

## Government Consultation on a Revised Freedom of Information Code of Practice

### Response from the Universities and Colleges Employers Association

February 2018

#### Background

The Universities and Colleges Employers Association (UCEA) is a membership organisation for Higher Education Institutions (HEIs), the majority of which are exempt charities. While HEIs are constituted by a variety of means (for example, Royal Charter, incorporation by statute or under the Companies Act, or charitable trust) they are all defined in the national statistics as autonomous not-for-profit private corporations. Although HEIs are classified as public bodies under the Freedom of Information Act 2000, they are not part of the public sector.

UCEA represents 163 HEIs, in their capacity as the employers of approximately 410,000 members of staff in total, throughout the UK. UCEA's response focuses very particularly on question 3 of this consultation, which is:

*Is the guidance about publication of information about senior pay and benefits clear and helpful? Are there any areas of this guidance where further detail would be useful?*

#### Competing requirements for pay transparency within the HE sector

A consultation on a new regulatory framework for HE providers in England, run by the Department for Education on behalf of the Office for Students (OfS), closed in December; the outcome is awaited. The consultation introduces senior staff remuneration as a value for money issue. It proposes a new ongoing registration condition for the OfS, requiring providers to publish the number of staff paid over £100,000 per annum, and to explain their justification for pay above £150,000, in their annual accounts. The consultation document states that the OfS will be working alongside sector bodies to improve performance and that the Government has called on the sector to work through the Committee of University Chairs (CUC) to develop and introduce a Remuneration Code. In parallel, the CUC is now consulting on Draft Remuneration Guidance, which includes a HE Remuneration Code for senior post holders. It defines senior post holders as the Head of Institution (HoI), usually all or some members of the senior executive team and possibly some other senior staff who report directly to the HoI. This consultation ends on 12 March.

Against this background of a proposed new regulatory requirement, supported by a CUC HE Remuneration Code, a revised Freedom of Information (FOI) Code that widens its scope to include publication of information about senior pay and benefits is unhelpful for the sector. This is especially so because it includes a different salary threshold, and appears to cover a different set of staff, than the proposed regulatory framework. It is important that Government departments and agencies work together to ensure a clear and unified approach to pay transparency requirements for the sector. We urge the Government to refrain from introducing new requirements without first considering the outcome of the CUC's

consultation and giving HEIs the opportunity for self-regulation exercised in accordance with the final CUC Code and the OfS requirements.

#### The level of post to be covered

The Code creates uncertainty as to exactly which posts are covered. It refers to “Senior Executive Pay and Benefits”, then goes on to direct public authorities to publish the pay and benefits of “Senior staff at Director level and equivalents” (covering salaries of £90,000 above) and thirdly to benefits in kind of “Director level and equivalents”. It is unclear whether the omission of the words “Senior staff at” for this third requirement means that there is a different threshold or whether it is a drafting error. The Code then refers to the Civil Service Director grades of SCS2 and above as the posts within central government departments for which pay data should be published, and suggests a read-across to this, for other public authorities, of a minimum equivalent of ‘management board level’. Moreover, HEIs are currently unclear as to the meaning of these different descriptors in the context of the HE sector. The inconsistencies are most unhelpful and would doubtless lead to different approaches being taken by different sectors and different employers within a sector. We urge the Government to ensure that the final Code is more tightly defined and consistent in its definitions regarding the level of staff to be covered, taking into account the different structures of the various types of organisations covered by the FOI Act.

HE employers accept the principle that there should be appropriate and sufficient transparency in senior executive remuneration. The current ambiguity as to the level of post for which pay information should be published, means that HEIs are unclear whether posts that pay £90,000 or above, but are not on the senior executive team, are included. In HEIs, most staff paid above £90,000 (76.2 per cent<sup>1</sup>) are academic staff performing teaching or research duties. They do not operate as “directors” nor do they operate at executive board level. Remuneration differs significantly from one subject area to another. Nearly one third (33 per cent) of academics earning over £90,000 are concentrated in four subject areas: business, clinical medicine, bioscience and economics. Therefore, publication of salaries of academic staff earning more than £90,000 at an HEI would show more about the fields in which it is active than about the extent to which it is paying above or below market rates for its staff.

It is not clear why a threshold of £90,000 has been chosen. £100,000 is the long-standing benchmark above which HEIs are required by HEFCE to publish salaries in their annual financial statements.

Finally, it is not clear whether publication of exact salaries is required or publication of numbers of staff in salary bands (for example £10,000 bands, in line with financial statement reporting). The requirement to publish names and job titles is also unclear: are these to be matched to salaries, or published as a separate list of individuals earning above £90,000.

#### Impact on recruitment, retention and pay inflation

Publication of names, job titles and salary details of academic posts over £90,000 would make it easier for competitors to seek to attract staff through offering higher salaries. This may create a potential adverse impact on recruitment and retention of talent and the creation of salary inflation. It could damage the ability of HEIs in the UK to attract and retain talent compared to global competitors, as global institutions seek to attract the best research academics with more competitive salaries. Similarly it would likely create greater competition across the UK for the same staff. Affecting the supply and therefore the quality of senior

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<sup>1</sup> Taken from the UCEA [Senior Staff Remuneration Survey](#) – a survey of the remuneration of senior academics in professor grades or higher and the professional services equivalent.

academic staff or the creation of an inflationary effect on salaries would be neither in the student or the public interest.

This argument is supported by case law. In [Kings College London v Information Commissioner \(EA/2014/0054\)](#) the Tribunal considered a FOI request for the specific job titles and salary bands of all staff earning over £100,000 in £10,000 salary bands. Initially the ICO ordered KCL to disclose the information but, on appeal, it was ruled that:

- a). although it was fair to publish the salaries of professional services staff (PSS) who are on the executive body of the University, it was unfair to publish this information about PSS who were not [ss 96 and 102]; and
- b). although it was accepted that the disclosure of PSS pay would not be likely to affect the commercial interests of the University, disclosure of academic staff pay would harm such interests [ss 18 and 129].

To protect the global competitiveness of the sector and avoid increasing staff turnover and salary costs, UCEA proposes that the section 43(2) FOIA exemption - that "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)" - should continue to apply to the publication of salaries within the sector below senior executive level.

#### Potential for Data Protection breaches

The draft Code requires public authorities to include names and job titles when publishing salaries. Clarification is needed as to whether this extends to expenses and benefits in kind. More generally, HEIs have expressed concerns about the tension between the recommended minimum reporting requirements in the Code and an individual's rights to protection under the Data Protection Act and General Data Protection Regulation. Section 40 of the FOIA exists to protect the personal data of those working for organisations subject to the FOIA. Wherever personal data is disclosed under the FOIA there is a requirement to ensure that a lawful basis under Schedule 2 of the Data Protection Act is met and that any disclosure would not be in breach of Principle 1 - disclosures of personal data must be 'fair'. This may leave HEIs vulnerable, either to complaints and litigation in relation to data protection breaches, or to action by the ICO. In a 2015 FOI [decision notice](#), the ICO upheld a decision of Kings College London, to withhold salary information for thirty academic staff under section 40(2) of the FOIA. The basis of this decision was that the information was personal data, the academics would have a strong and reasonable expectation that their salary information would not be disclosed by their employer, and there was no legitimate public interest in the disclosure of individual salary information.

There is also a concern that the positive and beneficial open access nature of the HE sector, which leads many academic and non-academic staff to make their contact details and social media accounts readily available and public, could leave staff at risk of abuse. There has been a significant focus on senior pay within HEIs; some commentary and online reaction has been very personal. HEIs need to consider the wellbeing of their staff at the same time as being transparent about public spending.

#### Administrative/bureaucratic burden

We highlight a concern, that compliance with a FOI Code that sets a different threshold for publication schemes than those within the regulatory framework would create a disproportionate burden on HEIs.

HEIs are concerned also about the requirement under the Code to publish expenses quarterly. Annual publication is considered to be more proportionate in terms of the volume of work that it will create to collate the information. Annual reporting would tie in with the preparation and disclosure of the HEI's accounts. It is also likely to be more accurate, because staff do not always submit expenses claims at the point at which they are incurred.

All HEIs will have policies on business expenses which ensure value for money and proper use of public money. Simply publishing lists of individuals' expenses without any commentary will not be meaningful. Expenses are often a direct consequence of the nature and requirements of a role, rather than illustrating any particular excess. For example, Vice Chancellors and other senior University executives travel regularly for the benefit of their institution. It is accepted that individual institutions would be able to voluntarily add context around the particular role of a member of staff, however, this is likely to further add to the burden of publication administration.

#### Hospitality

Some HEIs have highlighted a view that some business hospitality expense should be treated as highly confidential – particularly with regards to high profile fundraising projects and events. Publishing details of hospitality provided by senior leaders within HEIs could lead to commercially sensitive details entering the public domain. Guidance on how to cost hospitality received and guidance on what should/should not be included, would be helpful.

#### Conclusion and recommendations

The draft Code is unclear as to the level of staff whose salaries are to be included in publication schemes. If the requirement is to publish salaries of staff below senior executive level, particularly academic staff, the potential negative consequences include:

- i) staff never before subject to such a requirement seeing the publication of their salary;
- ii) individual academics being deterred from taking up appointments in the UK;
- iii) poaching of senior academics and executives by UK and international employers able to identify individuals' precise remuneration packages, leading to salary inflation and loss of talent;
- iv) HEIs exposed to risks of complaints of data protection breaches; and

UCEA urges the Government to amend the Code to make it clear that publication schemes should cover the pay and benefits of those at senior executive level only. UCEA would be pleased to assist in advising on an appropriate definition of senior executive roles within the HE sector for this purpose.

The Code should not place reporting requirements on HEIs that contradict those that will in the coming few months be required of the HE sector in the new OfS regulatory framework and the incoming CUC remuneration code for senior post holders, both of which are being developed specifically for the HE sector.

The pay transparency requirement for all staff outside of the senior executive team should be as currently required in providers' annual financial statements, i.e. anonymised through use of broad salary bands for all staff paid over £100,000.

If a £90,000 threshold were used in the FOI Code, it should be very clear that the threshold is a £90,000 salary **as well as** membership of the senior executive team.

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