

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 January 2014

Public Authority: The University of Essex
Address: Wivenhoe Park
Colchester
Essex
CO4 3SQ

Decision (including any steps ordered)

1. The complainant has requested a copy of Essex University's (the University) risk register. The University refused to disclose this information under section 43(2) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the University has failed to demonstrate that section 43(2) FOIA is engaged.
3. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Provide a copy of the withheld strategic and operational risk register.
4. The public authority must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 9 July 2013 the complainant made a request for the University's risk register.
6. The University responded on 22 July 2013 and refused to disclose the requested information under section 43(2) FOIA.
7. The University provided an internal review on 26 July 2013 in which it maintained your original position.

Scope of the case

8. The complainant contacted the Commissioner on 31 July 2013 to complain about the way his request for information had been handled.
9. The Commissioner's investigation has looked at whether the University correctly applied section 43(2) FOIA to the withheld information.

Reasons for decision

Section 43 – commercial interests

10. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.
11. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43. This comments that:

*"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."*¹

¹ See here:

[http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freed](http://www.ico.gov.uk/for_organisations/guidance_index/~/media/documents/library/Freed)

12. The University has argued that it works in a commercially competitive market. It said its two main areas of activity, education and research, are dependent upon its ability to compete effectively in the recruitment of students and securing research grants. The Commissioner has concluded that it falls within the scope of the exemption.
13. Having concluded that the withheld information falls within the scope of the exemption the Commissioner has gone onto consider the prejudice disclosure would cause and the relevant party or parties who would be affected.

Whose commercial interests and the likelihood of prejudice

14. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.
15. The University has stated that, in withholding the information it considers that disclosure of the information would be likely to prejudice its own commercial interests.

The nature of the prejudice

16. The University argued that identifying areas that it believes pose risks to achieving its objectives in relation to student recruitment and research grants will show its competitors where it perceives weaknesses to exist in its competitive position. The likelihood of risk and level of risk identified in its risk register reflects the judgement of the University in relation to its position in the market. It believes that disclosure of this information, in itself, would be prejudicial to its competitive position and therefore either would, or would be likely to, prejudice its commercial interests. It said that exposing this information would leave it vulnerable to actions by competitor institutions with whom the University is competing actively.
17. Furthermore, it explained that the University's risk register also describes the steps the University is taking to mitigate the risks it faces. It said the ways in which it mitigates the risks it has identified relate

directly to its operational and marketing plans, setting out how it is pursuing its commercial interests and promoting its ability to compete effectively. It said that disclosure of information relating to risk mitigation poses an even greater risk of prejudice to its commercial interests.

18. It said its strategic and operational risk register reflects a direct relationship between the current risks identified, the current mitigations the University has put in place to address them and its current competitive position with regard to other Universities seeking to recruit from the same pool of students and the same funders of academic research.
19. The Commissioner's guidance and many previous decision notices have accepted the general principles that information relating to a commercial activity is more likely to be sensitive when the activity in question is live².
20. However, the Commissioner considers that arguments which identify this generic scenario alone are not sufficient to engage the exemption. The Commissioner considers that the prejudice test is not a weak test, and a public authority must be able to point to prejudice which is "real, actual or of substance" and to show some causal link between the potential disclosure of specific withheld information and the prejudice.
21. The Commissioner considers that an evidential burden rests with public authorities to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, real, actual or of substance. In the Commissioner's view, if a public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected.
22. In this case, the University has argued that disclosure of the information would be likely to result in prejudice to its competitive position in terms of recruitment of students and obtaining research grants. However, the Commissioner considers that the University has failed to identify precisely what form the prejudice would take and failed to clarify how this would be caused by the disclosure of the specific withheld

² See, for example, this decision notice relating to the London Borough of Newham:
http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fs_50431421.ashx

information. Further arguments provided by the University, and the Commissioner's consideration of those arguments is contained in the confidential annex attached to this Notice.

23. The Commissioner considers that the fact that a risk register will identify potential weaknesses within an authority does not inevitably lead to a conclusion that its disclosure will have an impact on commercial interests. In failing to explain precisely how the disclosure of specific parts of the register would be likely to result in prejudice, the Commissioner considers that the University has failed to demonstrate a necessary causal link.
24. The Commissioner has therefore concluded that the University has failed to demonstrate that the exemption is engaged. As he does not consider that the exemption is engaged, the Commissioner has not gone on to consider the public interest arguments.

Right of appeal

25. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

26. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
27. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Pamela Clements
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
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SK9 5AF