

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 April 2021

Public Authority: The Council (University of Hull)
Address: University of Hull
Hull, UK
HU6 7RX

Decision (including any steps ordered)

1. The complainant has requested a copy of a handbook, manual and other material related to a course from the University of Hull (the university). The university refused to provide the requested information citing sections 21, 40(2), 43(1) and 43(2).
2. The Commissioner's decision is that the requested information has been correctly withheld under section 43(2) of the FOIA (commercial interests) but that the university breached section 10(1) by failing to respond to the complainant within the legislative timeframe.
3. The Commissioner does not require the public authority to take any further steps.

Request and response

4. On 12 May 2020 the complainant made the following request for information under the FOIA -

"Please can you email through a copy of any handbook or manual issued to students on the MA Creative Writing program, and also (if different) a copy of each module description including assessment methods, reading lists etc."

5. The university acknowledged the request but then some time went by without further communication. The complainant had to send several chaser emails before the university responded. On 23 July 2020 a clarification was requested about which course the complainant was referring to. He clarified on the same day.
6. A holding email was sent to the complainant on 7 August 2020 which suggested that the university would be applying section 43(2)(commercial interests).
7. On 11 August 2020 the Commissioner wrote to the university regarding the handling of the information request.
8. On 20 August 2020 the university responded and refused to provide the requested information citing sections 21 and section 40(2) of the FOIA. The university pointed out that information about the course was available on its website.
9. The complainant requested a review on 25 August 2020.
10. On 18 September 2020 the university provided its internal review. The review acknowledged that its response had been very late and maintained its position regarding sections 21 and 40(2). Additionally sections 43(1) and (2) were cited.
11. The review explained that the personal handbook is a course hub which gave enrolled students access via the university's student portal which is known as 'Canvas'. The university then stated that this would contain personal data such as personal coursework material, individual assessments and performance. Disclosure would be against data protection legislation. There is also a second hub known as the 'Student hub' which was outside the scope of his request.

Scope of the case

12. The complainant first contacted the Commissioner on 15 June 2020 to complain about the way his request for information had been handled.
13. During a telephone call between the Commissioner and the university on 26 February 2021, the university confirmed that it did not intend to continue to cite section 40(2). The university also indicated that it was reconsidering the citing of sections 43(1) and section 21.
14. On 19 March 2021 the university sent its response to the Commissioner and confirmed that it was solely relying on section 43(2) FOIA.

15. The Commissioner therefore considers the scope of this case to be the university's application of section 43(2) to the withheld information. She also intends to look at any procedural matters that occurred during the university's handling of this request.

Reasons for decision

Section 43(2) – Commercial interests

16. 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.
17. The university cited section 43(2) with regard to the requested information – a copy of any handbook or manual issued to students on the MA Creative Writing program and also (if different) a copy of each module description including assessment methods, reading lists etc. The Commissioner has been provided with a sample of the withheld information.
18. 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
19. Although most commercial activity relates to the purchase and sale of goods, it also extends to other fields such as services.
20. The Commissioner's guidance says that there are many circumstances in which a public authority might hold information with the potential to prejudice commercial interests.
21. The exemption is subject to the public interest test which means that, even if it is engaged, the Commissioner also needs to assess whether it is in the public interest to release the information.
22. Section 43 is a prejudice based exemption. The public authority needs to demonstrate a clear link between disclosure and the commercial

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

interests of the party. There must also be a significant risk of the prejudice to commercial interests occurring and the prejudice must be real actual or of substance for it to be successfully engaged.

23. The university needs to establish that the actual harm that it alleges would or would be likely to occur if the withheld information was disclosed relates to its commercial interests. Firstly, the university identified itself as one of the parties suffering prejudice to its commercial interests and identified another party, CEG Digital, whose commercial interests would also be prejudiced. CEG Digital helped deliver, market and develop the course.
24. The ICO has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged - ie either prejudice 'would' occur or prejudice 'would be likely to' occur.
25. The university is relying on the higher threshold. The term "would...prejudice" means that prejudice is more probable than not to occur (ie a more than a 50 per cent chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so).
26. Firstly, the university consulted with CEG Digital about this information request and, following those communications, the university put forward the following arguments in relation to the prejudice to CEG's commercial interests:
 - That release would prejudice and/or damage the commercial interests of CEG in addition to the university's commercial interests, in that it would potentially provide competitors, free of charge, with the materials, methods upon which the courses are created and delivered and undermine CEG's unique selling points;
 - Unfairly disadvantage CEG and its future business propositions if the information was to be made public;
 - Would give a competitor to CEG a commercial advantage in future competitive tenders if sensitive commercial information was released;
 - Damage CEG's competitive position in the marketplace generally.

27. The university also put forward arguments regarding detriment to its own commercial interests and directed the Commissioner to her own advice that "*a commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent*"². From this definition the university argues that it is clear that both the university and CEG Digital have commercial interests in all of the materials and information requested relating to the MA Creative Writing program. The course details as outlined on the website are as follows:

"...MA in Creative Writing

Three start dates per year: January, May and September

Next welcome week: 24 May 2021

Next course start date: 31 May 2021

Application deadline: 17 May 2021

Duration: two years (part-time)

Format: online, with optional face-to-face events

Total fees for the two year course: May 2021 - £10,000;
September 2021 - £10,300 ...

Additional costs: due to the nature of the subject, and copyright restrictions placed on institutional libraries by some publishers, students will need to purchase some core texts.³

The university points out that it charges for the course as set out above. It is not a free course.

28. The university contends that the Commissioner's guidance equates "prejudice" with "harm" and that disclosure would prejudice the university's commercial interests as it would harm those interests. This includes a clearly foreseeable loss of revenue from student fees. The

² <https://ico.org.uk/for-organisations/section-43-commercial-interests/>

³ <https://online.hull.ac.uk/courses/ma-creative-writing>

university poses the question, why would students pay approximately £10,000 to study for an MA in Creative Writing when they could submit an FOI request and potentially get access to key materials and information from that course free of charge?

29. The Commissioner's guidance refers to "procurement" and "your own commercial activities" which the university argues covers this scenario where the university and CEG Digital have worked together on the materials and information requested for this course.
30. The university argues that the requested information is linked to commercial activity – the teaching materials produced for the course with its partners. It quoted from the Commissioner's guidance as follows:

*"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 was a commercial activity which enabled UCLAN 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, in which 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 the teaching materials produced for its degree courses were commercial interests."*⁴

The university similarly "has a commercial interest in maintaining the assets upon which the recruitment of students depends", those assets being its teaching materials produced for its degree courses.

31. The complainant's view is that the university took a very long time to cite section 43(2). He argues that it is impossible to see how the release of reading lists can harm anyone's commercial interests. He disputes whether the release of this material would be more than likely to lead to people not applying for the course, unless the material released showed that the course was valueless which the complainant suggests cannot be what the university is saying.

⁴ <https://ico.org.uk/for-organisations/section-43-commercial-interests/>

32. Although the Commissioner does not accept all of the arguments put forward by the university, she nevertheless agrees that the release of the requested information would be prejudicial to the university and CEG Digital at the higher level. The material held on the portal has been developed by the university and CEG Digital for the MA in Creative Writing, it is integral to the delivery of a course that has been purchased by students. In the case of a university, the courses it creates, develops and sells in a strongly competitive market are vital to its commercial interests.

Public interest test

33. Although the Commissioner accepts that the exemption is engaged she intends to look at the public interest in order to assess whether the release of the information would or would not be in the public interest.

Public interest arguments in favour of releasing the information

34. The complainant did not put forward any public interest arguments for the requested information to be disclosed. Clearly though he believes that it is in the public interest that the information should be released.
35. The university acknowledges the public interest in transparency, openness and accountability in the spending of public money but does not believe that they are strong arguments in relation to this request.

Public interest arguments in favour of maintaining the exemption

36. The university concluded that there was a stronger public interest in withholding the information because disclosure would negatively affect its ability to negotiate or to compete in a commercial environment. Disclosure would involve a loss of revenue from student fees and with *EA/2011/0188 Willem Visser v Information Commissioner* (1 March 2012) in mind, the university stressed the Tribunal's words that there is a public interest in not prejudicing the commercial interests of one player in the market and distorting competition which is not in the public interest. The university again pointed to the Commissioner's guidance which contained a quote from the Tribunal,

"If the commercial secrets of one of the players in the market were revealed then its competitive position would be eroded and the whole market would be less competitive, with the result that the public benefit of having an efficient competitive market would be to some extent eroded." (paragraph 20)

37. The university contends that it would suffer reputational damage, as would CEG Digital, and that this argument is a strong one and relevant to this request. Students on the MA course have paid and are paying approximately £10,000 in course fees to access the course. The disclosure of this information would "*cause unwarranted reputational damage*" to the university and CEG Digital if it was provided free of charge. The university would additionally lose trade if the ability to gain information for free resulted in a decline in student numbers. It was stressed to the Commissioner that the university operates in a highly competitive higher education marketplace for courses such as this one.

Balance of the public interest

38. The Commissioner has not considered all the points made by the university because they do not appear relevant to this particular request. However, the central argument that the university would be unable to compete in a highly competitive commercial environment if it had to disclose information for which students have paid fees, is persuasive and is clearly not in the public interest. Higher education providers invest a great deal of money in their courses for which students pay not inconsiderable fees. If all or part of this course was to be provided free of charge it would be detrimental to the university and CEG Digital which would lead to a loss of revenue and a loss of reputation which would cause prejudice to its commercial interests.

Section 10 – time for compliance

39. The request was made on 12 May 2020. Although it was acknowledged, the complainant was forced to send a series of chaser emails to find out what was happening with the university's response. On 30 June 2020 the university emailed to say that it had been considering whether section 21 applied to the request but this has not been conveyed to the complainant. After the time for compliance had passed by more than a month, the complainant was asked for clarification on 23 July 2020.
40. The university did not finally respond until 20 August 2020. As the time for compliance had already passed when clarification was sought, the university breached section 10(1) of the FOIA.

Other matters

41. The university did not engage well with the complainant. Apart from the lateness of its response, the university wrote to the complainant extremely late to ask for clarification over a simple matter. Similarly the university did not engage well initially with the Commissioner. However,

the Commissioner understands that this situation has now improved and she has found recent engagement to be good.

42. The Commissioner also has some concerns regarding the content of both the response and the internal review but she is aware that there have been changes and expects that this will now remedy the situation.

Right of appeal

43. 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

44. 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.
45. 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

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