

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 31 July 2017

**Public Authority:** University of East Anglia  
**Address:** Norwich Research Park  
Norwich  
NR4 7TJ

#### Decision (including any steps ordered)

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1. The complainant has requested information from the University of East Anglia ("the University") relating to its decision making process and the decision to close its London campus.
2. The Commissioner's decision is that the University has correctly withheld the requested information under section 43(2) (commercially sensitive) of the FOIA.
3. The Commissioner does not require the University to take any steps.

#### Request and response

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4. On 16 January 2017, the complainant wrote to the University and requested information in the following terms:  
  
*"I would like to know if you hold any documentation that is in regards to the decision making process and finally the decision made to why the university closed the London campus."*
5. On 17 January 2017, the complainant clarified his request. In relation to the 'decision making process' the information was only to include policy and procedure documents and in relation to the decision to close the London campus this was to include all information excluding emails.

6. On 14 February 2017 the University responded. It said that information on how the decision to close the University's London campus was arrived at from a procedural perspective is contained within documents available on its website. It said that the rationale for the decision to close the London Campus was published and is available on its website as an archived press release. It also said that it has withheld some information about why the campus was closed citing sections 36(2)(b)(ii) and 43(2) of the FOIA as its basis for doing so.
7. Following an internal review the University wrote to the complainant on 14 March 2017 and upheld its decision to withhold the information under sections 36(2)(b)(ii) and 43(2) of the FOIA.

### Scope of the case

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8. The complainant contacted the Commissioner on 14 March 2017 to complain about the way his request for information had been handled.
9. The Commissioner has, in the first instance, considered whether the University was correct to apply the exemption at section 43(2) of the FOIA to the request and will only go on to consider section 36 if she finds that the first exemption does not apply to some or all the withheld information. She has also considered whether the public interest favours maintaining the exemption.

### Reasons for decision

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#### Section 43(2) of the FOIA – Commercial interests

##### The public authority's' position

10. The University has withheld the requested information in reliance on the exemption under section 43(2) of the FOIA. This is because, it says that disclosure of it would prejudice its own and also a third party's commercial interests.
11. Section 43 (2) of the FOIA states:

*“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).”*

[The Commissioner's FOIA Awareness Guidance No. 5 states that a 'person' may be an individual, a company, the public authority itself or any other legal entity.<sup>1</sup>]

#### Complainant's position

12. The complainant argues that, in his view, the University cannot engage the exemption at section 43(2) of the FOIA to withhold the requested information because he is not seeking the information for 'commercial gain' but for 'academic interest'.
13. The Commissioner feels it may be beneficial to explain that a request made under the FOIA is purpose blind and that information provided in response to a request is considered to be in the public domain and therefore accessible to the world at large. Although the complainant states he would like the information for academic interest, this cannot be said of other parties that may access the information.
14. It is not unlikely that other organisations would access the information, once in the public domain, and it could be used in other ways that could damage the commercial activity of the University and the third party.

#### Is the exemption engaged?

15. The Commissioner first considered whether the exemption at section 43(2) is engaged. In order to do this she considers that three criteria must be met.
  - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.
  - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must, be real, actual or of substance.
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – e.g.,

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1178/awareness\\_guidance\\_5\\_v3\\_07\\_03\\_08.pdf](https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf)

disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

16. With regard to the first criterion, while the essential feature of commerce is trading, the information which falls within the exemption may relate only indirectly to the activity of buying and selling. Moreover, the involvement of private sector partners in the financing and delivering of public sector projects and services has become a common feature of public life. In this context public authorities are likely to hold a good deal of information both related to the particular project in which a private partner is involved and more generally to the private partner's business.
17. In this case, the withheld information includes details about the University's partnership with a third party leading up to the closure of its London campus, and therefore the Commissioner is satisfied that this information relates to commercial activity.
18. With regard to the second criterion and prejudice to the University, it says that the higher education sector in the UK is a highly competitive environment in regards to securing the number and quality of students desired. Therefore, release of information about the nature and terms of the dissolution of its partnership (that lead to the closure of its London campus) with the third party, would be likely to cause doubt in the minds of current and potential partners about its suitability for partnership ventures and also its ability and/or willingness to abide by contractual terms.
19. The University says that the withheld information was classed 'secret' and includes confidential information about the nature of their relationship at the time the campus was closed and so in its view, it and the third party regarded, and continue to regard this information as commercially sensitive. It says that in light of the passage of time it has looked at the withheld information again. But it believes that the information remains commercially sensitive given its contents and the continued commercial relationship with the third party. The University also says that its consultations with the third party (evidenced in its submissions to the Commissioner) indicate that it strongly objects to the release of the information and it believes that this position would be shared with any prospective partner due to the contents of the withheld

information. The University is therefore of the opinion that there is a significant likelihood of prejudice occurring.

20. With regard to the second criterion and prejudice to the third party, the University says that the third party's work in the UK education market is a highly competitive commercial activity, with at least six established private sector firms providing similar services and numerous universities also participating in this activity. The third party's business model is dependent on partnering with companies and agents and that doing so is essential to its continued viability. The third party says that release of the withheld information could harm its reputation and therefore cause its existing partners to re-examine their relationships with it. It says that release of the information would be a disincentive to other companies looking to partner with it and also discourage companies from entering into future partnerships and collaborative undertakings with it. The information is therefore strategically useful to the third party's competitors and thus prejudicial to its commercial interests.
21. The University says it has applied section 43(2) of the FOIA to the entirety of the documents containing the withheld information on the basis that they refer to its partnership with the third party throughout and must be read as a whole. The Commissioner has reviewed the withheld information and agrees that reference to the University's partnership with the third party is made throughout the documents and that they must be read together to understand the decision made.
22. The Commissioner is satisfied that the prejudice alleged by the public authority is real and of substance, and there is a causal relationship between the disclosure of the requested information and the prejudice which the exemption is designed to protect. She must however establish whether disclosure would, or would be likely to result in the prejudice alleged (e.g., the third criterion).
23. With regard to the third criterion, the Commissioner has considered the third party's submissions to the University about the release of the withheld information. In light of the current partnership between the organisations, the confidential nature of the withheld information, the mutual understanding that the information remain commercially sensitive and taking into account that the passage of time since the decision was made to close the University's London campus, the Commissioner agrees that the possibility of prejudice to the University occurring is real and more than a hypothetical possibility.
24. Furthermore, in light of the third party's business model being reliant upon its ability to successfully form and maintain partnerships and the

fact that the contents of the withheld information focuses on the nature of its relationship with the University at the time the campus was closed, which, if released under the FOIA would be available to the world at large and in absence of any counter arguments made by the third party about its contents, the Commissioner is satisfied that there is a real risk of prejudice to the third party's commercial activity occurring from release of the information rather than a hypothetical possibility.

25. Therefore, the Commissioner has concluded that disclosure would present a real and significant risk of prejudice to the commercial interests of the University and the third party. Consequently, she finds that the exemption was correctly engaged.

### **Public interest test**

26. The exemption is however subject to the public interest test set out in section 2(2)(b) of the FOIA. The Commissioner must therefore also consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosing the withheld information.
27. The University has considered the merits in favour of disclosing the withheld information and the factors in favour of maintaining the exemption.
28. The University says that disclosure of the information would increase transparency of its functions and decision making process, including providing evidence of its good decision making and best use of public resources. It also says that disclosure would promote public understanding of its partnership with the third party.
29. The University says that the factors in maintaining the exemption include the public interest in not prejudicing its own and the third party's ability to engage, perform and compete on a level playing field in the provision of higher education in their respective markets, which, it says requires the ability to discuss matters of commercial sensitivity candidly and openly.
30. It also says that because of its current partnership with the third party and its provision of higher education there is a public interest in the requirement to preserve confidentiality between the contracting parties.
31. The Commissioner has considered the nature of the withheld information, the confidentiality, the requirement and ability of both organisations to compete in the higher education market by forming partnerships, the current partnership with the third party in the

provision of higher education to students (the public) and the third party's submissions following its review of the withheld information. She also notes that the University has already released information into the public domain about its decision to close its London campus.

32. In light of the third party's submissions, the Commissioner agrees that the third party would not look favourably upon the University if it released the withheld information, and therefore there is a real risk that this could affect the university's ability to maintain and form partnerships with organisations in its provision of higher education within the education market. In this case, release of the information would specifically affect the University's ability to maintain its current partnership with the third party.
33. The Commissioner also agrees that the nature of the withheld information provides insight into the third party's relationship with the University at the time its London campus was closed. Therefore, and as the third party's business model is dependent on its ability to form and maintain partnerships, there is a real risk that if the withheld information was released, then despite the passage of time since the campus was closed, it could still have an affect the third party's ability to maintain and form new partnerships with organisations relating to its work in connection with the provision of higher education.

## **Conclusion**

34. The University has already disclosed information into the public domain about its decision to close the London campus. In its submissions the University has explained the prejudice that could arise, which would not be affected by the passage of time if the withheld information is disclosed:
  - the University's ability to maintain its partnership with the third party,
  - the third party's ability to maintain and form partnerships, and
  - the consequential adverse effect on current students who benefit from this relationship and future students who also stand to benefit from this relationship and others of the third party.
35. The Commissioner has concluded that the public interest in maintaining the exemption outweighs that in disclosing the information.
36. As the Commissioner considers that section 43(2) was correctly engaged and finds that the balance of the public interest lies in favour of

maintaining the exemption she has not considered the application of section 36(2)(b)(ii).



## Right of appeal

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37. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

38. 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.

39. 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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