

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 February 2020

Public Authority: The Corporation Board of Blackburn College
Address: Blackburn College
Feilden Street
Blackburn
Lancashire
BB2 1LH

Decision (including any steps ordered)

1. The complainant has requested from Blackburn College (the "college") the annual programme reviews ("APRs"), external examiner and course consultant reports from 2012 to 2018, validation documents and minutes of internal meetings relating to engineering courses. The college refused to provide the requested information, citing section 43(2) - prejudice to commercial interests.
2. The Commissioner's decision is that the college has correctly withheld the information under section 43(2).
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 3 July 2019 the complainant made a request in writing under the FOIA to the college for the following information -

"1. The APR's for Engineering (both BEng and HND) for the years 2012 to 2018 along with the External Examiner and Course Consultants reports for these years.

2. The final signed off validation document for the current BEng along with the recommendations from Lancaster from the validation meetings regarding this validation."

3. The final signed off validation for the Advanced level Apprenticeships for Engineering along with the minutes of the internal meetings and validation meeting with the comments and recommendations from Lancaster.

4. The minutes of the meetings around the Engineering Courses in action and the response and recommendations from Lancaster around this."

5. The college responded on 23 July 2019. It confirmed holding the requested information but refused to provide it, citing section 43(2) of the FOIA as its basis for doing so.
6. The complainant requested an internal review on 15 August 2019. The college completed a review of its handling of the request on 6 September 2019 and wrote to the complainant upholding its decision.

Scope of the case

7. The complainant contacted the Commissioner on 16 August 2019 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of this case to be the college's application of section 43(2) to the requested information.

Reasons for decision

9. Section 43(2) of the 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.
10. The Commissioner has defined the meaning of the term "commercial interests" in her guidance on the application of section 43 as follows:

"...a commercial interest relates to a person's ability to participate

competitively in a commercial activity”¹

Most commercial activity relates to the purchase and sale of goods but it also extends to other fields such as services.

11. The exemption is subject to the public interest test which means that, even if the Commissioner considers the exemption to be engaged, she needs to assess whether it is in the public interest to release the information.
12. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm that the public authority alleges would or would be likely to occur if the withheld information was disclosed has to relate to commercial interests.
 - 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. Any prejudice that results must also be real, actual or of substance.
 - Thirdly, there is a need to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, whether disclosure would or would be likely to result in prejudice or there is a real and significant risk of the prejudice occurring.
13. The withheld information is extensive and consists of the detailed plans/framework for the named courses and the notes of detailed discussions between Lancaster University (which the college runs validated degree courses for) and the college regarding the quality of the latter’s provision. Additionally there is feedback from examiners regarding any issues found when undertaking their reviews.
14. The college considers that all the withheld information is commercially sensitive and confidential. The fact that the college considers the information to be confidential does not, in itself, mean

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

that the information is commercially sensitive or prejudicial. However, the requested information consists of the detailed plans for courses and information concerning the quality of its provision. The college relies on the sale of these courses to generate income as it charges for each place.

15. The Commissioner accepts that the actual harm relates to the college's own commercial activities and that of Lancaster University, though she has not been provided with the latter's view.
16. The college explains that the release of confidential information could be damaging to its reputation. It considers that it retains ownership of this information and that it would be likely to be detrimental to its commercial interests for that ownership to be removed. The college outlines the detriment it considers would occur as follows:
 - The APRs, the external examiner and the course consultants' reports for Engineering contain details of confidential discussions between the college and the university regarding the content of courses and any issues that may have occurred which, if released, could be used to damage the reputation of either institution.
 - The college explains that its validation documents for the Bachelor of Engineering form the basis of the course that it then sells. It describes this as, in effect a 'secret formula' that a third party could use to write a course and take it to market very quickly, in competition with the college. The college operates in a competitive environment where other institutions are seeking to sell similar products to potential students.
 - The requested information also includes validation documents for the Advanced level apprenticeships for Engineering. This is a new course in which the college has invested a significant amount. The college makes the same arguments for withholding it, as set out in the bullet point above.
 - The college argues that the minutes of meetings within which issues have been flagged up and resolved are confidential and any release into the public domain would be damaging to the college and its partner, Lancaster University.
17. The college makes the case for a causal relationship or a clear link between the disclosure of this information and a prejudice to its commercial interests by pointing to an example in the Commissioner's guidance:

"In the case of University of Central Lancashire (UCLAN) v IC and

Professor Colquhoun EA/2009/0034, (8 December 2009), the Tribunal found that the selling of courses by UCLAN was a commercial activity which enabled it to remain solvent.

The Tribunal considered that a body which depends on student fees to remain solvent has a commercial interest in maintaining the assets upon which the recruitment of students depends. These assets were the teaching materials UCLAN had produced for its degree courses.

The Tribunal accepted that UCLAN was operating within a competitive environment where other institutions of higher education were also seeking to sell similar products (undergraduate degree courses) to potential students.

The Tribunal therefore concluded that UCLAN's interests in its teaching materials produced for its degree courses were commercial interests.”²

18. Finally, the Commissioner needs to establish whether the level of likelihood of prejudice that is being relied on by the college is met.
19. To meet the lower threshold of “would be likely to” result in prejudice, the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; there must be a real and significant risk.
20. It is clear from the college’s submission that it is claiming the lower threshold in terms of the prejudice to its commercial interests. Disclosing this information could result in competitors undermining the college by accessing its already prepared and validated materials and any issues that had emerged during their preparation for its own commercial advantage.
21. The Commissioner finds that the disclosure of the withheld information would be likely to result in prejudice that is real, actual and of substance to the college’s commercial interests. The Commissioner therefore finds that the exemption at section 43(2) is engaged with regard to the college.

² <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

The Commissioner notes that the Tribunal concluded that the public interest favoured disclosure regarding the withheld information in EA/2009/0034.

22. Although the Commissioner accepts that the exemption is engaged, it is necessary for her to go on to consider whether the public interest favours maintaining the exemption or disclosing the requested information.

Public interest test

23. Section 43(2) is a qualified exemption. The Commissioner has undertaken a public interest test, balancing the public interest in disclosure against the public interest in maintaining the exemption.

Public interest arguments in favour of disclosure

24. The college has not provided any details of what considerations it made in favour of disclosing the requested information.
25. The complainant stated that this information should be in the public domain but has only alluded to his own personal interests rather than those required for the public interest test.

Public interest arguments in favour of maintaining the exemption

26. The college does not believe that the request relates or refers to its accountability for the spending of public money, the protection of the public or involves any procurement or tender processes.
27. The college argues that a third party could use this information to write a course and take it to market, effectively standing in direct competition to its commercial interests. The college is operating in a competitive environment where other institutions are seeking to sell courses to potential students.
28. Additionally the college's view is that the notes from the meetings could damage the brand and reputation of both educational institutions (the college and Lancaster University).
29. For these reasons, the college argues that it is not in the public interest to disclose the requested information.

Balance of the public interest arguments

30. The Commissioner's view is that the interests of the college regarding this information are commercial in nature. She recognises that the college has to offer courses that will attract students in order to survive in a crowded and competitive market. She also acknowledges the college's investment in the writing and development of these courses, one of which was a new course that had not yet started when the request was made.

31. The Commissioner does not consider that there has been any persuasive public interest arguments put forward as to why this information should be released. The Commissioner agrees that there are no public interest grounds such as accountability, the protection of the public, or transparency in the procurement process.
32. In the absence of any compelling public interest arguments for disclosure being put forward, the Commissioner finds that the disclosure of the requested information would be likely to be commercially prejudicial to the college because it has the potential to provide course blueprints to a rival educational organisation.
33. The Commissioner therefore considers that it is not in the public interest to undermine the college's ability to compete in a competitive sector and finds that the college has correctly withheld the information by virtue of section 43(2).

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@justice.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
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