

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 July 2017

Public Authority: University of Sussex
Address: Sussex House
University of Sussex
Falmer
Brighton, BN1 9RH

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the University of Sussex (the University) for marketing data. The University refused the request under the section 43(2) (commercial interests) exemption.
2. The Commissioner's decision is that section 43(2) was correctly applied and the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

Request and response

3. On 4 November 2016 the complainant requested the following information:

'Q1 Please state how much your university spent on marketing in (i) the 2014/15 financial year and (ii) the 2015/16 financial year?

Q2 In each of these years please state how much was spent with (i) google, (ii) twitter and (iii) Facebook?

Q3 In each of these years please state how much was spent in advertising/promotion of your institution using professional sports teams? Please state the name of the team, how much was spent and what exactly was provided for this fee.'

4. On 29 November 2016 the University withheld the information under section 43 (prejudice to commercial interests).
5. The complainant requested an internal review on 5 December 2016. The University sent him the outcome of its internal review on 16 December 2016 upholding the decision.

Scope of the case

6. On 17 February 2017 the complainant wrote to the Commissioner and argued that

'Release of the bald spending figures would not give competitors any insight into their marketing strategies just an idea of the spend, which to be fair they could get a rough idea of just by looking at the internet. By way of contrast, I attach copies of four replies from other establishments to exactly the same request where none have felt the need to resort to exempting the information.'

7. The University has confirmed to the Commissioner that it has not spent any money in relation to advertising / promotion via a professional sports team, and so the answer to Q3 should have been that the information was not held.
8. The Commissioner has therefore focussed her investigation on whether the University correctly applied the exemption under section 43(2) of the FOIA to Q1 and Q2 of the complainant's request.

Reasons for decision

Section 43(2) - Commercial interests

9. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it. The exemption is subject to the public interest test which means that even if it is engaged account must be taken of the public interest in releasing the information.
10. The exemption can be engaged on the basis that disclosing the information either 'would' prejudice someone's commercial interests, or, the lower threshold, that disclosure is only 'likely' to prejudice those interests. The term 'likely' is taken to mean that there has to be a real and significant risk of the prejudice arising, even if it cannot be said that the occurrence of prejudice is more probable than not.

11. For section 43(2) to be engaged the Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the University alleges would be likely to occur if the withheld information was disclosed has to relate to the commercial interests;
- Secondly, the University must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice to those commercial interests; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e. whether there is a real and significant risk of the prejudice occurring.

Commercial interests

12. 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."*¹

13. The University has explained that it operates in an extremely competitive environment in relation to student admissions. The University has seen consistent increases in student numbers compared with a Higher Education sector decline. Disclosure of marketing strategy - specifically the marketing spend and where that spend is directed - could be damaging to the commercial interests of the University and adversely affect its recruitment position.

- Releasing information relating to the amount spent on marketing, in particular the different marketing platforms used would amount to disclosure of marketing strategy.
- The University has spent time and resource on determining its marketing strategy and spend.
- Disclosure of individualised information (such as the spend on Google, Twitter and Facebook) could provide information as to the

¹ See here: https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf

effectiveness of different marketing tools and forums, which could be used by competitor institutions. Disclosure could also affect the interests of those commercial organisations.

- The University's position in the sector would likely be prejudiced if the information was in the public domain, as this would undermine its competitive advantage in the sector and impact on recruitment.

14. The Commissioner is satisfied that the actual harm alleged by the University relates to its commercial interests. Accordingly, she is satisfied that the first criterion is met.

Causal link

15. 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.

16. The University has provided the Commissioner with details of the way in which it believes its commercial activities would be affected by disclosure of the requested information. The University has pointed out that its

- position would be particularly compromised if there was disclosure in relation to the marketing platforms used and the amount spent on each of those. Any change in spending would give an indication of the University's view of the effectiveness of those platforms.
- significant increase in applications and registered students is the result of a detailed and careful marketing strategy with targeted spend, which factors in diversity in terms of students and subjects.

17. The complainant has argued that other universities have provided the same information.

18. The University has explained that marketing strategy and market position differs across institutions. For the University its marketing strategy is a major factor in its approach to student recruitment. The University wished to maintain its market position, and continue to provide a high quality of education to an increasing number of students.

19. The Commissioner is satisfied that the University has provided reasonable arguments to suggest that there is a causal link between the requested information and its commercial interests.

Likelihood of prejudice

20. In *Hogan and Oxford City Council v the Information Commissioner* [EA/2005/0026 and 0030] 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.” (paragraph 33)

21. In this case, the University has confirmed that it is relying on the lower threshold to engage the exemption. The University has argued that disclosure would be likely to prejudice its own commercial interests and its competitiveness in the Higher Education sector. The Commissioner’s view is that “would be likely to” places an evidential burden on the public authority to show that the risk of prejudice is real and significant.

22. The University has pointed out that it devotes significant resources to its marketing strategy:

- Even the disclosure of the headline spend in the previous two years could be sufficient to compromise its commercial interests. Universities have a finite budget and the allocation of spend across academic and professional services areas is a key consideration in successful operational planning. Other institutions would have an insight into its finance management in relation to the areas of marketing and recruitment, and could mirror the success of the University.

23. The Commissioner has seen the withheld information and she is satisfied that it would be of use to a competitor by providing valuable insight into the marketing strategy that has allowed the University to succeed in a highly competitive student recruitment market. This would be compromised if other institutions were able to adapt their own marketing strategies on the basis of knowledge of the University’s marketing strategies.

24. This is not in itself a reason not to disclose the information under FOIA. However, it does indicate the importance that the University attaches to this information and the prejudice that would be caused if it was disclosed.

25. For all of these reasons the Commissioner has found that the section 43(2) exemption is engaged and therefore has now gone on to consider the public interest test.

Public interest test

26. Section 43(2) is a qualified exemption which means that even where the exemption is engaged, information can only be withheld where the public interest in maintaining that exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosure

27. The complainant stated that the public interest would be better served 'by there being an open, honest and transparent view of how the University's finances are being spent'.
28. The University acknowledges the importance of transparency and the public interest in ensuring financial accountability of public bodies. The University publishes information about its finances on its website: <http://www.sussex.ac.uk/finance/>. Information as to the effectiveness of different marketing tools and forums, which could be used by competitor institutions, is not published.

Public interest arguments in favour of maintaining the exemption

29. As regards the public interest in maintaining the exemption the University said that there was a public interest in ensuring that it operates in a fair and competitive market:
- the University's ability to provide the best education for its students, including attracting the right mix and diversity of students - was better served in maintaining its marketing strategy, competitive advantage and strong market position.

Balance of the public interest arguments

30. The Commissioner considers that there is always some public interest in the disclosure of information. This is because it promotes the aims of transparency and accountability, which in turn promotes greater public engagement and understanding of the decisions taken by public authorities.
31. However, the Commissioner's view is that in this case there is a stronger public interest in protecting the commercial interests of the University and ensuring that it is able to compete fairly.
32. The Commissioner understands that release of the information into the public domain could undermine the University's competitive advantage and impact on recruitment.

33. Therefore, the Commissioner has decided that in all the circumstances of the case, the public interest in maintaining the section 43(2) exemption outweighs the public interest in disclosure.

Right of appeal

34. 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

35. 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.
36. 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
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