Freedom of information obligations for Stonewall scheme participants

This briefing sets out a summary of the two recent decisions by the Information Commissioners Office (ICO). It is intended to inform public authorities participating in Stonewall (and similar) schemes in order to encourage them to respond promptly and appropriately to future Freedom of Information requests.

Introduction

There is significant public interest in Stonewall, and in particular in the extent of its influence on public authorities. This can be seen, for example, in the BBC *Nolan Investigates* series, the work of respected, senior academics who have raised concerns about Stonewall's influence, and the Reindorf report into "de-platforming" at University of Essex.

In 2021 Legal Feminist and Sex Matters coordinated a campaign of Freedom of Information Act (FOIA) requests to public authorities about their involvement in its Diversity Champions and Workplace Equality Index schemes.

While some organisations have disclosed all the information requested, over 70 refused, with many citing **confidentiality** or **commercial-interest** exceptions.

Previously, the Information Commissioner's Office (ICO) has upheld this approach. But recent decisions in relation to Oxford University and Huddersfield University rejected these reasons and required the universities to disclose the information.

The two recent decisions

Both decisions relate to the feedback received from Stonewall on submissions to their Workplace Equality Index (WEI). They differ because the scope of the two requisitions was different and the two universities sought to rely on somewhat different exceptions.

- **University of Oxford IC-129040-Y4T2 30th June 2022.** The university relied on section 41 of FOIA (actionable breach of confidence) to withhold the feedback. **The Commissioner found that University is not entitled to rely on section 4.**
- **University of Huddersfield IC-125081-Q8J6 13th July 2022.** The university relied on section 41 (actionable breach of confidence), section 43 (commercial interest) and section 40 (personal data). **The Commissioner found that the university is not entitled to rely on section 41, but could rely on section 43 for some limited parts of the information requested, and was correct to redact personal data.**

The ICO's Huddersfield University decision explicitly refers to the Oxford one, suggesting that the ICO will treat similar disputes that come before it in the future in the same way.

Information held in confidence: not a reason to withhold

Section 41 provides an exception to FOI disclosure obligations where information is provided in confidence. The usual test for section 41 cases was set out in *Coco v A N Clark (Engineers) Limited [1968] FSR 415*, which described three elements which must be present in order that a claim can be made. According to the decision in this case, a breach of confidence will be actionable if:

- the information has the necessary quality of confidence
- the information was imparted in circumstances importing an obligation of confidence
- there was an unauthorised use of the information to the detriment of the confider.

However, for that claim to be "actionable" within the meaning of section 41(1)(b) FOIA, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed. As Lord Falconer (the promoter of FOIA as it was passing through Parliament) said during the debate on the legislation:

> "The word 'actionable' does not mean arguable… It means something that would be upheld by the courts; for example, an action that is taken and won."

The Commissioner therefore considers that it is not sufficient to merely claim that a breach of confidence might be brought. In order to rely on this exemption, any action must be likely to succeed.

In relation to both Oxford University and Huddersfield University, the Commissioner accepted that the bespoke feedback from Stonewall meets the criteria for being confidential. However, in considering whether the breach of confidence would be actionable (that is, would Stonewall win a case?), the Commissioner considers that the universities would be able to put forward a public-interest defence, and that this would override the competing public interest in maintaining the duty of confidence.

The reasoning is based in part on the Human Rights Act, which requires a balance between the Article 8 right to privacy and a family life, on the one hand, and the Article 10 right to freedom of expression (which includes the freedom to receive and impart information and ideas), on the other. The Commissioner's decision cites *London Regional Transport v The Mayor of London [2001] EWCA Civ 1491; [2003] EMLR 88*, which found that the public interest can override confidentiality without requiring exceptional grounds. This was also reflected in the ruling by the Information Tribunal in *Derry City Council v ICO (EA/2006/0014, 11 December 2006)*, which found that "an exceptional case is no longer required to override a duty of confidence that would otherwise exist".

The Commissioner considers that: "Breaching the confidence of Stonewall may be a proportionate means of achieving a legitimate aim – bringing transparency to the workings of the Workplace Equality Index and Diversity Champions Programme."

The Commissioner was of the view that, in relation to Section 41, the universities would have a public-interest defence on which it could rely.

Commercial interest: training products, but not feedback, could be withheld

Section 43(2) of the FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it. The Commissioner has defined the meaning of the term "commercial interests" in his guidance as follows:

> "…A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent."

This exemption is subject to the public-interest test, which means that even if the Commissioner considers the exemption to be engaged, he then needs to assess whether it is in the public interest to release the information.

Stonewall has previously expressed the view that releasing the information would probably be commercially prejudicial to itself. Huddersfield University's view was also that disclosure could give other organisations an advantage when submitting their own WEI application, as other applicants might copy the university's submission details. It also argued that disclosure of proprietary materials would, or would be likely to, prejudice the commercial interests of Stonewall in providing services on payment of a membership fee.

The Commissioner accepted that these were legitimate commercial interests, but decided on balance that the public interest in transparency overrode them in relation to WEI feedback and the consultancy document; however, not the newsletters and training materials, which are central to Stonewall's fee-based subscription service.

Should personal identifying information be redacted?

Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied. Section 40(3A)(a)10 relates to data-processing principles and personal data (the DP principles), as set out in Article 5 of the General Data Protection Regulation (GDPR).

Under this rule the university redacted names, phone numbers and email addresses of members of staff of the university and Stonewall, as well as discussion about their annual leave, availability, pronouns and reasons for absence. **In the circumstances of this case, having considered the withheld information, the Commissioner was satisfied that there was justification in withholding this information.**

Take-aways for respondents

In responding to FOI requests concerning Stonewall, the Diversity Champions Scheme and the Workplace Equality Index, organisations should consider that:

- The confidentiality exception (S41) is unlikely to be upheld.
- The commercial-interest exception (S43) is unlikely to be held in relation to the organisation's submission to the Workplace Equality Index and feedback received, or details of bespoke consultancy.
- The commercial-interest exception (S43) may be upheld in relation to proprietary materials such as training packages, but this has been tested only insofar as it applies to EDI training to university staff. The balance of interests would be different, for example, in relation to material shown to children in schools, or materials purporting to guide public authorities in the performance of their public duties.
- The personal-data exception (S40) is likely to be upheld for limited redactions of personal identifying information such as names and email addresses of staff.

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