

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 29 May 2013

**Public Authority:** The Open University  
**Address:** Walton Hall  
Milton Keynes  
MK7 6AA

### **Decision (including any steps ordered)**

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1. The complainant made a series of requests to the Open University for information related to its decision to dismiss a number of associate lecturers employed overseas. The Open University had disclosed information in response to some of the requests but had also withheld some information under various exemptions and also maintained that the cost of complying with some of the requests would exceed the appropriate limit under section 12 of FOIA.
2. The Commissioner has investigated the complaint and found that since all of the requests are for the same or similar information the Open University is entitled to aggregate the total costs of complying with the requests as a whole. The Commissioner found that the aggregated costs would exceed the appropriate limit of £450 and therefore the Open University was entitled to refuse the requests under section 12(1). The Commissioner requires no steps to be taken.

### **Request and response**

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3. On 10 July 2012 the complainant made a freedom of information request to the Open University ("the University") for information related to the decision of the University to dismiss a number of associate lecturers employed overseas. The request was in fact made up of 21 separate requests which are included as an annex to this letter.
4. The University responded on 7 August 2012. Some of the requested information was disclosed or else the University said that the

information was not held. However, for some of the requests the University applied exemptions to withhold information, namely:

- Section 12 – cost exceeds appropriate limit
- Section 40 – personal information
- Section 42 – legal professional privilege
- Section 43 – commercial interests

5. The complainant subsequently asked the University to carry out an internal review of its handling of the request and the University presented its findings on 12 September 2012 at which point it said that it was upholding its initial response. It confirmed that it had taken in excess of two and a half days to locate, retrieve and extract the variety of information that had been disclosed and that this included the time taken to establish that no recorded information was held. It said that in light of the fact that it had already taken in excess of the appropriate limit to deal with the request it would not be providing any further information. The University also said that it was upholding the application of section 43(2) where this had applied to particular information falling within the scope of some of the complainant's requests.

## **Scope of the case**

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6. On 31 July 2012 and on 20 September 2012 (subsequent to the University completing the internal review) the complainant contacted the Commissioner to complain about the decision to refuse to disclose some of the information he requested.
7. Following discussions with the Commissioner the complainant said that he wanted to refine the scope of his complaint to challenge the University's response to parts 6, 8, 9, 14(a), 16, 17 and 18. The complainant also suggested that his complaint could be satisfied by the University disclosing four key documents which he had identified.
8. In an attempt to resolve the case informally the University provided the complainant with further information, including some of the key documents referred to but other information continued to be withheld. However, it also maintained that the costs of complying with the request would exceed the appropriate limit and that therefore it was entitled to refuse all the requests under section 12(1). Indeed it said that it had already exceeded the appropriate limit in providing its initial response to the complainant's requests.

9. In light of this, the Commissioner considers it appropriate to make a decision in the first instance on whether the University was entitled to refuse any or all of the complainant's requests under section 12(1) of FOIA rather than considering whether any of the information which continues to be withheld would fall under an exemption in part II of FOIA.

## **Reasons for decision**

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10. Section 12 of FOIA provides that a public authority is not obliged to comply with a request for information if it estimates that the cost of complying with the request would exceed the appropriate limit. The appropriate limit for public authorities outside of central government is set at £450.
11. The costs that a public authority may take into account when producing its estimate are set out in the Freedom of Information and Data Protection (Appropriate Limit and fees) Regulations 2004 or the "the fees regulations".
12. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the costs it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
  - determining whether the information is held;
  - locating the information, or a document containing it;
  - retrieving the information, or a document containing it; and
  - extracting the information from a document containing it.
13. A public authority should calculate the time spent on the permitted activities at the flat rate of £25 per person, per hour.
14. Under section 12 a public authority may also aggregate the costs of complying with two or more requests where the requests relate to the same or similar information and where the requests are made within a period of 60 consecutive working days. It is important to note that multiple requests for information within a single item of correspondence are separate requests for the purposes of section 12.
15. In this case the requests all relate to the decision of the University to dismiss the associate lecturers and the complainant had expressly linked the requests by including them within the same letter. There is an overarching theme or common thread running between the requests as

they are concerned with one particular decision made by the University and the requester makes it clear that this is the case. The Commissioner is satisfied that the requests are sufficiently similar that they may be aggregated for the purposes of section 12. The consequences of this are that section 12 can be applied where the University estimates that the combined costs of dealing with the complainant's requests would exceed £450 (or 18 hours).

16. First of all the University provided the Commissioner with a list of the costs it had actually incurred in responding to the complainant's requests. The Commissioner reviewed this list and found that not all of the costs listed were attributable to the activities listed in regulation 4(3) and therefore could not be taken into account for the purposes of section 12(1). However, it was apparent from this list that the University had spent over 14 hours locating, retrieving and extracting information falling within the scope of the requests which it either provided to the complainant or to which it applied an exemption.
17. The University also provided the Commissioner with an estimate of the time it would take to comply with those particular requests where it had informed the complainant that the cost would exceed the appropriate limit.
18. For request 6 it explained that this would involve 10 key people taking two hours each to locate and retrieve documents and emails they held on the subject over a five year period and that even then it thinks that this would only retrieve partial information. The University was able to demonstrate that the issue covered by this request dated back many years to at least 2005 and had involved various departments within the University. As such it suggested that the 20 hours or £500 figure was in fact a conservative estimate.
19. To comply with request 14(b) would involve the University searching approximately 20 sets of staff related Committee papers and reports over an approximately five year period which would take at least half an hour to retrieve and review each set of papers for relevant information. It estimated that this would take more than one working day or £180.
20. For request 14(c) the University said that it had estimated that it would take 10 key people two hours each to locate and retrieve emails and documents they held on the subject over a 5 year period. Again, the University explained that the request concerned an issue which dated back many years and had involved a number of different departments within the University. It suggested that the 20 hours or £500 figure needed to fulfil this request was also a conservative estimate.

21. Request 12 was not complied with at the time of the request and the University indicated that this would take an hour to deal with which would require the retrieval and printing of approximately six sets of minutes and/or related documents from an electronic filing system.
22. In estimating these costs the University said that it had not undertaken a sampling exercise but had instead based its estimate on the knowledge and experience of the Freedom of Information Co-ordinator and the Director of Human Resources. Given that the University had already completed searches for some of the information and provided it to the complainant it is reasonable to assume that it would have some understanding of the type of information he was looking for and the time that would be needed to compile its response.
23. The Commissioner has considered the estimate put forward by the University and whilst in some cases he has found that some inappropriate costs were taken in to account it is nevertheless clear that the time taken to comply with the requests in their entirety would significantly exceed the appropriate limit.
24. Some of the requests are for complex information and rather than being requests for specific documents or easily identifiable information are instead broadly phrased and wide ranging. For instance, the requests which the University has identified as the most time consuming ask for "all reports, correspondence, e-mails, internal and external assessments and other documents". Having taken this in to account and having considered the complex nature of the issue at the heart of the requests, the length of time covered by the request and the various departments involved he is satisfied that it was reasonable for the University to conclude that the cost of complying with the request would exceed the appropriate limit. Having reviewed the calculations provided by the University the Commissioner considers that an estimate that it would take up to 62.2 hours or £1555 is reasonable in the circumstances.
25. The Commissioner has decided that the aggregated costs of complying with all of the requests would exceed the appropriate limit and therefore section 12(1) applies.

## **Other matters**

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26. The Commissioner has found that the public authority was not obliged to respond to any of the complainant's requests because the aggregated costs of complying with them all would exceed the appropriate limit. However, the University actually disclosed some information to the

complainant in its initial response because, it explained, it wanted to be "as open as possible about a decision making process which affected individuals", and so had chosen to answer as many of the complainant's requests as possible in a way that was likely to remain within or exceed as little as possible the £450 limit. The Commissioner appreciates that in this case this was done with the intention of being helpful but he would also refer public authorities to his guidance on section 12 which suggests that as a matter of good practice, where section 12 applies to a request or requests they should avoid disclosing some information and claiming section 12 for the remainder of the information. Ultimately this denies the requestor the right to express a preference as to which part or parts of the request they may wish to receive which can be provided under the appropriate limit.<sup>1</sup>

27. In practice, as soon as a public authority becomes aware that it intends to rely on section 12, it makes sense for it to stop searching for the requested information and inform the complainant. This avoids any further and unnecessary work for the public authority as it does not need to provide any information at all if section 12 is engaged.

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[http://www.ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/costs\\_of\\_compliance\\_exceeds\\_appropriate\\_limit.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/costs_of_compliance_exceeds_appropriate_limit.ashx)

## Right of appeal

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28. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

29. 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.
30. 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 .....**

**Pamela Clements  
Group Manager, Complaints Resolution  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

Annex – the request

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1. Kindly provide me with the reason why it was decided to issue a redacted version of this document to ALs. Kindly provide copies of e-mails, minutes of meetings etc. in which the decision or instruction to provide ALs with a redacted version of this document is recorded.
2. I would like to know whether the University Council received a redacted version of this document or a non-redacted version of this document.
3. I would like to know whether Council imposed an embargo on the disclosure of this document.
4. Kindly provide me with all minutes and proceedings of the meeting at which the decision to impose an embargo was taken, the discussion in this regard, any differing viewpoints and the result of a final vote on the issue.
5. Kindly provide me with the full (non-redacted text) of all appendices to this Council Paper and any other documents, papers or submissions relating to this document and the discussion of it.
6. Kindly provide me with all documents, internal reports, reports by external experts and consultants, e-mails and other documentation on which paragraph 7 of the Council paper is based, in particular the statement that *"Over time, it has become clear that the UK contract of employment does not comply with employment law in all CE countries. Despite considerable investigation and work over the last few years, it has not been possible to arrive at a contract of employment which complies with the employment law of all 12 European countries in which the University currently employs staff, and meets the operational requirements of the University."*
7. I would like to know which the 12 European countries are in which the University employs staff.
8. In relation to paragraph 7, kindly provide me with any documents (in the broadest sense of the term) on which the statement *"The alternative would be to have separate and different contracts for different countries, which would be both unwieldy and prohibitively expensive to manage"* is based. In particular, kindly provide me with any calculations of the cost, qualified as "prohibitively expensive", per country and documents explaining, analysing and assessing the reasons why this would be "unwieldy".
9. In relation to the statement in paragraph 7 *"Even if this approach were adopted, this would not enable equal treatment of staff, particularly*



*Associate Lecturers, as some European countries do not permit short notice redundancy of staff in response to changes in student numbers, and staff in Continental Europe.*" I would like to know what concept of "equal treatment" was applied in making this assessment, bearing in mind that "equitable" can mean "equivalent" and not necessarily "the same". What models of employment were investigated and what consultation with staff, if any, took place to establish whether an equitable solution could be found for this matter? Kindly provide me with an overview of the number of instances in which it has not been possible to accommodate changes in student numbers in the past 10 years due to the employment arrangements with Continental Europe.

10. Paragraph 8 states *"The decision was taken by Vice-Chancellor's Executive (VCE), on the basis of analysis carried out in the summer of 2011, that direct employment of staff in Continental Europe is no longer sustainable."* Kindly provide me with the minutes of the Vice-Chancellor's Executive at which this decision was taken together with any supporting documents. Kindly provide me with an explanation of the criteria of "sustainability" in reaching this conclusion.

11. In paragraph 8, reference is made to *"a Project Steering Group and Project Team [...] established to take forward the proposal in November 2011."* Kindly provide me with the terms of reference of the Project Steering Group and any subsequent formal and *de facto* amendments to these contained in e-mails etc.

12. Kindly provide me with the minutes of the meetings of the Project Steering Group and Project Team.  
[With regard to paragraph 11, kindly note that questions in relation to alternative teaching arrangements will be submitted separately.]

13. In paragraph 13 the following statement is made: *"It has become clear that the reaction has come from a relatively small number of affected staff and students but that they have engaged with a number of different media, including OU forums, LinkedIn, Facebook, Twitter, and more traditional forms of communication, such as Times Higher Education (THE)."* On what basis did the University come to the conclusion that the reaction came from a "relatively small group of a staff and students"? How did the University measure the size of this group and its support base?

14. Paragraph 17 includes the following statement: *"It was emphasised that this was not a financial decision but a compliance and risk issue, with the University being non-compliant in four countries and having difficulty in being compliant in other CE countries, particularly in areas of tax, social security, corporate law and registration as a University."*

- a. I would like to know in which four CE countries the OU is non-compliant.
- b. I would like to know what the nature of this non-compliance is, its duration, the extent (in quantitative and qualitative terms), who bears the risk of this non-compliance, what the estimated cost of becoming compliant would be, whether the authorities in the respective countries have been informed or, to the best of the University's knowledge, are aware of this non-compliance and whether the University intends to ensure that it is fully compliant and that any arrears are met in the short term.
- c. Kindly provide me with all reports, correspondence, e-mails, internal and external assessments and other documents relating to non-compliance in the various countries in which the OU is and has been active in relation to tax, social security, corporate law and registration as a University, and the extent, duration and possible (cumulative) sanctions which could be imposed on the University for such non-compliance.
- d. I would like to know during which periods in the past 12 years the Open University employed coordinators and has had offices and local postal addresses/telephone numbers in the various CE countries in which it operated.
- e. I would like to know whether the University's accountant has been informed of any outstanding tax liability, or risk thereof, in CE countries, of which the University is or has been aware. Kindly provide me with documents supporting your answer.
- f. I would like to know whether any outstanding tax liability, or risk thereof, in CE countries has been recognised in the University's annual accounts, including the explanatory notes to the annual accounts, or whether any such risk, or actual or potential tax liability, in CE countries has been reported as an off-balance liability.
- g. If such a tax liability and/or risk thereof in CE countries has been recognised in the University's annual accounts, kindly provide me with documents attesting to this. If such a tax liability and/or risk thereof has not been recognised in the University's annual accounts, I would like to know why this is the case. Kindly provide me with any minutes of any meetings and/or other documents of any department within the University in which it was decided that this liability and/or risk should not be recognised in the annual accounts and/or that the accountant should not be informed of this liability/risk.
- h. I would like to know whether this risk and/or tax liability has been included in or excluded from other filings of financial data with public

authorities (e.g. the Ministry of Education and/or tax authorities in the UK and CE countries, etc.).

15. Paragraph 17 includes the following statement: "*The Finance Director also noted European pension law, which would require the USS member universities to pay off the USS deficit the moment it become a 'cross border' pension scheme, and prevented staff based in Europe being treated the same as UK staff for pension purposes.*" I would like to know in what manner the Finance Director "noted" this. Have estimates been made of the cost involved and the extent of this risk or was the Finance Director simply noting something that might become a risk in the future? Kindly provide me with all documents (in the broadest sense) in which an assessment of this risk is made or in which allusions are made to it.

16. Paragraph 18 makes reference to a payback period of the cost of terminating the employment of associate lecturers in CE. I would like to know whether the payback period includes the cost of full disclosure of non-compliance to the respective authorities in CE countries and the cost of payment of any fines, outstanding taxes and social security payments, etc.

17. Paragraph 19 includes the following statement: "*A final concern expressed was over the impact that the decision to withdraw from direct employment would have on the reputation of the University; it was felt that this was bound to impact adversely on the University's competitive position and ability to recruit students in future.*" I would like to know which departments or faculties of the University felt that this was the case and on what information this feeling was based. Furthermore, kindly provide me with any documents (in the broadest sense of the term) relating to this matter and providing an assessment of it, both in qualitative and quantitative terms.

18. Paragraph 19 includes the following statement: "*.. but it was felt that the short-term risk was more acceptable than the longer term risk of continued non-compliance.*" Kindly provide me with all documents in which these two risks are described and compared (either qualitatively or quantitatively) and, in particular, a quantification of the risk of past, present and future non-compliance, which presumably provides the basis for the business case and for the calculation of the payback period.

19. Kindly provide me with the full, unedited and unredacted document known as C-2012-01-02 Appendix 1: SPRC paper on Proposed Changes to Employment Arrangements in Continental Europe (SPRC-2012-01-04B - Strictly Confidential and Restricted) (insofar as this is different to the document requested under point 5) and C-2012-01-02 Appendix 2: UCU Concerns and University Management Response.

20. Kindly provide me with all minutes and other documents (in the broadest sense of the terms) of the Vice-Chancellor's Executive and the HR department pertaining to the decision to terminate the employment of ALs in CE.

**B. Matters relating to consultation of associate lecturers in Continental Europe**

21. Kindly provide me with all minutes and internal correspondence of the HR department, between the HR department and senior management, and between the HR department and the Project Steering Group and Project Team in relation to the organisation of consultation and information meetings in CE countries.