

Decision Notice



Decision 249/2013 Robyn Bray and Edinburgh Napier University

Partnership with Navitas (Edinburgh International College)

Reference No: 201300075

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www.itspublicknowledge.info

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Summary

On 6 February 2012, Miss Bray asked Edinburgh Napier University (the University) for information about its partnership with Navitas UK Holdings Ltd (Navitas), operating as Edinburgh International College (EIC). The University provided some information and withheld some information under section 33(1)(b) of FOISA.

The Commissioner found that the exemption did not apply to some parts of the withheld information, and ordered its disclosure.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions); 33(1)(b) (Commercial interests and the economy)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 6 February 2012, Miss Bray asked the University to provide a range of information about its partnership with Navitas, operating as EIC. This decision considers the response to parts 4 and 5 of her request, in which she asked for:
 - the minutes of any meeting regarding the establishment and negotiation of the partnership between the University and Navitas (part 4) and
 - the details of the contract between Navitas and the University (e.g. length of contract, terms of contract, restrictions on the commercial activities of either party as outlined in the contract, any provision of facilities outlined in the contract) (part 5). Miss Bray indicated that she would like a copy of the contract.
2. The University responded on 16 March 2012, and provided Miss Bray with some information, including copies of minutes covered by part 4 of her request. The University withheld some information from the minutes under section 33(1)(b) of FOISA. It withheld in full the information covered by part 5 of her request under sections 33(1)(b) and 36(2) of FOISA.



3. On 11 May 2012, Miss Bray asked the University to review its decision to apply these exemptions.
4. The University notified Miss Bray of the outcome of its review on 11 July 2012. In relation to part 5 of the request, the University decided to make available a copy of the Core Agreement of the Recognition and Articulation Agreement (the RAA), with some information redacted and withheld under section 33(1)(b) of FOISA. It stated that some information from the minutes covered by part 4 of Miss Bray's request continued to be withheld under the same exemption, and explained its reasons.
5. The University did not state whether it was also relying on the exemption in section 36(2) of FOISA. As it did not mention the exemption in its review response, or put forward any submissions to the Commissioner on this exemption, the Commissioner understands that the University withdrew its reliance on section 36(2) after reviewing its response to Miss Bray.
6. In a letter received on 10 January 2013, Miss Bray informed the Commissioner that she was dissatisfied with the outcome of the University's review and wished to apply to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Miss Bray had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

8. On 4 February 2013, the University was notified in writing that an application had been received from Miss Bray and was asked to provide the Commissioner with the information withheld from her. The University responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the University, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions about the information covered by the request and why it was considered exempt from disclosure under FOISA.
10. The University responded on 19 March 2013, and referred the Commissioner to the arguments it had outlined in its correspondence with Miss Bray. Further correspondence with the University took place during the investigation.



Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Miss Bray and the University. She is satisfied that no matter of relevance has been overlooked.

Section 33(1)(b) – Commercial interests and the economy

12. Section 33(1)(b) of FOISA provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
13. There are elements which an authority needs to demonstrate are present when relying on this exemption. It must indicate whose commercial interests would (or would be likely to) be harmed by disclosure, the nature of the commercial interests, and how those interests would (or would be likely to) be prejudiced by disclosure. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third-party would, or would be likely to be harmed, it must make this clear. In this respect, it is good practice to consult the third-party.

The University's arguments

14. The University told Miss Bray that some information in the RAA (the contract agreement with EIC and Navitas) was exempt from disclosure under section 33(1)(b) of FOISA. In the University's view, the fact that the RAA included information about terms and conditions, payment agreements, pricing structures and other financial and operational obligations indicated that EIC, Navitas and the University have commercial interests which would be prejudiced by disclosure.
15. The University went on to explain that the release of specific individually focused information and prices within the contract would prejudice substantially the commercial interests of EIC and Navitas, because disclosure would, or would be likely to, significantly hamper the company's ability to compete for similar contracts. Their competitors would be able to access all aspects of the contract, reducing the competitiveness of EIC and Navitas.
16. The University also considered that disclosure would harm an ongoing business relationship. It argued that it was important for the University to be able to assure commercial partners that information which they have identified as commercially sensitive, and as capable of causing significant harm to their business interests, would not be released into the public domain.
17. In relation to the information withheld from the minutes (part 4 of Miss Bray's request), the University argued that this was sensitive commercial information relating to the contract, and that disclosure could cause real and significant commercial damage to EIC and Navitas. Competitors could use the information to their own advantage, which would be to the detriment of EIC and Navitas.



18. After considering the public interest in disclosing or withholding the information, the University took the view that the public interest lay in ensuring the continuing commercial success of the University, and disclosure would put it at risk of being unable to secure the most financially viable solution if organisations were inhibited from working with the University. The University had also taken into account the passage of time since the contract was created, which was approximately two years. Given that the RAA was to be in force for an initial period of five years, the University argued that the information it contained still had the requisite commercial value (with the implication that disclosure would therefore be contrary to the public interest).
19. In its submissions to the Commissioner, the University advised that it wished to rely upon the arguments put forward in its correspondence with Miss Bray (summarised above). It stated that particular emphasis should be given to the detailed financial information in Schedule 7 of the RAA, the disclosure of which would cause real and significant harm to its partner's commercial interests.
20. The University stated that it had consulted with Navitas and had received representations and arguments from them against disclosing the withheld information, which the University respected.
21. At the Commissioner's request, the University provided a copy of the representations it had received from Navitas, which included more detailed arguments than those put forward by the University in support of the exemption in section 33(1)(b) of FOISA. The University was asked whether it wished to rely on the arguments put forward by Navitas. In response, the University stated that it believed the arguments presented in its review response of 11 July 2012 contained sufficient detail to cover all instances of redacted information.

Miss Bray's arguments

22. In her application to the Commissioner, Miss Bray did not accept that the University's assessment of the harm test required by section 33(1)(b) had been adequately conducted, arguing that it had not considered the fact that the contract had been signed nearly three years ago. She took the view that the information was too old to be of relevance, and that the majority of it was already in the public domain.
23. Miss Bray also believed that the University had wrongly prioritised its commercial interests and those of its partners above the public interest in disclosing information about an issue of great interest in educational circles, i.e. the use of private companies to deliver education.



The Commissioner's views

24. As noted above, Miss Bray argued that much of the withheld information was already in the public domain. If true, this would affect significantly whether disclosure of the information under FOISA would be capable of causing substantial prejudice to the commercial interests of any of the parties involved. However, after investigation, the Commissioner is satisfied that, although part of the RAA was disclosed following the University's review of Miss Bray's request, the remaining withheld information was not publicly available and did not fall into the categories of information which (during the investigation) she identified as being in the public domain.
25. The Commissioner has carefully considered the withheld information in this case, in relation to the arguments put forward by the University in its letter to Miss Bray of 22 July 2012, upon which it has chosen to rely. These arguments are of a general nature and the only part of the withheld information which the University has singled out for specific comment is Schedule 7 of the RAA, which contains detailed financial information. The Commissioner is disappointed that the University chose not to provide more detailed arguments in relation to the other parts of the withheld information, after being informed that it was not clear from its submissions why the exemption in section 33(1)(b) of FOISA should apply to specific parts of the withheld information.
26. The Commissioner accepts that some of the information in Schedule 7, if disclosed, is clearly capable of causing substantial harm to the commercial interests of the University, EIC and Navitas. It comprises the core financial terms of the agreement, and the Commissioner accepts that disclosure of this information would provide commercial competitors with an advantage, and would be likely to damage the University's business relationship with Navitas. The Commissioner has reached the same conclusion about the information in clauses 12 and 13 of the RAA, and paragraph 15.2.4 of the RAA. The Commissioner accepts that the exemption in section 33(1)(b) of FOISA is engaged in relation to this information, and will go on to consider whether the public interest in disclosing the information outweighs the public interest in maintaining the exemption (as required by section 2(1)(b) of FOISA).
27. In relation to the remaining information withheld from the RAA, the position is less clear, given that the limited arguments put forward by the University do not explain why certain specific information would be capable of causing significant harm to the commercial interests of any of the parties. The Commissioner has noted the views put forward by Navitas, but the University has not asked her to take these views into consideration in her decision.



28. The University has not provided the Commissioner with any evidence or compelling argument to show that disclosure of other parts of the withheld information would (or would be likely to) cause the same level of commercial harm as disclosure of parts of Schedule 7, clauses 12 and 13, and paragraph 15.2.4 of the RAA. Most of the remaining withheld information relates to administrative arrangements agreed between the University and Navitas, or to quality standards. It is not clear from submissions why disclosure of this information would prejudice substantially any commercial interests. Some of the withheld information relates to the academic programme which EIC will offer. Again, the University has not explained (despite being invited to do so) why this should be considered to be commercially sensitive, or why disclosure would substantially prejudice its own the commercial interests or those of its partners.
29. The Commissioner therefore finds that the exemption in section 33(1)(b) of FOISA was wrongly applied to the information withheld from the RAA, with the exception of the information already identified. The Commissioner requires the University to disclose the remaining information to Miss Bray.
30. In relation to the information withheld from the minutes covered by part 4 of Miss Bray's request, the Commissioner found that some information withheld from the minutes would not, and would not be likely to, cause substantial prejudice to commercial interests, if disclosed. The minutes record matters discussed between June 2008 and October 2010. Some of the parts withheld relate to matters which were settled before Miss Bray made her request in February 2012, by which time it seems likely that the sensitivity of such information would have decreased substantially. In the absence of any explanation from the University which would show otherwise, the Commissioner finds that the exemption in section 33(1)(b) of FOISA was wrongly applied to this information, which should now be disclosed to Miss Bray. (The Commissioner will provide the University with marked up copies of the documents indicating what information should be disclosed.)
31. The Commissioner accepted that disclosure of some information withheld from the minutes would be likely to have an adverse effect on the University's business relationship with Navitas, and that the exemption in section 33(1)(b) was engaged. In reaching this view, the Commissioner took into account that that there was likely to have been some expectation of confidentiality between the partners when certain matters were discussed and minuted. Given the lack of arguments put forward by the University specifically in relation to this information, the Commissioner has accepted that the exemption applies only where, in her view, it appears to her to be reasonable to accept that commercial harm would be likely, in the context described by the University in its submissions and in its letter to Miss Bray of 22 July 2012.
32. The Commissioner will go on to consider the public interest test required by section 2(1)(b) in relation to the information in the minutes which she has found to be covered by the exemption in section 33(1)(b) of FOISA.



The public interest test

33. Having found that the exemption in section 33(1)(b) of FOISA applies to some parts of the withheld information, the Commissioner has considered the public interest test in section 2(1)(b) of FOISA. This requires consideration of whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemption.
34. The Commissioner accepts Miss Bray's point that, in relation to this case, there is a public interest in the disclosure of information about private, commercial bodies providing education in partnership with a Scottish university. Miss Bray stated that this was an issue of great interest in educational circles and frequently discussed in the media. The Commissioner accepts this is so (some examples are referenced below)¹².
35. On the other hand, the Commissioner accepts that where disclosure would be likely to cause significant harm to commercial interests, including those of a Scottish public authority, this in itself should be an indication that the public interest may lie in withholding the information that would cause such harm.
36. In balancing these two competing arguments, the Commissioner has taken into account the fact that the University has already disclosed parts of the RAA and redacted versions of the steering group minutes, which provide some information about the University's agreement with Navitas and EIC. She has also taken into account the nature of the information to which the exemption has been found to apply, which for the most part is detailed financial information, or commercially sensitive information to which an expectation of confidentiality would reasonably apply.
37. On balance, the Commissioner finds that the public interest in disclosure to be satisfied by previous disclosures by the University and disclosure of the additional information which was wrongly withheld under section 33(1)(b) of FOISA. In these circumstances, she finds that the public interest in maintaining the exemption in relation to the remaining withheld information outweighs the public interest in its disclosure.

¹ <http://www.timeshighereducation.co.uk/409502.article>

² <http://www.eis.org.uk/napier/print.asp?id=272>



DECISION

The Commissioner finds that Edinburgh Napier University (the University) partially failed to comply with the Freedom of Information (Scotland) Act (FOISA) in responding to the information request made by Miss Bray.

The Commissioner upholds the University's decision to withhold some information under section 33(1)(b) of FOISA. However, she finds that the University failed to comply fully with Part 1 of FOISA by wrongly withholding certain information under this exemption.

The Commissioner requires the University to provide Miss Bray with the information which was wrongly withheld, as indicated in the marked up documents sent to the University with this decision. The University is required to provide this information by 27 December 2013.

Appeal

Should either Miss Bray or Edinburgh Napier University wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Rosemary Agnew
Scottish Information Commissioner
12 November 2013



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

33 Commercial interests and the economy

- (1) Information is exempt information if-

...

- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

...