a great writer and a public intellectual, will be a similarly iconic appointment, inspiring students as well as contributing to cultural debates inside and outside the University'*.
9. In 2007, following an FOI request from the Manchester Evening News, the University released details of its non-clinical professorial salary scale, from which the newspaper reported a salary figure of £80,000 for Professor Amis. This figure was widely reported in the national press and the Times (26 January 2008) quoted Professor Amis as saying, *'It's very much Manchester University's decision to make and I abide by it'*. Professor Amis' salary attracted some controversy because whilst it was

relatively modest (when compared to the equivalent salary scale), the hourly rate was considerably higher than many professorships (since the contracted hours of work for the position amounted to approximately 28 hours).

10. The University has informed the Commissioner that, *'the salary scale was released in an attempt to be helpful, but in retrospect was probably not so as Professor Amis' salary was individually negotiated and did not map exactly on to a spinal point within the scale. This situation is the same for Professor Toibin'.*

Scope of the case

11. On 18 June 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
12. The Commissioner explained that it would only be in exceptional cases that a public authority would be expected to disclose an individual's exact salary (i.e. where there were compelling public interest arguments to do so), and the well established approach which public authorities are expected to take with regard to the disclosure of salary information is to disclose the appropriate salary band for the individual concerned.
13. In the case of Professor Toibin, his salary had been individually negotiated and therefore did not fall within the University's non-clinical professorial salary scale. Even if it had, the scale in question was so wide (£58,624 to £122,747) as to render it of little practical use in terms of providing the public with an approximate figure for Professor Toibin's salary. The Commissioner explained that in cases involving individually negotiated salaries, the established practice is for the public authority to disclose a salary figure to the nearest £5,000. The complainant confirmed that he would be prepared to accept a figure to the nearest £5,000 of Professor Toibin's salary.
14. The Commissioner informed the complainant that as the University held no information concerning Professor Toibin's expenses at the time of his request, such information fell outside of his investigation. The Commissioner confirmed that he had received copies of Professor Amis' expenses and that the University had consented to the Commissioner informing the complainant that these were in no way excessive or unusual (which would attract particular public interest). This being the case, the Commissioner asked the complainant whether he would be content for the scope of the investigation to focus solely on the salary information for Professor Toibin which the University had withheld. The complainant confirmed that he would be happy with this approach.

15. The Commissioner made clear that he was not expecting the University to disclose Professor Toibin's exact salary, and directed the University to relevant recent cases involving individually negotiated salaries.
16. The University informed the Commissioner that it was '*not comfortable with such a narrow band*', but made no suggestion of a suitable alternative band. On receipt of the University's final submissions, it became apparent that the University was of the view that it was not obliged to disclose *any* information concerning Professor Toibin's salary. The University also confirmed (for the first time) that it was applying section 43(2) to the information requested.

Reasons for decision

Section 43(2)

17. Section 43(2) of the FOIA states that information is exempt if disclosure would, or would be likely to prejudice the commercial interests of any person (including the public authority holding it).
18. The University has withheld the requested information on Professor Toibin's salary on the basis that disclosure would prejudice its commercial interests.
19. Describing the type of commercial interests contended in this case, the University explained that:

'Whilst Professor Tobin and others of his type have duties as part of their employment, in Professor Tobin's case the delivery of a set number of student seminars and public events over the course of a year, this only forms a proportion of the purpose of their employment. Part of the business case for their appointment is, through their status, reputation, and creative input, to attract students to and raise the profile of their departments.'
20. The Commissioner would agree that there is a commercial interest in the University being able to promote its services and attract as many students as possible to the courses it offers. The securing of high profile figures such as Professor Toibin and his predecessor would clearly assist such promotion and there is evidence to suggest that has been a notable increase in applications for the Centre's creative writing courses.
21. The University has highlighted that higher education institutions are operating in an increasingly competitive environment and are in competition with each other for students (and hence tuition fee income). This competition includes overseas universities and private research

institutions. The University has stated that, *'we would expect that a certain number of applicants and research partners would choose Manchester over another university because, or partly because, of Professor Toibin's presence. To this extent Professor Toibin's appointment is in part based on a commercial judgement'*.

22. In terms of the type of prejudice which the University asserts would result from releasing any information about Professor Toibin's salary, this is mainly two-fold. *'Firstly, it would provide its competitors with a valuable piece of intelligence about the payment for this post, and by extension similar posts within the University. Secondly it would make it more difficult to recruit to this post in the future, and to posts in the UK of this nature from abroad'*.
23. Based upon the submissions put forward by the University, the Commissioner is satisfied that there is a causal connection between the potential disclosure of the withheld information and prejudice to the University's commercial interests.
24. However, in order for section 43(2) to be engaged, the likelihood of the prejudice claimed must be more than merely hypothetical; the risk of it occurring must be real and significant.
25. The University admitted that the claimed prejudice, *'is difficult to gauge with complete certainty because it is not a situation which, so far as we are aware, has ever arisen before. Unlike in other sectors and professions, there is currently no expectation that the salaries of senior academics will be made public'*. Since the University has asserted that the prejudice claimed *'would'* occur if the withheld information were disclosed (as opposed to *'would be likely'* to occur), it is necessary for the University to demonstrate that it would be at least more probable than not that the prejudice would occur if the information were to be disclosed.
26. In this case the University has failed to provide any evidence to substantiate the degree of prejudice claimed. Whilst the Commissioner would agree that there is no expectation that the *exact* salaries of senior academics will be made public, he does not agree with the University's view that there is no expectation that any salary information concerning senior academics will be made public.
27. In this particular case, quite apart from the general principles of transparency and accountability applying to such salary information (which the Commissioner will address more fully below), there is already a precedent for the release of such information which was made by the University itself.

28. In response to the previous FOI request for information concerning Professor Amis' salary (in 2007), the University disclosed its non-clinical professorial salary scale. Given that this scale currently runs from £58,624 to £122,747, the Commissioner considers that in order for the Manchester Evening News to arrive at a figure of £80,000, it is highly likely that the University provided the newspaper with some information enabling it to narrow down the salary scale to such a specific figure. In other words, the '*valuable piece of intelligence*' which the University asserts should not be disclosed, was in fact disclosed by itself in relation to Professor Toibin's predecessor. Against this background, the Commissioner does not consider the University's position in relation to the likelihood of prejudice occurring a particularly credible one.
29. There is similarly no evidence to support the claim that disclosure of information relating to Professor Toibin's salary would '*make it more difficult to recruit to this post in the future*'. Indeed, the evidence which does exist suggests that disclosure would not do so. The disclosure of information concerning the salary of Professor Amis does not appear to have acted as a disincentive or discouragement to Professor Toibin. It also demonstrates that Professor Toibin, as the holder of such a high profile position, should have had a reasonable expectation (based on the University's handling of the previous request concerning his immediate predecessor) that some information relating to his salary would be likely to be publicly available.
30. The University also raised the possibility that, '*if Professor Toibin has the hoped for positive impacts on his department he will be coveted by other universities, and this could lead to an approach by a competitor*'. Such a possibility, without supporting evidence, is purely hypothetical, and for the reasons already stated, is insufficient to establish the degree of likelihood necessary under section 43(2). In other sectors, such as broadcasting it is accepted that approaches for 'talent' are often made by offering competitive salaries but the University sector is quite different in terms of staff motivation and as already noted there is no evidence to suggest such approaches take place. Many other factors will drive the decision of an academic to move; such as research budgets, academic freedom, research time and opportunities to generate additional income. The Commissioner notes in passing that Professor Amis remained in post for four years, despite a specific salary figure being widely reported in the national press
31. For the reasons given above, the Commissioner is not satisfied that the necessary likelihood of prejudice has been established by the University (even on the basis of the less evidentially demanding '*would be likely to*' level of prejudice). He therefore finds that the section 43(2) exemption is not engaged and that there is consequently no need to consider the public interest test attached to this exemption.

Section 40(2)

32. Section 40(2) of the FOIA provides an exemption for information that constitutes the personal data of third parties:

'Any information to which a request for information relates is also exempt information if –

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.'

33. Section 40(3)(a)(i) of the FOIA states that:

'The first condition is –

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of 'data' in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress)'

34. Since the requested information clearly identifies and relates to Professor Toibin, it is his personal data within the definition of the Data Protection Act 1998 (the DPA).

35. Such information is exempt if either of the conditions set out in sections 40(3) and 40(4) of the FOIA are met. The relevant condition in this case is at section 40(3)(a)(i) of the FOIA, where disclosure would breach any of the data protection principles. The University has argued that disclosure of the personal data would breach the first data protection principle, which states that, *'Personal data shall be processed fairly and lawfully'*. Furthermore, at least one of the conditions in Schedule 2 of the DPA should be met.

36. The University explained that:

'The University does not consider that the case law associated with the Freedom of Information Act 2000 applies to the salaries of purely academic members of staff in the higher education sector. It has long been a matter of principle that the salaries of such staff members are confidential, and there is no expectation within the sector that they will become publicly available. The University does not believe that there

is a public interest in the release of such salary information, nor does it believe that there is a necessity to release it under the Act'.

37. However, there is no exemption within the FOIA for *'purely academic members of staff in the higher education sector'*. The fact that FOIA case law to date does not include cases involving such individuals does not mean that they are not subject to the FOIA and the principles governing the same. The FOIA has now been in force for seven years and as in other areas of the public sector, previous conventions and understandings within academia are not determinative, noting the principles of freedom of information and the greater degree of openness and transparency which it promotes.
38. As the Commissioner's Guidance makes clear, *'those who are paid from the public purse should expect some information about their salaries to be made public'*. The Commissioner accepts that Universities are different from other public authorities in how they are funded and Professor Toibin's salary is not funded by taxpayers to the same extent. However, Universities are classed as public authorities under the Act and still receive significant public funds. The University is therefore incorrect in its assertion that there is no expectation within the sector that some salary information will become publicly available. Indeed, given that the University had previously released significant information about his predecessor's salary, Professor Toibin could not have reasonably thought that his own salary would be treated differently in response to any related FOIA requests.
39. The University has attempted to draw a distinction between the University of Bristol case (FS50386186) in which the Commissioner ordered the disclosure of salary band information concerning those individuals responsible for major financial and policy initiatives, and the present case, on the basis that Professor Toibin, *'does not occupy a management position in the University'*.
40. It is certainly true that one of the considerations that the Commissioner will take into account when deciding whether an individual should have a reasonable expectation that some information concerning their salary will be disclosed is whether they are responsible for major policy decisions or expenditure of public funds. The Commissioner accepts that Professor Toibin's role within the University does not entail such strategic responsibilities.
41. However, another relevant factor is whether the individual in question has a public profile or public-facing role. There are few professors attached to the University with a more prominent public profile than Professor Toibin. This high public profile will have been central to the University's wishes to retain Professor Toibin. The University will have

wished to maintain and build upon the success of his predecessor in the post of Professor of Creative Writing. The Commissioner notes that this success was succinctly summed up by the Guardian newspaper on 26 January 2011:

'But as his tenure comes to an end, many now consider the author to have been good value; Amis's lectures have been packed and his presence has raised the profile of the University, helping to attract other big name literary speakers such as Howard Jacobson and John Banville. The University said there had been a 100% increase in student applications for courses at the Centre for New Writing since Amis's arrival'.

42. There is a further point of public interest attached to information concerning Professor Toibin's salary, as it was individually negotiated and not subject to the standard non-clinical professorial scale. Whilst it may not be uncommon within the academic sphere for such salaries to be individually negotiated, it is not common for such salaries to command such a generous hourly rate as that applicable to the position of Professor of Creative Writing at the University. This is so, even taking into account the University's argument that, *'as with most academic members of staff here, the amount of contact time with students and the general public represents only a proportion of their contribution, which will also include writing and research'.*
43. In his request for an internal review, the complainant informed the University of his belief that *'the information requested has a distinct public interest value, especially so in light of the recent announcement on tuition fees and cuts to higher education. People have a right to know that Universities are spending their money wisely'.* The Commissioner agrees that this is a public interest argument that carries significant weight. The public in this context can be broken down into the general public as taxpayers, the 40,000 students who attend the University, students who plan to attend the University and the 10,000 staff who work at the University.
44. The University has suggested that Professor Toibin's presence at the University would be *'partially self funding'* and *'to some extent not funded from the public purse'* due to the expected effect of an increase in applications for taught courses in English. However, whilst an increase in student numbers would benefit the University in terms of the increased revenue (through tuition fees), the Commissioner is not persuaded by the suggestion that Professor Toibin's role could therefore be regarded as not significantly funded from the public purse.
45. The University has advised the Commissioner that the suggestion that Professor Toibin's salary be released, *'on these terms has caused a*

significant amount of disquiet both within this University and within professional HE circles'. However, the Commissioner does not expect the University to disclose Professor Toibin's exact salary.

46. He rather expects the University to accord with the established approach in cases involving salaries which fall outside a salary band (in this case a very broad band), and disclose a salary figure for Professor Toibin to the nearest £5,000.
47. The University has advised the Commissioner that, *'Professor Toibin has now been consulted and has indicated that he would object to the release of his salary by the University'*. This suggests that Professor Toibin mistakenly believes that the Commissioner requires his exact salary to be disclosed. Even if this is not the case, and Professor Toibin is aware that what is expected is disclosure of an approximate figure (to which he would nevertheless object), his consent is not required, but has been taken into account when considering the fairness of any such disclosure.
48. For the reasons detailed above, the Commissioner considers that Professor Toibin should have a reasonable expectation that some information regarding his salary (but not the exact amount or the details of how it was negotiated) would be subject to public scrutiny. The Commissioner draws support for his view by the fact that Professor Toibin will doubtless be aware that the University has already publicly disclosed that his salary is less than that which was paid to Professor Amis.
49. Given Professor Toibin's high profile role within the University and the small number of contracted hours of work for which he could reasonably be assumed (given what is known about his predecessor's salary) to be earning a significant sum of public money, the Commissioner does not consider that it would be unfair for an approximate salary figure, to within £5,000, to be disclosed. Such a disclosure would satisfy the legitimate public interest in transparency and accountability attached to this case, without being unfair to Professor Toibin.
50. The Commissioner also disagrees with the University's claim that there is no legitimate public interest in the release of salary information for purely academic members of a University. There is a general level of public interest in senior, high profile academic salaries and the specific level of public interest in each case will depend upon its own particular facts.
51. Rather than adopt a case specific approach in this instance,, the University appears to have taken a blanket approach to the type of information concerned. It has not considered the public interest in

transparency and accountability which this particular case carries. It has also incorrectly asserted that FOIA does not apply to salary information concerning purely academic members of staff.

52. In conclusion, the Commissioner considers that in this case the legitimate public interest outweighs the intrusion of disclosing an approximate salary figure for Professor Toibin, to within £5,000. The Commissioner has therefore concluded that the disclosure, on these terms, would not be unfair, highlighting following reasons:
- There was a reasonable level of expectation that salary information would be disclosed under FOI, for a post that was high profile and senior in terms of the academic level.
 - Although the situation with Universities is more nuanced than other public authorities the information still relates to a significant public role.
 - There was a strong level of legitimate public interest in the information.
 - Disclosure of the salary within £5000 would not be an intrusion in the Professors Toibin's privacy that would cause him significant prejudice.
53. The Commissioner also finds that disclosure would meet schedule 2 condition 6 in the Data Protection Act. Disclosure is necessary to meet a legitimate public interest and disclosure within £5000 is a proportionate way to meet the public interest when considering any prejudice to the data subject. The Commissioner has not been presented with any additional reasons as to why disclosure would be unlawful.
54. The Commissioner therefore considers that section 40(2) was incorrectly applied to withhold such salary information in this case.

Other matters

55. The University stated that it felt that, *'the issues surrounding this particular case are fundamental to the current position of HEIs (Higher Education Institutions) in this country that they need to be tested through a formal decision notice'*. Whilst the University may have concerns about changes within the higher education sector, a decision notice cannot address general issues, only those specific to the case.
56. Whilst the late application of an exemption to a request is admissible under the FOIA, it is not encouraged. In this case the University's

decision to apply section 43(2) at a late stage of the Commissioner's investigation meant that the complainant was not provided with a full refusal notice.

Right of Appeal

57. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

58. 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.
59. 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

Steve Wood
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