

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 July 2019

Public Authority: The Governing Body of the City of Liverpool
College

Address: Roscoe St
Liverpool
L1 9DW

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the Governing Body of the City of Liverpool College (the College) for the detailed costs of running a course. The College 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 October 2018 the complainant made a 10 part FOIA request about the recently cancelled A-level Maths evening class on the grounds of cost.
4. On 31 October 2018 the College responded to each of the 10 parts of the FOIA request including question 3 - 'Detail of the calculation of the cost of running the course'. The College responded: '*£14,000 which covers direct teaching cost and contribution towards overheads (buildings, utilities, repairs and maintenance, administration, teaching materials, IT, specialist support for learning difficulties)*'.
5. The complainant requested an internal review on 31 October 2018. He only questioned the response to Q3. The College had provided an overall cost for the course but he had specifically requested the detail of the calculation not a broad description of the costs included.

6. The College sent the complainant the outcome of its internal review on 8 November 2018. It answered the query on Q3 stating *'The College has answered your query in relation to the context of your question and without compromising the commercial interests of the College itself.'*

Scope of the case

7. The complainant contacted the Commissioner on 12 January 2019 to complain about the way his request for information had been handled. In particular, he complained about its decision to withhold the detail of the calculation of the cost of running the course (Q3).
8. The Commissioner has focussed her investigation on whether the College correctly applied the exemption under section 43(2) of the FOIA to Q3 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. In this case the College is relying on the lower threshold to engage the exemption.
11. For section 43(2) to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the College alleges would be likely to occur if the withheld information was disclosed has to relate to the commercial interests;
 - Secondly, the College 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 College stated that for the evening A-level Maths course it '*is operating as a commercial entity offering a course of study to the general public on a demand led basis. No part of the offer is funded via government sources and is outside the scope of public funding via the Education and Skills Funding Agency... the top line figure of £14,000 was given as an indication only and in good faith.*'
14. The College explained that the course is not publicly funded but part of the commercial trading activities which the College engages into in order '*to remain a viable operation and remain solvent.*'
15. The College receives state funding to operate courses for 16 to 19 provision but this does not cover all educational needs that a further education college is expected to service in its regional location. '*We therefore need to engage in commercial activity to market and sell courses which are competitively priced to encourage adults to sign up as students. This enables us to keep the College operating...*'
16. The College operates in an extremely competitive environment and faces a very challenging financial time within the education sector. It is in competition with a number of other local educational institutions as well as the private sector education providers offering qualifications including remote education courses. '*It is therefore vital that we are able to deliver courses in a competitive way to draw in student subscription without revealing to our competitors how we cost each and every aspect which forms part of the courses' delivery.*'

¹ See here: <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

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

Causal link

18. 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.
19. The College has provided the withheld information to the Commissioner and this includes the hourly charge rate for the course with a breakdown of teaching and non-teaching costs. The College explained that the charge rate is used for all college provision of this type and that as an educational institution its aim is *'simply to break even on these courses, therefore there is no allowance for profit'*.
20. The College stated that *'having our non-state funded courses' funding information out in the public domain and known to our competitors puts us at direct risk of being undercut...We need to be able to operate confidently in this market without fear of our competitors having access to our costing approach and either mimicking or undercutting various aspects of the course's costing'*.
21. The Commissioner is prepared to accept that disclosing the charge rates for all of these courses to competitors delivering similar courses may allow them to undercut the College. The College has no allowance for 'profit' and so *'it would lose its competitive edge and could see student subscription fall at a time when we need this additional income stream. To us this is more than a hypothetical scenario and a real possibility which would prejudice our commercial interests.'*
22. The Commissioner is satisfied that the College has provided reasonable arguments to suggest that there is a causal link between the requested information and its commercial interests.

Likelihood of prejudice

23. 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)

24. In this case, the College confirmed that it is relying on the lower threshold to engage the exemption. It argued that disclosure of the detailed breakdown of costing would be likely to prejudice its own commercial interests.
25. 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.
26. The College explained that the Maths course is one which students are responsible for meeting the cost. *'The numbers of those potential students in the market fluctuates and there is plenty of choice in the area for them to choose from so we must remain competitive and attractive in our pricing. Even though the request...stems from a decision not to run the courses... (It) goes to our costing strategy for a non-state funded course.'*
27. The main prejudice that would be caused *'would be that our competitors in the area would scrutinise our costing approach and seek to undercut us in delivering such courses...the College would lose its competitive edge and could see student subscription fall at a time when we need this additional income stream.'*
28. In addition, the College stated that *'adult courses are often funded by employers who will be looking at margins and which provider can get the price right'*.
29. The Commissioner has seen the withheld information and she is satisfied that it would be of use to a competitor by providing a valuable insight into the costing of these courses. This is not in itself a reason not to disclose the information under FOIA. However, it does indicate the importance that the College attaches to this information and the prejudice that would be caused if it was disclosed.
30. For all of these reasons the Commissioner has found that the section 43(2) exemption is engaged and has therefore gone on to consider the public interest test.

Public interest test

31. 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

32. The complainant argued that *'approximately 4 weeks into the course the college cancelled the course on the grounds that it did not have*

sufficient numbers to cover the cost of running the course... It is clear that the overriding purpose of a college has to be the provision of education and there is clearly a public interest in knowing the basis for the cancellation of courses. It is not possible to determine whether the cancellation is reasonable or not without seeing how the college has allocated the overheads and to this extent it is my view that the public interest outweighs any commercial interest in keeping the information private.'

33. The College accepts that for public authorities there is a general need for openness and transparency in the way it operates especially when a course is state funded and the public purse is being scrutinised for best value.

Public interest arguments in favour of maintaining the exemption

34. The College said that there was a public interest in ensuring that it operates in a proper competitive environment. This particular course is not state funded: *'it comes within the competitive trading activities of the College to ensure it remains a solvent entity...courses need to be delivered in a cost effective way for a profit to be of any benefit to the income stream of the College'*.

Balance of the public interest arguments

35. 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.
36. However, the Commissioner's view is that in this case there is a stronger public interest in protecting the commercial interests of the College and ensuring that it is able to compete fairly for the non-state funded courses.
37. The Commissioner notes that the College has already provided a total figure for the cost of the course and understands that release of the more detailed information into the public domain would undermine the College's competitive advantage and impact on its provision of such courses in the future.
38. 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.

Other Matters

39. The College initially considered that it had no legal requirement to disclose the information to the complainant as the course of study is outside the scope of public funding via the Education and Skills Funding Agency. The Commissioner reminds the College that requesters may request information under FOIA and that this has nothing to do with the type of funding of a course.

Right of appeal

40. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

41. 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.
42. 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