

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 March 2017

Public Authority: University of Wolverhampton
Address: Wulfruna Street
Wolverhampton
WV1 1LY

Decision (including any steps ordered)

1. The complainant has requested from the University of Wolverhampton a copy of the report that was presented to both the July 2015 Board of Governors meeting and the September 2015 Academic Board meeting.
2. The University of Wolverhampton has disclosed parts of the report but redacted the rest under Sections 43(2) and 22 of the FOIA.
3. The Commissioner's decision is that the University of Wolverhampton has not successfully applied Sections 43(2) and 22 of the FOIA.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the redacted parts of the report that was presented to both the July 2015 Board of Governors meeting and the September 2015 Academic Board meeting.
5. The public authority must take these steps 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

6. On or about 31 March 2016 the complainant wrote to the University of Wolverhampton (the University) and requested information in the following terms:

"I wish to make a request under the Freedom of Information Act 2000:

To view the minutes of the July 2015 Board of Governors meeting and the June September 2015 Academic Board meetings and all reports to those meetings in respect of the topic of university league tables, with specific reference Wolverhampton's decision to release or not to release information to the compliers of league tables (newspaper-based and independent).

In particular I request the Vice-Chancellor's report to the July Board of Governors meetings, and any subsequent report to the September Academic Board meeting.

In my opinion, disclosure of these documents and minuted decisions is in the public interest.

I would request your assistance in meeting this request as defined by Section 16 of the Act".

7. The University responded on 22 April 2016. It clarified that the minutes of the July 2015 Academic Board and the Vice Chancellor's report to the July 2015 Board of Governors did not make any reference to the topic of University league tables. It therefore declined to disclose this information as it said it fell outside the scope of the complainant's request.
8. By way of assistance, the University pointed out that the minutes and agendas for the Board of Governors meetings were routinely published and were accessible from its website¹. However, it added that where items were confidential or commercially sensitive they would be redacted prior to publication. The University disclosed a copy of the July 2015 Board of Governors minutes and also the confidential minute; '1532' concerning 'League Tables'. This minute confirmed the University's intention to re-enter the league tables at an appropriate time in the future to be specified by the Vice Chancellor.
9. By way of further clarification, the University said that it only held one report in the timeframe specified in the complainant's request relating to league tables. This report went to both the July 2015 Board of Governors meeting and the September 2015 Academic Board meeting.

¹ <http://www.wlv.ac.uk/about-us/governance/board-of-governors/meetings/minutes-of-the-board/>

10. The University therefore confirmed that the only information falling within the scope of the complainant's request was the report relating to the league tables which it had withheld under Section 43(2) of the FOIA.
11. On 25 April 2016 the complainant requested an internal review.
12. Following an internal review the University wrote to the complainant on 23 May 2016. It stated that it was upholding its original decision to apply section 43(2) of the FOIA.

Scope of the case

13. The complainant contacted the Commissioner on 30 May 2016 to complain about the way his request for information had been handled.

Chronology

14. The Commissioner contacted the University on 19 July 2016 to request a copy of the withheld information together with any further arguments it wished to advance in support of its application of section 43(2) of the FOIA.
15. The University responded on 15 and 25 August 2016. It clarified that the withheld information comprised of the 'League Tables Report' that was presented to the University's Board of Governors meeting on 2 July 2015. In its response, the University provided further arguments in support of its application of section 43(2) of the FOIA and indicated that only parts of the report were commercially sensitive.
16. The Commissioner responded on 25 August 2016 and enquired as to whether the University would be prepared to disclose a redacted version of the report.
17. The University responded on 26 August 2016 and provided the Commissioner with a redacted version of the report it was prepared to disclose. The redactions consisted of the removal of one sentence under the first heading on page one and paragraphs 2 to 8 inclusive on pages two and three of the report. A copy of the redacted report was passed to the complainant by the Commissioner on 26 August to see whether it was sufficient to satisfy his complaint.
18. The complainant replied on 30 August 2016 stating that the redacted report was insufficient to satisfy his complaint as he wanted to see the whole report.

19. The Commissioner wrote to the University again 30 August 2016 and advised that the redacted report was not sufficient to satisfy the complainant's complaint and invited the University to reconsider its position prior to her drafting a Decision Notice. In the absence of a reply the Commissioner wrote to the University on 12 September, 23 September, 25 October, 2 November, 3 November, 8 November 2016.
20. The University eventually responded on 11 November 2016 maintaining its position that the redacted parts of the report were exempt from disclosure under Section 43(2) of the FOIA. It also said it was applying Section 22 of the FOIA to the material contained within the redacted parts of the report as this information would be published at some stage in the future.
21. The Commissioner replied on 16 November 2016 and asked the University to specify which parts of the redacted information it intended to publish in the future and an estimate as to when that might be.
22. The University responded on 8 December 2016 and clarified that it was applying Section 22 of the FOIA to all of the redacted parts of the report to which it had applied section 43(2) with the exception of the third sentence under the first heading on page 1 of the report.

Background

23. There are a number of different league tables which rank UK universities. The primary aim of these tables is to inform potential undergraduate applicants about the universities based on a range of criteria, including entry standards, student satisfaction, staff/student ratio, academic services and facilities, expenditure per student, research quality, proportion of Firsts and 2:1s, completion rates and student destinations. All of the league tables also rank universities on their strength in individual subjects.
24. The main league tables are those published by The Guardian², The Times and The Sunday Times³ and the Complete University Guide⁴. Each calculates their tables using different criteria and weighting.

² <https://www.theguardian.com/education/ng-interactive/2016/may/23/university-league-tables-2017>

³ <http://www.thetimes.co.uk/>

⁴ <https://www.thecompleteuniversityguide.co.uk/league-tables/rankings>

25. The University of Wolverhampton (the University) has not appeared in the external newspaper league tables since 2010. The last time it appeared was in the Times league tables in June 2009.
26. The University is in a minority by not participating in the league tables.⁵
27. The University has stated on its website that it believes the 'league tables disadvantage universities such as Wolverhampton as they are constructed using a methodology that does not accurately reflect the positive impact we make upon the communities we serve or represent a fair picture of our strengths. There are many published assessments of our performance.'⁶
28. At the Board of Governors' meeting in July 2015 the University confirmed its intention to re-enter the league tables at an appropriate time in the future to be decided by the Vice Chancellor based on the estimated re-entry position.

Reasons for decision

29. The University has withheld the redacted parts of the report that was submitted to the July 2015 Board of Governors' meeting and the September 2015 Academic Board's meeting under Sections 43(2) and 22 of the FOIA.
30. The Commissioner has seen the withheld information which consists of one sentence under the first heading on page one and paragraphs 2 to 8 inclusive on pages two and three of the report.
31. The Commissioner will now consider each of the FOIA exemptions applied by the University in turn.

Section 43(2) of the FOIA – prejudice to commercial interests

32. Section 43(2) 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.

Commercial interests

⁵ <https://www.thecompleteuniversityguide.co.uk/wolverhampton/>

⁶ <http://www.wlv.ac.uk/about-us/league-tables/>

33. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner has considered the meaning of the term in her 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."*⁷

34. The withheld information consists of the factors and metrics considered by the University in reaching a decision as to whether it should re-join the league tables and if so, when. The University believes that these factors and metrics relate to its ability to attract new students and therefore its ability to compete in a competitive commercial market. The Commissioner considers that this information is commercial and therefore falls within the scope of the exemption.
35. Having concluded that the withheld information falls within the scope of the exemption the Commissioner has gone onto consider the prejudice which disclosure would or would be likely to cause and the relevant party or parties which would be affected.

Nature of the prejudice

36. When investigating complaints which involve a consideration of prejudice arguments, the Commissioner considers that the relevant test is not a weak one 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 and the prejudice. As long as the prejudice is real and not trivial, its severity is not relevant to engaging the exemption – this will be factored in at the public interest test stage.
37. The University has argued that disclosure of the redacted information into the public domain could contribute to rumour, speculation and inaccurate public debate which would be of harm to the University and its students.
38. The University has also argued that disclosure of the information which relates to its decision as to when to re-enter the league tables may have the potential to reduce the number of students applying to it. This would reduce its student body and harm its business model and strategies. As a result it would harm the University in a competitive market.

⁷ See here:

http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx

39. A further argument advanced by the University is that disclosing the information prior to any formal announcement would negatively impact on its reputation.

Likelihood of prejudice

40. In *Hogan and Oxford City Council v the Information Commissioner* [EA/2005/0026 and 0030] at paragraph 33 the Tribunal said:

“there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not.”

41. In this case the University has argued that disclosure would prejudice its own commercial interests and its competitiveness in the Higher Education (HE) sector. The Commissioner's view is that “would prejudice” places a much stronger evidential burden on the public authority and must be at least more probable than not.
42. The University must therefore demonstrate that it is more probable than not that prejudice will occur to its commercial interests if the withheld information is disclosed into the public domain.
43. The University has argued that releasing the redacted information into the public domain ‘could contribute to rumour, speculation and inaccurate public debate which would’ harm it and its students. However, the University has not specified which parts of the redacted information would have this effect and why it would affect its commercial interests.
44. The University has also argued that disclosing information relating the timing of its re-entry into the league tables ‘may have the potential to reduce the number of students applying’. However, it has not identified which parts of the redacted information would have this effect and why it would affect student applications. It is already known that the University has not participated in the league tables since 2010 and that it intends to re-enter them at an appropriate time in the future to be decided by the Vice Chancellor based the estimated re-entry position. It is also known that when the University exited the league tables it was at a level of 113 out of 119 institutions.
45. Another argument raised by the University is that disclosure of the redacted information ‘could negatively impact upon’ its ‘reputation’. However, as stated above it has not specified which parts of the redacted information would have this affect and why.

46. The Commissioner notes that the arguments put forward by the University are fairly generic in nature. They do not make specific reference to the information which has been redacted or provide evidence to demonstrate a causal link between disclosure and prejudice to its commercial interests.
47. In cases where a public authority has failed to provide adequate arguments and has otherwise not demonstrated that an exemption is engaged, the Commissioner does not consider it to be her responsibility to generate arguments on its behalf.
48. In this case, the arguments provided by the University are so lacking in detail that the Commissioner considers that they would even fail to meet the weaker limb of the probability of the prejudice arising, which requires it to be shown that *"...prejudice should be real and significant, and certainly more than hypothetical or remote."*
49. Having considered the submissions in the initial and internal review responses to the complainant, the Commissioner has concluded that the University has failed to clearly define the actual prejudice and to make concrete the causal link between the information being disclosed and the prejudicial effects occurring. In light of this, she has concluded that the University has not shown that disclosure of the information would result in prejudice to its commercial interests.
50. As the Commissioner has found that the exemption under Section 43(2) has not been engaged the Commissioner has not gone on to consider the public interest test.

Section 22 of the FOIA – future publication

51. The University has also argued that disclosure of the redacted information in the report is exempt from disclosure under Section 22 of the FOIA as it will be published at some dated in the in the future.
52. Section 22(1) of the FOIA says that information is exempt from disclosure if (a) the public authority holds it with a view to it being published by the authority or any other person, at some future date (whether determined or not); (b) the authority held the information with a view to such publication at the time the request was made; and (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in (a).
53. Section 22(1) is subject to the public interest test.

54. The Commissioner's guidance on Section 22⁸ states that information is exempt if-
- (a) is it held by the public authority with a view to publication at some future date (whether determined or not),
 - (b) it was already held with a view to such publication at date of the request and
 - (c) it is reasonable in all the circumstances to withhold it until the date of publication in (a) above

Future publication

55. For the exemption in Section 22 to apply, the University must have had a settled expectation at the time of the request that the information would be published at some future date. This intention to publish must pre-date the request.

Publishing the same information as the request

56. A general intention to publish some information in the future will not be sufficient to engage Section 22. The University must show that the information it intends to publish is the specific information the complainant requested. In this case, the report that was submitted to the July 2015 Board of Governors' meeting and the September 2015 Academic Board's meeting.

No fixed publication date

57. Although the public authority must hold the information at the time of the request with a view to its publication, the exemption in Section 22 does not require it to a set publication date to be in place.
58. It therefore follows that a public authority may still be able to apply the exemption if;
- There is a publication deadline, but publication could be at any date before then;
 - Publication will take place once other actions have been completed;
 - Publication will take place by reference to other related events; or
 - There is draft publication schedule that hasn't been finalised.

'Publication' can have a wide meaning

59. The term 'publication' requires the information to be made available to the general public. It is not sufficient if a public authority (or another person) only intends to make the information available to a particular, restricted audience.

Reasonable to withhold the information prior to publication

60. It is incumbent on a public authority when applying Section 22 to consider whether it is reasonable, in all the circumstances, to withhold information until the date of publication.

The exemption can't apply post-publication

61. Once the information has been published, the exemption in Section 22 will no longer apply to any of the same information contained in either earlier draft versions or in other documentation.

The public interest test

62. As Section 22 is a qualified exemption, it follows that, if the requested information falls within it, the public authority must carry out a public interest test.

Application of Section 22 to the current case

63. The Commissioner has referenced her guidance, as summarised above, to consider whether the University has successfully engaged Section 22.
64. In its initial response to the complainant dated 22 April 2016 the University did not make any reference to any intention to publically publish the requested information at some future date. It simply stated that the information was 'commercially sensitive' and as a result it was being withheld under Section 43(2) of the FOIA.
65. In its internal review response to the complainant dated 23 May 2016, the University stated that it was upholding its original decision to withhold the entirety of the requested information under Section 43(2). It concluded by stating its view that it was reasonable in all the circumstances to wait until it had made a formal decision regarding its re-entry to the league tables before disclosing the information to the complainant. However, it did not make any specific reference to an intention to publish the information in its entirety to the public at some future date.
66. Following the intervention of the Commissioner, the University agreed on 26 August 2016 to disclose some, but not all, of the requested information to the complainant. It did this in an attempt to resolve the

complaint informally not because it was part of any settled intention at the date of the request to publish it at some future date.

67. In its letter to the Commissioner dated 11 November and its subsequent email dated 8 December 2016, the University stated that it was applying Section 22 to paragraphs 2 to 8 inclusive on pages two and three of the report. Specifically, it stated that this information would be published in the future. However, it said that it was unable to confirm when this would be, as this would effectively reveal the date when it would re-enter the league tables, which was dependent upon a number of factors.
68. The Commissioner is not persuaded by the arguments put forward by the University that Section 22 of the FOIA has been successfully applied. It has not produced any evidence to demonstrate that at the time of the request in March 2016 it had a settled intention to publish the entirety of the requested information at some future date. It was only after it disclosed parts of the requested information in August that it applied Section 22 in November 2016. Furthermore, although the University has stated that it intends to publish 'the information contained within the material redacted' from the report, it has not made it clear whether it actually intends to publish the whole report.
69. As the Commissioner has found that the requested information does not fall within the exemption under Section 22 she has not gone on to consider the public interest test.

Right of appeal

70. 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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

71. 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.

72. 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

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