

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 March 2019

Public Authority: The Governing body of Durham University
Address: The Palatine Centre
Stockton Rod
Durham
DH1 3LE

Decision (including any steps ordered)

1. The complainant made a freedom of information request to Durham University (the University) for a breakdown of income from corporate hospitality. The University provided some information and refused the remainder of 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 25 July 2018 the complainant requested the following items of information:
 - '1) Please state your university's income from corporate hospitality in each of the following financial years:
 - a) 2013/14
 - b) 2014/15
 - c) 2015/16
 - d) 2016/17
 - e) 2017/18
 - f) 2018/19 to 25.07.18
 - 2) Please provide a breakdown of this income by corporate hospitality client, for each of the following financial years:
 - a) 2013/14

- b) 2014/15
- c) 2015/16
- d) 2016/17
- e) 2017/18
- f) 2018/19 to 25.07.18

3) Please provide a list of organisations that have paid your university to host conferences at your university, and the total each paid, for each of the following financial years:

- a) 2013/14
- b) 2014/15
- c) 2015/16
- d) 2016/17
- e) 2017/18
- f) 2018/19 to 25.07.18'

4. On 10 August 2018 the University responded and disclosed the information to Q1. It refused to provide the requested breakdown of information at Q2 and Q3 citing section 43(2).
5. The complainant requested an internal review on 13 August 2018. The University sent him the outcome of its internal review on 6 September upholding the decision.

Scope of the case

6. On 18 September 2018 the complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular, he complained about its decision to withhold some of the requested information (Q2 and Q3) under Section 43(2) of the FOIA.
7. The Commissioner has focussed her investigation on whether the University correctly applied the exemption under section 43(2) of the FOIA to the withheld information.

Reasons for decision

Section 43(2) - Commercial interests

8. 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.

9. 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.
10. 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

11. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner has considered the meaning of the term in her 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
12. The University has explained that it operates in an extremely competitive environment in relation to corporate hospitality in its area. It has already disclosed the total annual income from corporate hospitality but to disclose a breakdown of companies/organisations to competitors would allow their sales teams to target those companies.
13. 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.

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

Causal link

14. 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.
15. The University has stated that *'disclosure of the information would in effect provide a 'ready-made' list of customers for competitors to target.'*
16. The complainant has argued that *'this information provides no information that would be actually commercially useful to a competitor. No details of services, charging schedules, or profit margin calculations, examples of information that could be commercially sensitive because it would allow a competitor to set its rates accordingly, would be provided in response to this request, simply an overall figure.'*
17. The University has provided the Commissioner with the withheld information and additional information showing that the majority of organisations only host one event per year. Therefore, the Commissioner accepts that disclosure of a breakdown by the name of the organisation with the cost and type of event would provide a useful list of organisations seeking to host an event in the area and would give a commercial advantage to the University's competitors.
18. 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

19. 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)
20. 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 corporate hospitality in the area. 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.

21. The University stated that *'Event Durham is a commercial arm of Durham University. Direct competitors that are not Public Authorities and therefore not subject to FOI legislation do not face the same level of scrutiny nor would be expected to or would voluntarily disclose this information. Charges are subject to agreement between the University and the customer. Should this information be disclosed to the applicant, it is considered to be disclosed to the public at large, no matter the purpose of the applicant's request. Disclosure of the information would in effect provide a 'ready-made' list of customers for competitors to target.'*
22. The Commissioner has seen the withheld information and she is satisfied that it would be of use to a competitor by providing them with a list of customers interested in hosting an event in the area. The list provides potential business opportunities for competitors' sales teams to target, putting the University at a competitive disadvantage.
23. 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.
24. 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

25. 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

26. The complainant stated that *'it is well known that the university provides such services, and companies that use the university often advertise that they are holding conferences publicly. The conference circuit is large, and the kinds of organisations that hold them are reasonably well known already.'*
27. The University considered that the factors in favour of disclosure included accountability to the public; providing transparency in relation to income and sources of this income; and providing an insight into the types of corporate client which book the University's services in relation to hospitality and conferences.

Public interest arguments in favour of maintaining the exemption

28. 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 proper competitive environment: *'the ability of Durham University to offer its services at its chosen rates without the potential for competitors offering lower prices... the University is not attempting to withhold details of any bookings that may be seen to be contentious or inappropriate.'*
29. The University maintains that there is little public interest in disclosing which organisations have either been provided with corporate hospitality nor which organisations have hosted conferences. The University has already *'disclosed financial information which in its opinion has more value in terms of public interest, in that the University is being transparent in relation to income generation.'*

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. By releasing the annual income from corporate hospitality for the last 5 years the University has already demonstrated its openness and accountability in this case.
31. However, releasing the breakdown of organisations which have hosted events or conferences at the University would provide competitors with a commercial advantage.
32. The Commissioner understands that release of the information into the public domain would undermine the University's competitive advantage and impact on its ability to compete fairly for corporate hospitality.
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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF