

Mr David
By email

6 August 2024

Our ref: FOI-24-0125

Thank you for your correspondence of 9 July 2024, in which you requested the following information from the University of Sussex.

Request

1. A copy of any agreements / contracts / terms made as part of membership of the Mirocals Consortium.
2. A copy of the license terms granting rights to the Mirocals trial data to any third party / company and / or related correspondence on those terms.
3. A copy of the EU Horizon grant and its relevant terms.
4. A copy of any non-disclosure agreements made as part of the Mirocals Consortium or similar agreements on matters which are to be kept confidential.

Response

Your request has been dealt with under the Freedom of Information Act 2000 ("the Act").

Although the University holds the information that you have requested, it is being withheld under section 41 of the Act on the basis that it is information that has been provided in confidence and/or under section 43 of the Act on the basis that disclosure would be prejudicial to commercial interests, i.e. of both the University and other involved third parties.

'Information provided in confidence' refers to information that the University has obtained information from a third party, and disclosure of it could give rise to an actionable breach of confidence.

Although this exemption is absolute and is not subject to the public interest test outlined in the Act, the University has considered the public interest in releasing information in recognition of the fact that in the common law of confidence there may be circumstances where there is an overriding public interest in the information to the extent that the duty of confidence may be superseded.

Although the University recognises that there is a public interest in openness and accountability in the activity of public bodies and also in allowing individuals to understand decisions made by public bodies it does not consider that this interest outweighs the compelling interest in upholding the Section 41 exemption in respect of the requested information at this time.

Accordingly, the University has concluded that the public interest is best served in maintaining the exemption.

Additionally, section 43 of the Act exempts disclosure of information which would, or would be likely to, prejudice the commercial interests of any person including, in this instance, the University itself. In this case the University considers that releasing this information into the public domain, and therefore to competitor institutions, could potentially undermine its position

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in the sector and/or its ability to secure research funding. Other institutions could use this information to their advantage in what is now an extremely competitive environment. Furthermore, the information requested also relates to other third parties involved in the trial and releasing this information into the public domain would also be likely to undermine their positions in the relevant sector(s).

Section 43 is a qualified exemption and accordingly the University has balanced the public interest in maintaining this exemption against the public interest inherent in releasing the information. Although the University acknowledges that there is a public interest in openness and accountability in the activity of public bodies and also in allowing individuals to understand decisions made by public bodies, on this occasion the University considers that the public interest is better served in maintaining our competitive advantage at this time, particularly in relation to research and associated funding. Accordingly, the University has concluded that the public interest is best served in maintaining the exemption.

You can find out more about the relevant section of the Act, and some guidance points which the University has considered when applying the Act in this response, in the form of a Guidance Note attached to this letter.

If you are not satisfied with this response, you may request a review, but this must be within 40 days of receiving this response. In the first instance please write to Alexandra Elliott, the Head of Information Management and Compliance, at the address below. Full details of our Freedom of Information internal review procedure are at:
<http://www.sussex.ac.uk/ogs/policies/information/foi/procedure>.

If you need to contact us about your request, please quote your reference number FOI-24-0125.

Yours sincerely,

Information Management Team
Division of the General Counsel, Governance and Compliance

Guidance Note

Explanation of FOIA – Section 41 – Information Provided in Confidence

You will find additional information about Section 41 of the Act provided below. An extract from the legislation, as well as some of the guidance used when applying it is included.

Section 41: Information provided in confidence.

- (1) Information is exempt information if—
- (a) it was obtained by the public authority from any other person (including another public authority), and
 - (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
- (2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with Section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.

Guidance

Section 41 of the Act provides an exemption to the right of access to information under the Act if its release would give rise to an actionable breach of confidence.

This exemption qualifies the right of access under the Act by reference to the common law action for 'breach of confidence'. According to that action, if a person who holds information is under a duty to keep that information confidential (a '**duty of confidence**'), there will be a 'breach of confidence' if that person makes an unauthorised disclosure of the information.

The concept of 'breach of confidence' has its roots in the notion that a person who agrees to keep information confidential should be obliged to respect that confidence. However, the law has now extended beyond this: the courts recognise that a duty of confidence may also arise due to the confidential nature of the information itself or the circumstances in which it was obtained.

The concept of 'breach of confidence' recognises that unauthorised disclosure of confidential information may cause substantial harm. For example, the disclosure of commercially sensitive information could result in substantial financial loss. The law protects these interests by requiring the information to be kept confidential: if information is disclosed in breach of a duty of confidence, the courts may award damages (or another remedy) to the person whose interests were protected by the duty.

The Information Commissioner has issued guidance on the section 41 exemption, which is available at https://ico.org.uk/media/for-organisations/documents/1193/confidentialinformation_v4.pdf

Explanation of FOIA – Section 43 – Commercial Interests

You will find additional information about Section 43 of the Act below. An extract from the legislation, as well as some of the guidance used when applying it is included.

Section 43: Commercial interests.

- (1) Information is exempt information if it constitutes a trade secret.
- (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with Section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).

Guidance

Section 43(1) exempts information if it constitutes a trade secret. The Act does not define a trade secret, nor is there a precise definition in English law. However, it is generally agreed that:

- it must be information used in a trade or business;
- it is information which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret; and
- the owner must limit the dissemination of the information, or at least, not encourage or permit widespread publication.

Section 43(2) exempts information from being disclosed if such disclosure would be likely to prejudice the commercial interests of any person.

Section 43(3) provides that the duty to confirm or deny does not arise if, or to the extent that, complying with that duty could, or would be likely to, prejudice the commercial interests of any person.

The term 'commercial' can be taken to mean relating to an activity in the way of a business, trade or profession. Again, the exemption is (expressly) capable of applying not only to the commercial interests of outside organisations, but also to a public authority's own commercial interests.

When it comes to considering a public authority's own interests, a range of circumstances may be relevant, including the authority's position in the market place both as a purchaser and as a supplier. However, the prejudice to the commercial interests of a public authority must be contrasted with prejudice to other interests such as the body's political or other non-commercial reputational interests, which are not protected by this exemption.

The Ministry of Justice has issued guidance on the Section 43 exemption, which is available at <https://www.justice.gov.uk/downloads/information-access-rights/foi/foi-s43-exemptions.pdf>

The ICO has also issued guidance on the Section 43 exemption, which is available at https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf