

Reply to request for internal review under Freedom of Information of Act 2000	
Name of Requester	Elspeth V Moray
Contact Details	request-694318-3a6d200e@whatdotheyknow.com
Date Received	24 October 2020
Deadline for Response	20 November 2020

<i>Basis for Internal Review: Incorrect application of exemptions</i>	<i>I am writing to request an internal review of Nottingham Trent University's handling of my FOI request 'NTU Gender Recognitions Act (GRA) Reform Consultation Analysis: Communications & Who wrote summary & overviews as it was not the analysis team etc.</i>
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Nottingham Trent University Response:

I write further to your email dated 24 October 2020 requesting an internal review of the University's response to your request for information under the Freedom of Information Act 2000 (the FOIA). You submitted an FOI request by email dated 26 September 2020 ("your original request"). The University provided its response to your request on 23 October 2020.

You have requested an internal review of the University's refusal to disclose the information it held in reliance on the exemptions identified and explained in its response. You also raised a number of queries/responses within your request. I have undertaken an internal review in accordance with the University's Freedom of Information Internal Review Procedure (available on the University's website at <https://www.ntu.ac.uk/about-us/governance/freedom-of-information>). In conducting the internal review, I have considered your original request and the University's response dated 23 October 2020, as well as your request for an internal review dated 24 October 2020 ("your review request").

Within your review request you have sought additional information, which was not requested as part of your original request. Your request for new information is not being considered as part of this internal review, but as a new FOI request for which a separate response will be provided.

My response to each of your points relating to the University's response to your original request as set out in your review request is as follows:

Request No. 1

FOIA Section 12 Fees Limit

I note that you have sought all communications by all mediums - which is extremely wide. Individual responses, organisation responses, and the consultation data sent by the GEO in order to enable the University to conduct the analyses required by the project are retained in one place (i.e. the University's data store) and amounts to a substantial volume of information.

In addition to the three researchers who were named in the report issued by the GEO, there were approximately 23 other individuals involved in the project in a variety of roles. Those individuals also hold email correspondence relating to the project in their own separate mailboxes. The project covered a period of over two years and significant

correspondence was generated during that period of time, email correspondence in particular, not all of which relates to this project. Correspondence falling within the ambit of your request would need to be located within each individual person's mailbox, reviewed manually to cross-reference against this particular project in order to extract the project-related information. Researchers and other individuals who may have been involved in this project are also involved in other projects/matters across the University (this would be one of many in some cases) and thus their mailboxes would contain 1000s of emails which would require identifying and reviewing to reference against this project. Further, a number of the individuals who have been involved in the project at some point are no longer at the University, and thus identification of communications and correspondence that they may have been involved in is far more complicated as we are unable to access such information readily.

Given the volume of information in both the data store and in the researchers' mailboxes, I have concluded therefore that an estimated information-retrieval time in excess of 18 hours was reasonable in the circumstances. Accordingly the use of the Section 12 Fees exemption in response to your original request was appropriate and the exemption stands.

FOIA Section 41(1) - Information received in Confidence

There was no expectation that communications received from the GEO would be placed into the public domain and therefore they were considered to be confidential and were treated accordingly. Having reviewed the material, it is clear to me that all of the communications sought in your request No. 1 are exempt because in the reasonable opinion of the qualified person, who for these purposes is the Vice Chancellor, disclosure would be likely to inhibit the free and frank exchange of views for the purpose of deliberation (FOIA s36 (2)(b)(ii)) and would otherwise be likely to prejudice the conduct of public affairs (FOIA s36(2)(c)). I consider that this exemption is more appropriate than s41(1) as contained in the original response and accordingly the University now places reliance on the s36 grounds for the reasons outlined below.

FOIA Section 36 - Prejudice to the Conduct of Public Affairs

The qualified person's reasons are as follows:

1. Disclosure would be likely to inhibit the free and frank exchange of views for the purpose of deliberation (FOIA s36(2)(b)(ii)).

The GEO required the University to engage closely and constructively with it in order to complete the commissioned analysis. In particular, the University was required to provide regular up-dates on progress, to collaborate with the GEO in developing a coding framework, produce draft analysis reports for consideration by the GEO, and present the final findings together with summaries.

The project relied significantly on the exchange of views between the University and the GEO and its success was contingent on those views being candid and honest. It was imperative therefore that the researchers could set out their views comprehensively and critically in respect of each iteration of the project and that they could respond to any criticism to inform and, if necessary following deliberation and discussion with the GEO, modify subsequent steps of the analyses.

If the researchers had any intimation that those communications would be put into the public domain, there would be a real and significant risk that they would have been much more circumspect in their communication with the GEO, with the result that the GEO would not have been properly appraised of the development of the project. It goes

without saying that such openness is fundamental to any future deliberation in a collaborative project of the kind undertaken with the GEO. The prospect of public scrutiny, particularly in relation to a subject matter that is highly sensitive, would have presented a real risk of inhibition thereby limiting the effectiveness of any future comparable deliberation processes and, ultimately, the quality of the output. Disclosure to the public at large would also be contrary to the expectations of the GEO.

2. Disclosure would otherwise be likely to prejudice the conduct of public affairs (FOIA s36(2)(c)).

The requested communications with the GEO contain information relating to the general administration of the project, in addition to information about the substantive analyses being conducted. It is indispensable to the University's mission as a research-active institution that those who commission work can have confidence in its ability to deliver outputs to the highest standard. The spectre of public scrutiny of the minutiae of the project's processes, including its general administration, would have a detrimental effect on the University's ability to deliver project outcomes efficiently and effectively. The prospect of disclosure would, in effect, provide an unnecessary distraction from the specific projects and diversion of resources away from those projects and towards managing potential publication. It would very likely result in compromising the quality of the commissioned work.

Public interest

We have considered the public interest in transparency and accountability for use of public funds, factors to which you refer in your request for an internal review. That interest has already been met by including in the published report a detailed explanation of the methodology used by the University in analysing the questions.

There is also a public interest in ensuring the quality of research particularly when research may influence public policy. It is, however, apposite to note again that the GEO's purpose was simply to obtain evidence on how best to modernise and to render less bureaucratic the process of gender recognition, a right that already exists under the GRA. Its purpose was not to question or amend the right per se. That right was to remain unchanged. In the circumstances, publication of the methodology also fulfilled the public interest regarding the quality of the research being conducted.

The balance of public interest lies in ensuring the free and open communication between the University and the GEO, in particular the freedom to seek each other's views to advance the project and to secure its efficient and effective administration, which the prospect of publication would be very likely to compromise. In the circumstances, the public interest in maintaining both limbs of the exemption (i.e. s36 (2)(b)(ii) and(c)) outweighs the public interest in disclosing the requested information.

FOIA Section 43(2) Prejudice to Commercial Interests

The University's response to your original request was correct to conclude that disclosure would be likely to prejudice the University's commercial interests. The University was commissioned to analyse the responses to the consultation in response to a competitive tender. The information covered by your request includes details of the University's approach to projects such as the GEO consultation that set it apart from other tender submissions. That approach has been developed over a number of years and was ultimately responsible for the University's success in the competitive tendering exercise. Putting that information into the public domain would provide other research institutions competing for similar work with valuable information that would be likely to undermine the University's position in future tendering exercises and thereby likely to prejudice its commercial interests. The University's response to your original request was also correct

in identifying the balance of public interest as laying in maintaining the exemption. I would add that it is essential, in the public interest, that tendering exercises remain competitive so that government tenderers obtain value for money. That competitive edge would be eroded by publishing details of the University's comparative advantage.

Finally the response to your original request stated that disclosure would also be likely to prejudice the GEO's commercial interests. Having considered the matter further, I have concluded that it is unlikely that the GEO, a government agency/office possesses commercial interests. The exemption is, therefore, being relied upon solely in respect of likely prejudice to the University's commercial interests.

Request No. 2

As set out in our original response, the Government Equalities Office wrote the executive summary. The University does not know who at the GEO wrote the executive summary and therefore does not hold the requested information. As per our original response, I consider that this is a question you will have to raise directly with the GEO, which is also likely to be subject to the FOIA.

The University communicated with a number of people at the GEO, but, as noted above, it was not aware who specifically drafted the summary. In your review request, you have asked for the name of the University's (presumably main) contact at the GEO. I consider that disclosure would amount to a breach of data-protection law as explained in the response to your original request. There was no reasonable expectation that names would be put into the public domain. The main contacts are not public-facing, senior staff responsible for policy making and in the circumstances disclosure would be unfair and unlawful. There is no overriding public interest that would warrant disclosure. I conclude that the University was correct in relying on FOIA s40 (2) in respect of this request.

Request No. 3

Section 38(1) Health & Safety

Having considered the response to your original request, I have concluded that the University was correct to rely on Section 38(1) i.e. to conclude that disclosure of the names of the University's team of specialists would be likely to endanger their physical or mental health and/or their safety. I wish to expand on the reasoning supporting the use of that exemption.

The issues of gender identity and reassignment are controversial and often result in a polarisation of strongly-held views. Individuals connected with both pro- and anti- trans rights have been subjected to campaigns of vilification and harassment. For example, the press earlier this year reported that an academic was assigned security guards to protect her from transgender activists; see <https://www.pressreader.com/uk/the-scottish-mail-on-sunday/20200126/282213717792430>

The risk to staff is neither hypothetical nor generalised. That fact accounts for the University's decision to name only the three most senior researchers who had a significant role in the published report. Putting into the public domain the names of the remainder of the project team would unreasonably expose them to a real risk to their physical/mental health and/or their safety.

The original response correctly assessed the balance of public interest. As that response indicated, there is a public interest in transparency, accountability and increased public understanding of research activities. That interest is already fulfilled in relation to the

subject matter of your request by the published report which explains in detail the methodologies used to analyse the responses to the GEO's consultation, which also contains the name of the three main researchers involved in the project.

In so far as revealing the names and qualification details of the team involved in the project would promote additional transparency, accountability and understanding, I find this to be unwarranted by reason of the real and increased risk of danger to the University's researchers. That fact is itself a potent public interest argument against disclosure.

It should be noted that a number of the individuals involved in the project had no expertise/knowledge re trans or gender recognition, but were simply part of the project to carry out specific tasks, such as coding.

There was an intention that the report be published name-blind – i.e. that the names of the researchers or organisation who had assisted with the project would not be named as part of the report. However, it was the lead researchers' own decision that they be named within the report to promote openness and transparency and to provide validity to the report. All three academics are established within their fields and hold senior positions within the University; they were prepared for media interest/social media interaction following publication of the report. You can find further information about the three lead researchers and their specialist areas of research on our website:

Professor Daniel King: <https://www.ntu.ac.uk/staff-profiles/business/daniel-king>.

Professor Carrie Paechter: <https://www.ntu.ac.uk/staff-profiles/social-sciences/carrie-paechter>.

Dr Maranda Ridgway: <https://www.ntu.ac.uk/staff-profiles/business/maranda-ridgway>.

FOIA Section 40(2) – Personal Data

Because the information you have requested amounts to the personal data of the individuals with relevant expertise in the University's team, I have also considered whether its disclosure would breach the first data-protection principle requiring fair, lawful and transparent processing of personal data. I have concluded that it would indeed constitute such a breach for the reasons outlined below. The personal data is therefore absolutely exempt from disclosure under (FOIA s40 (2)).

Lawfulness in the context of your request is that the processing (i.e. disclosure to the public) is necessary for the purposes of legitimate interests pursued by you (or the public at large), except where the processing is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the researchers concerned. There is no presumption in favour of disclosing third party personal data under the FOIA. Your legitimate interests (or those of the public at large) must be balanced against the rights and legitimate interests of the members of the University's team. In this case, disclosing the information requested would be unwarranted because the individuals had no reasonable expectation that their names together with their specific qualifications would be disclosed to the public at large. In fact, given the sensitivities of the subject matter and individuals' vulnerability to campaigns of harassment, as already explained above in relation to the health-and-safety exemption, they participated in the project on the understanding that their identities would not be published. The three senior lead researchers published their names, however, at their own volition, in order to provide an appropriate level of transparency.

Publication would be very likely to cause anxiety and distress to the remaining researchers. Publication would also be unfair in the circumstances and I know of no overriding public interest that would justify disclosure. It is worth noting that a similar

consultation exercise was conducted in Scotland and the published analysis of responses did not identify the researchers involved because of the concerns outlined above.

The University is prepared to provide information in general terms regarding researchers' qualifications. Those qualifications ranged from advanced masters students, PhD students to Professors in a variety of relevant disciplines.

Request 4

As a preface to my review of the response to your original requests 4(a) to (h), I wish to emphasise the specific and limited role the University played in the consultation exercise, which is also explained in the published report.

The GEO wished to consult the public on reform of the Gender Recognition Act. The University was commissioned by the GEO to analyse the responses to the consultation when it was already underway, but a couple of weeks before it closed. The GEO drafted the original questions, the executive summary, the introduction and the description of the questions in the report. The University's role was to undertake the analysis of the quantitative and qualitative data, in the light of the questions the GEO posed. The University compiled the statistics, drafted the narrative description of the quantitative analysis and the narrative description of the qualitative material. The University also wrote the methodology section.

The purpose of the analysis was to present the responses to the GEO's consultation questions and also to reflect the weight of the different responses. As stated in the introduction to the report, the primary purpose of the GEO's consultation *"was to gather evidence on how best to modernise and simplify the GRA, and make the process less intrusive and bureaucratic for trans and non-binary people. The consultation questioned neither the right of a person to identify with another gender nor the existence of a provision for a legal gender change"* (page 17). The University did not take any theoretical or ideological position on trans identities; to do so would have taken it outside of the subject and purpose of the consultation. There was however a need to understand the nuances and specificities of language that respondents might use in order to interpret their statements. The research team therefore needed to include relevant experts to assist in the understanding of the vocabulary and nuances of the language used by respondents and also to help to understand the way in which different communities might interpret the material that might be presented in the report. The key focus, as articulated in the methodology, was to reflect the views that were put forward through the lens of the questions which were asked. The core objective for the University therefore was to provide a narration of the views expressed by those who responded to the consultation questions that the GEO had posed. The University did not take a position on the topics of gender identity, trans identity and non-binary humans and non-binary identities, having substance or longevity, but focused on the core objectives of the consultation.

Request 4(a) and (b) – the request falls within the ambit of the FOIA but the team did not, for the reasons outline above, take a 'position' on gender etc. The University does not, therefore, hold the requested information.

Requests 4(c) & (d) – the University was correct to conclude that these requests did not fall within the ambit of the FOIA. They were instead an invitation to debate whether individuals can be non-binary, sex/biology versus gender etc. and did not amount to a request for recorded information.

Request 4(e) - the GEO identified specified organisations as *"Women's group, women's rights organisation, women's rights campaigns or feminist campaign groups"*, a categorisation on which the University relied when describing respondents. Amnesty

International, to which you refer in your review request, was categorised by the GEO as "Other (human rights, businesses, regulatory bodies, and others)".

Request 4(f) – as indicated above, the University's role was primarily to analyse the quantitative and qualitative data and not challenge real or actual "gender ideology". The University does not therefore hold information regarding the issues referred to in this request.

Request 4(g) – the report stated " *Many respondents on both sides of the debate pointed to high-profile news stories about trans women prisoners who had been housed in the female prison estate and had gone on to commit sexual offences against female inmates. Respondents frequently discussed safeguarding policies and individual risk assessments, arguing that if these were robust, and individuals were assessed on a case-by-case basis, this would minimise the risk of problems.*" There is no dismissal, as stated in your request 4(g). The University's role has already been explained above and in the methodology section of the report. Questioning the veracity of the news stories referred to by respondents was beyond the University's methodological remit and accordingly it holds no information in respect of any instruction.

Request 4(h) – again, please refer to the methodology section of the report and the further explanation above. The University holds no information relating to verification of claims regarding the gender recognition process because such an activity was outside of its methodological remit.

Request No. 5

The University does not hold the requested information. The focus for the consultation was England. P145 of the published report states that "*a number of campaigns that were co-ordinated by external groups or individuals were identified in responses to the consultation. Some of these were in the form of template responses, while other responses were directly or indirectly influenced by guidance that had been produced by others. The analysis team were able to identify 17 different sources of such responses, led by the following organisations/groups and individuals, but there may have been other small-scale campaigns which could not be identified*". The report lists the 17 sources identified and the groups referred to in your original request are not amongst them.

Request No. 6

Please see my response to request No.4(e) above.

Should you remain dissatisfied with the information provided to you within this response, you have the right, under Section 50 of the Freedom of Information Act 2000, to apply to the Information Commissioner for a decision as to whether your request for information has been dealt with in accordance with the requirements of Part 1 of the Act. You can find further information about the Act from the Information Commissioner at www.ico.gov.uk.

Yours sincerely

Rebecca Jenkyn
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