

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 December 2013

Public Authority: The Governing Body of London Metropolitan University

Address: 166-220 Holloway Road
London
N7 8DB

Decision (including any steps ordered)

1. The complainant has asked London Metropolitan University (the "University") where he could access copies of recent minutes produced by the University. The University explained that it was planning to publish its Board of Governors' minutes in the future and was therefore not obliged to disclose this information at the present time by virtue of section 22(1) of FOIA (information intended for future publication). During the course of the Commissioner's investigation, the University also introduced the following exemptions to parts of the minutes – section 30(2)(a)(iv) (investigations and proceedings), section 37(1) (communications with the Royal Household), section 42(1) (legal professional privilege) and section 43(2) (commercial interests).
2. The complainant has confirmed that he did not require the Commissioner to consider as part of this notice the University's application of section 43(2) of FOIA and one other piece of information, namely bank account numbers referred to in the minutes. For the remaining areas of the complaint, the Commissioner has found that sections 22, 30(2)(a)(iv) and 42(1) are not engaged. In respect of section 37(1) of FOIA, the Commissioner considers that the exemption is engaged and that the public interest lies in favour of withholding the information.
3. The Commissioner requires the public authority to disclose the requested minutes with the exception of the bank account numbers and the information to which the University had applied sections 37(1) and 43(2) of FOIA.
4. The public authority 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 Act and may be dealt with as a contempt of court.

Request and response

5. On 14 January 2013 the complainant wrote to the University and requested information in the following terms:

I'm just trying to track down London Met's council minutes, but I've only been able to find one set from 2011:

<http://www.londonmet.ac.uk/foi/classes/governance.cfm>

Could you let me know where the most recent ones are?

And, in addition, does London Met have a Senate, or is it basically just the Academic Council?

6. The University responded on 16 January 2013. In relation to the question concerning the Council minutes (request 1), the University explained that the intention of the Clerk to the Board of Governors was to adopt a formal publication protocol that would make the minutes of Board meetings publicly and routinely available through the University's online (FOI) Publication scheme. However, the University further advised that such a policy needed to be first considered by its Governance Committee (a sub-committee of the Board), the next meeting of which scheduled for the end of the month. In the meantime, the University informed the complainant that it was applying section 22 of FOIA to the minutes.
7. Regarding the question about the structure of the institution (request 2), the University clarified that it did not have a Governing Council, Academic Council or a Senate but rather a Board of Governors and an Academic Board.
8. The complainant wrote to the University on 17 January 2013 and challenged whether section 22 of FOIA had been properly applied. He pointed out the exemption was dependent on a public authority having an intention to publish the requested information at the time a request was made and disputed whether any decision about publication had been made in this case.
9. The University replied on 11 February 2013 and advised that the Board of Governors had met on 31 January 2013. The outcome of the meeting was that the Committee had agreed that the minutes of any given meeting of the Board should be published and made available through

the University's FOI publication scheme 12 months from the date of that meeting.

10. On 12 February 2013 the complainant asked the University to complete an internal review of its handling of request 1. He put forward three points demonstrating why the requested information should be disclosed. 1) There was no settled intention to release the minutes at the time the request was received. 2) There is, in any event, a strong public interest attached to the understanding of the decisions taken by the University in light of the public scrutiny it had been under in recent times. Building on the point, the complainant argued that the usefulness of the minutes would diminish if they were released a year after a meeting took place. 3) The complainant considered that the 12 month period for publication was not in line with accepted practices.
11. The University subsequently carried out an internal review, the conclusion of which was provided to the complainant on 5 April 2013. This upheld the University's original position. In coming to this decision, the University considered the points raised by the complainant but had nevertheless decided that section 22 of FOIA applied.

Scope of the case

12. The complainant contacted the Commissioner on 15 May 2013 to complain about the University's handling of request 1. Specifically, he asked the Commissioner to consider the University's decision to withhold the requested information.
13. At the stage of the Commissioner's involvement it was found that the minutes for the Board of Governors' meetings up to and including the meeting of 3 September 2012 had been published. It was therefore agreed that the disputed information comprised the minutes of the later meetings, which were held on the following dates:
 - 27 September 2012
 - 5 November 2012
 - 29 November 2012
14. Having revisited the contents of these minutes in the light of the Commissioner's investigation, the University maintained its reliance on section 22(1) of FOIA but also decided that additional exemptions would apply to parts of the minutes. The exemptions cited in FOIA were variously; section 30(2)(a)(iv), section 37(1), section 42(1) and section 43(2). The University also considered that two bank account numbers

would need to be redacted from the minutes when published, although the specific legislative basis for the redaction was not established.

15. Following discussions with the Commissioner, the complainant confirmed that his complaint did not extend to the information withheld under section 43(2) nor the bank account numbers. It was therefore left for the Commissioner to consider the remaining material.

Reasons for decision

Section 22 – information intended for future publication

16. Section 22(1) of FOIA states 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 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).
17. The exemption will only be engaged if, and only if, each of the conditions listed at (a) – (c) are satisfied. The Commissioner considers each of the conditions below. As a qualified exemption, section 22 of FOIA is also subject to the public interest test.

Did the University hold the disputed information at the time of the request?

18. There is no dispute that the minutes of the three meetings in question were and are held by the University.

With a view to publication?

19. In the Commissioner's guidance¹ on section 22 of FOIA, he makes the following observation:

"With a view to" indicates that an intention has been made to publish the information, or, at the very least, that information is held in the settled expectation that it will be published.

¹http://www.ico.org.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/section_22_information_intended_for_future_publication.pdf

20. The University has informed the Commissioner that up to the autumn of 2011 it routinely published the minutes of meetings of the Board of Governors on its website. Although the University did not specifically explain what happened in the period afterwards, the Commissioner is led to believe that this practice of routine publication stopped, with a decision only made more recently to consider whether and, if so, how public access to the minutes should again be achieved. Following an internal discussion, an internal paper was produced and delivered to the Governance Committee on 24 January 2013 which asked its members to consider whether it was appropriate to recommence formal publication of its Board of Governor minutes. The paper proposed that, unless decided otherwise, the Board's minutes should routinely be published after 12 months.
21. At a meeting held on 29 January 2013, the Governance Committee resolved to recommend to the Board that minutes of the Board of Governors should be published a year after the meeting to which they related, although it noted that the Board may wish to consider reducing this timescale. The recommendation to publish minutes after 12 months was then accepted by the Board at its meeting of 31 January 2013.
22. The University has conceded that the resolution of the Governance Committee and the ratification of the Board post-dates the information request. On this basis, it could be supposed that the University did not have a settled intention to publish the information when the request was received. However, the University has clarified that discussions about the publication of Board minutes had been ongoing in the three months prior to the ratification by the Board and the paper referring to the publication of minutes was written during this period.
23. In this regard, the University has claimed that the paper itself reflects that the issue was not whether the minutes should be published but rather the interval at which the minutes should be published.
24. The Commissioner, however, does not accept this analysis. He considers that a critical consideration relates to the inclusion of the word "recommence" in the part of the proposal quoted by the University of the paper put before the Governance Committee. The recommendation about when the minutes should be published only becomes effective if the Governance Committee agreed that the publication of the minutes should be *recommenced* in the first place. To this extent, the Commissioner disagrees that the paper evidences a settled intention to disclose the minutes at some point in the future.
25. Furthermore, the Commissioner is mindful that any decisions regarding the publication of the minutes ultimately rested with the Board of Governors. As the Board only formally considered the publication policy at the end of January 2013, at which point it was presumably still free to

reject the terms of the policy, the Commissioner considers that the evidence provided by the University demonstrates at most a strong likelihood that a decision would be made to publish the information at some future date and not a *settled* intention to publish this information.

26. The effect of this finding is that the Commissioner has decided that the conditions inbuilt into the exemption have not been met and therefore section 22(1) of FOIA is not engaged. He has not therefore been required to consider the public interest in disclosure and has instead gone on to consider the other exemptions that have been applied to parts of the requested information.

Section 30 – investigations and proceedings

27. The University has claimed that section 30(2)(a)(iv) of FOIA applies to some of the requested information. This provides that information held by a public authority is exempt information if –

(a) it was obtained or recorded by the authority for the purposes of its functions relating to –

(iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations

28. Broadly speaking, section 30(2) of FOIA is designed to protect the identity of confidential sources, primarily to ensure informants are not deterred from supplying law enforcement agencies with valuable intelligence. For information to be exempt under this provision, it must both relate to a public authority's investigations or proceedings *and* relate to confidential sources. As the Commissioner's guidance² on the exemption also reflects, section 30(2) not only protects confidential sources used in investigations falling under subsection (1) and criminal proceedings. It also protects those used by regulators for specified purposes.
29. The relevant investigations and proceedings are described in section 30(2)(a) of FOIA. Section 30(2)(a)(iv) itself is concerned with civil proceedings that result from a public authority's investigations.
30. The background to the application of section 30(2)(a)(iv) in this case relates to the Home Office's decision to revoke the University's Tier 4 sponsor licence (which was later reinstated). If a UK education provider

²http://www.ico.org.uk/for_organisations/guidance_index/~//media/documents/library/Freedom_of_Information/Detailed_specialist_guides/investigations-and-proceedings-foi-section-30.ashx

wants to teach international students, it must apply to the Home Office for a Tier 4 sponsor licence. In the event that the education provider's application is approved, the Home Officer will give the provider a licence and add it to a register of Tier 4 sponsors³.

31. The University has claimed that the disputed information relates to civil proceedings in that it concerns the application for a judicial review of the Home Office's decision regarding the University's Tier 4 status. The Commissioner does not dispute that information of this nature could fall under the category of 'civil proceedings'. However, he is also clear that the civil proceedings do not arise out of investigations referred to in the exemption itself nor is there any indication that the information relates to confidential sources. On this basis, the Commissioner has determined that section 30(2)(a)(iv) of FOIA cannot be engaged in the circumstances.

Section 37 – communications with Her Majesty, etc. and honours

32. The University has withheld under section 37(1)(a) of FOIA information contained in a separate minute to the main body of the minutes of 29 November 2012. This limb of section 37 states:

(1) Information is exempt information if it relates to –

(a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household

33. Until January 2011, the whole of section 37 was a qualified exemption under FOIA and therefore subject to the public interest test. However, with effect from 19 January 2011, this was changed by virtue of amendments made by The Constitutional Reform and Governance Act 2011. In particular, the change meant that section 37 is now an absolute exemption in respect of some information, thereby removing the requirement to apply the public interest test in this context. The absolutely exempt categories under section 37 of FOIA are as follows:

- communications with the Sovereign;
- communications with the heir or second in line to the Throne; and

³ <http://www.ukba.homeoffice.gov.uk/visas-immigration/studying/adult-students/education-provider/>

- communications with a person who has subsequently become heir to or second in line to the Throne.
34. The Commissioner notes that none of these categories are pertinent to this case.
35. An important consideration in respect of the exemption is that it covers information *relating* to communications with the Royal Family and not simply information contained in communications between a member of the Royal Family and an organisation. Furthermore, for relevant information not captured by one of the absolutely exempt categories listed above, section 37 represents a class-based exemption. In contrast to prejudice-based exemptions, these are ones in which it is assumed that disclosure of the nature covered by the section will be harmful. Consequently, there is not a requirement for a public authority to demonstrate what harm could flow from the release of the information for the exemption to be engaged. Instead, a public authority must next apply the public interest test.
36. The Commissioner is satisfied that the information falls within the description of information covered by the exemption, in that it relates to communications between a member of the Royal Family and the University. He has therefore gone on to consider the balance of the public interest.

Public interest arguments in favour of disclosure

37. The Commissioner will always attribute some weight to the importance of transparency and accountability in a public authority's actions and decision-making. The University has also acknowledged that the public interest in disclosure may potentially be strengthened in this case because of the significance and influence of the Royal Family and the awareness that the information will evidence the nature the relationship between an education provider and a member of the Royal Family.

Public interest arguments in favour of maintaining the exemption

38. The argument against disclosure principally stems from the claim that at the time of the request the issue under discussion was still live. In the University's view, there is a public interest in ensuring that it is afforded space in which to deliberate operational matters. The premature release of the information, on the other hand, could have a negative effect on the discussions because of the spotlight that disclosure would throw on them.

The balance of the public interest

39. To the Commissioner's mind, the disputed information does not in itself contain anything of upmost significance or that is injurious to a party. Although the information is not trivial, the Commissioner considers it unlikely that its disclosure would trigger, or otherwise inform, public debate to any meaningful extent.
40. The Commissioner considers that this finding would on the one hand serve to weaken the weight of the public interest in disclosure. Yet, on the other hand, he recognises that it may also indicate that the harm arising from the release of the information is unlikely to be particularly severe, in which event the case for disclosure should prevail.
41. Ultimately, however, the Commissioner has found compelling the fact that the discussions to which the information relates were not completed by the time of the request. The Commissioner agrees with the University that in the circumstances it was preferable to allow the respective parties space in which to engage with each other away from the public glare so that a satisfactory outcome could potentially be achieved. Corresponding with this view is the Commissioner's judgement that there was no overwhelming case for disclosure at the time in question.
42. For these reasons, the Commissioner has decided that the public interest in disclosure is outweighed by the public interest in maintaining the exemption.

Section 42 – legal professional privilege

43. Section 42(1) of FOIA provides that information is exempt from disclosure if it attracts legal professional privilege. As a qualified exemption, a public authority must apply the public interest test where the provision is found to be engaged.
44. There are two types of privilege within the concept of legal professional privilege; litigation privilege and advice privilege. Advice privilege covers confidential communications between a client and lawyer, made for the dominant purpose of seeking or giving legal advice. It will apply where litigation is not in progress or being contemplated. Litigation privilege, conversely, applies to communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation.
45. The University has claimed that parts of the requested minutes are covered by legal professional privilege because they constitute information provided to the University by its legal advisers in respect of the revocation of the University's Tier 4 sponsor licence. This is the same information that the University had applied section 30 of FOIA, the consideration of which has been referred to earlier in this notice.

46. The University has not explicitly stated whether it considers the disputed information is covered by advice or litigation privilege. The Commissioner has therefore had to decide whether the information falls into either category. In his view, it does not.
47. The reason for coming to this view is informed by his consideration of whether the information falls into one of the following four categories. First, the information was produced by, or directly quotes from, a legal adviser. Second, the information represents communications made for the purposes of obtaining legal advice. Third, the information is information that a lawyer has selected as a supporting document, the release of which would betray the trend of the legal advice given or the trend of litigation arguments. Fourth, the information tells us something about the content or substance of the legal advice received by the University. Legal professional privilege, be it advice privilege or litigation privilege, will only apply if one of these categories apply.
48. The Commissioner is satisfied that none of the first, second and third categories are relevant in the circumstances. He has therefore gone on to assess to what extent, if at all, the information reveals the nub of legal advice.
49. The Commissioner understands that the revocation of the University's sponsor licence prompted it to seek advice about the legal options available. The disputed information can be seen, broadly speaking, to provide an update on events surrounding the revocation and the possible way in which the University intended to proceed. What it does not do, critically, is summarise or otherwise refer to in some detail any legal advice the University had obtained.
50. The Commissioner has therefore determined that the information does not convey any legal advice or otherwise indicate the trend of the legal advice. On this basis, he has decided that section 42(1) is not engaged.

Other matters

51. FOIA requires every public authority to have a publication scheme, which commits the authority to publish information covered by the scheme. This reflects the positive duty that the legislation places on a public authority to take a proactive approach to making certain categories of information available.

52. The Commissioner has prepared and approved a model publication scheme⁴ that can be adopted by a public authority without modification. The scheme covers various classes of information, including, for example, what an authority's priorities are and how the authority is performing. Under this heading, the Commissioner places strategy and performance information, plans, assessments, inspections and reviews.
53. At its meeting of 31 January 2013 the Board of Governors of the University determined that:

the minutes of any given meeting of the Board should be published and made available through the University's FOI Publication Scheme 12 months from the date of that meeting. Some items of a commercial or sensitive nature may continue to be redacted under other provisions of the FOIA 2000.

54. Regarding the information included in a publication scheme, the Commissioner has not sought to provide prescriptive advice to public authorities on how long before information should be made available after it has been produced. However, he does consider that the time period should not be excessive, otherwise it risks undermining the usefulness of the information to the public. In page 3 of his guidance 'What should be published? Minutes and agendas'⁵, the Commissioner counsels that it is good practice for public authorities to have a process that ensures minutes related to regular meetings are published *reasonably soon after the meeting has been held.*
55. In the circumstances, the Commissioner considers it unlikely that publishing minutes 12 months after the date of a meeting could be deemed reasonably soon. He would therefore encourage the University to consider whether the time period should be reduced to reflect the spirit of the legislation and the Commissioner's guidance.

⁴http://www.ico.org.uk/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/model-publication-scheme.pdf

⁵http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/minutesandagendas.pdf

Right of appeal

56. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

57. 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.
58. 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

Graham Smith
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