

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 March 2021

Public Authority: The Governing Body of Nottingham College
Address: Science Park
Jesse Boot Avenue
Nottingham
NG7 2RU

Decision (including any steps ordered)

1. The complainant requested from Nottingham College ("the college") information regarding the amount spent on external consultants.
2. The Commissioner's decision is that the college was entitled to withhold the requested information under section 43(2) of the FOIA (commercial interests). The Commissioner also finds that the college did not comply with its obligations under section 17 of the FOIA (time for compliance).
3. The Commissioner does not require the college to take any steps as a result of this notice.

Request and response

4. On 19 June 2020, the complainant wrote to the college and requested information in the following terms:

"The College has said it is doing all it can to mitigate redundancies during the current Change programme.

This should include not renewing or commencing contracts of non-salaried permanent staff for the time being.

Could you please tell me the amount the college has spent on external "consultants" in the academic years

2016/17

2017/18

2018/19

2019/20 (to date – 19 June)

I don't mean staff cover, temps or agency staff. I mean 3 month + duration/proper contracts

If possible please break this down into relevant categories – for example

Exec team

Comms

HR

Estates

Curriculum

Finance

IT

City Hub

Etc

I am not interested in names or roles or individual amounts."

5. The college responded on 30 July 2020 and refused to provide the requested information citing section 43(2) of the FOIA (commercial interests).
6. On 31 July 2020 the complainant requested an internal review. He stated:

"The College lists the spend on all non-college staff in its annual report which is made public via the website. What's the difference? That figure presumably includes teaching cover and temporary workers – none of whom will put a significant dent into staffing budgets. [...] If you can't break it down, I am only interested in the overall amount spent on external contract staff/consultants for the years 2016/17, 2017/18, 2018/19 and 2019/20 to date (well end of play today actually!)."

7. Following an internal review the college wrote to the complainant on 28 August 2020. It appeared to maintain its position in respect of section 43(2) however it did not explicitly refer to the exemption. It also

appeared to rely on section 22 of the FOIA (information intended for future publication) in relation to some other information by stating:

"the summary figures for contracted out staffing services is provided within each year's financial statements. Once these are available for the 2019-20 academic year, this figure will be published within the annual financial statements on the college's website. Because this is information intended for future publication, it is exempt from disclosure now."

8. Following the internal review, the complainant wrote to the college again and stated:

"I have not asked for the all contracted staffing costs which I can see in the annual reports and which have increased year on year – I specifically asked for consultant costs not teaching cover or e.g security. This may not even be accounted for in the same way on the annual reports. Many staff are aware of the significant amount these costs have on the college."

Scope of the case

9. The complainant contacted the Commissioner on 28 August 2020 to complain about the way his request for information had been handled. In particular, he stated:

"Nottingham College is experiencing financial hardship and is making staff redundant. However over the past 4 years it has employed a range of external consultants on high day rates when it could be sourcing much better value. I understand some of these rates vary from £450-£750+ a day + VAT. I understand there are around 20 of these consultants being employed currently."

10. The scope of this notice is to determine whether the college was entitled to rely upon section 43(2) of the FOIA as a basis to withhold the requested information. It will also consider the timeliness of the college's response.

Background

11. By way of background, the college has stated that it is publicly known that it is under a Notice to Improve ("NTI") due to its financial situation. This NTI, although dated 1 July 2020, was published by the Education

and Skills Funding Agency ("ESFA") on 18 November 2020. The NTI states that it was triggered by, "*ongoing concern over the college's serious cashflow pressures*" and it sets out specific conditions for the future financial monitoring and progress of the college¹. An article published by the newspaper "FE week" in November 2020 discusses the college's position and states that "*the college's 2018/19 accounts show a £6 million deficit*"².

Reasons for decision

Section 43(2) – prejudice to commercial interests

12. 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. This is a qualified exemption and is, therefore, subject to the public interest test.
13. The exemption can be engaged on the basis that disclosing the information either "would" prejudice commercial interests, or the lower threshold that disclosure "would be 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.
14. For the Commissioner to accept that prejudice *would* result, she must be satisfied that this outcome would be more likely than not.
15. The withheld information consists of spreadsheets containing the figures which the college has spent on external consultants for the years specified in the request. It shows a summary of spending and also individual spreadsheets detailing the breakdowns for each year.
16. The college has not provided specific arguments as to why it considers this information is commercial in nature. However, having viewed the withheld information, and considering the request, the Commissioner accepts that the information is commercial in nature because it is the salaries paid by the college to external consultants.

¹ <https://www.gov.uk/government/publications/financial-health-notice-to-improve-nottingham-college>

² <https://feweek.co.uk/2020/11/19/esfa-reveals-major-cashflow-problems-at-mega-college-in-nottingham/>

17. The Commissioner accepts on the basis of this reasoning that the information in question is commercial in nature. The next step is for the Commissioner to consider the prejudice which disclosure would or would be likely to cause and the relevant party or parties that would be affected.
18. For section 43(2) to be engaged 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 commercial interests;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the withheld information 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, meaning whether there is at least a real and significant risk of the prejudice occurring.
19. With regards to the first criterion, the Commissioner accepts that the prejudice envisaged would be to the commercial interests of the parties concerned. Therefore, the Commissioner is satisfied that the first criterion is met. This is not to say that she agrees it will happen; simply that the criterion is met.
20. In its initial response to the request the college stated that disclosure would be likely to prejudice its commercial interests in relation to remaining competitive when recruiting future staff. In its response to the Commissioner, the college explained that its financial position affects the salaries that it is able to offer. It said that this has effects at leadership level, especially in the area of ICT because, *"in the private sector those with IT expertise can command salaries far in excess of the levels set by the pay and grading exercise the college went through in 2019."*
21. In responding to the Commissioner's investigation the college explained that it has experienced challenges with permanent IT recruitment and it is therefore forced to pay much closer to market rates often for temporary IT professionals. The college added that it has undergone multiple rounds of recruitment for a permanent ICT director throughout 2020 however as this has not been successful, interim consultants have been the only solution. It argued that these professionals are expensive and it is therefore essential to be able to keep the salary levels confidential. The college explained that this is because each time it

needs to recruit one of these individuals, it is important that it is able to drive down the agreed salary as much as possible. It argued that this driving down of the salary is reliant on maintaining confidentiality of the previous salaries for the same position.

22. The college explained that the information withheld also relates to the salaries of Estates and HR leadership staff. It explained that good leadership staff are expensive yet essential. The college added that it does not wish to rely on interim arrangements and it is working to reduce them however it argued that its leadership positions cannot remain empty while recruitment for permanent staff is ongoing, and that the salaries for these positions are always subject to negotiation. Again, the college argued that it needs to be able to drive down the costs of interim leaders due to the seriousness of its current financial position. Ultimately, it argued that if the requested information were to be disclosed, it would harm the college's negotiating position.
23. It explained that the only level of detail to which this information can be released without prejudicing the college's commercial interests is the combined figure on "contracted out staffing services" which is published in its annual financial statements. From the college's website, the financial statements are currently published for 2017/18 and 2018/19³. The college explained that the 2019-20 figures are intended for publication in early 2021. For reference, the contracted out staffing services cost for 2018/19 can be found on page 34 of the published annual financial statement⁴.
24. As mentioned at paragraph 6 above, the complainant has queried why the college publish the "contracted out staffing costs" but do not publish the consultant costs that he has requested. The Commissioner asked the college to provide some clarification between the difference in these types of costs. The college explained that "contracted out staffing costs" cover two types of recruitment. The first is the urgent recruitment of an individual to a specialist senior post while a permanent post-holder is found. The second is where a number of less specialist staff are recruited temporarily to perform a particular function that only arises temporarily. The college explained that while contracted out staffing costs covers both of these types of recruitment, consultant costs only

³ <https://www.nottinghamcollege.ac.uk/about-us/corporate/policies-and-reports/financial-statements>

⁴ <https://assets.nottinghamcollege.ac.uk/policies/Nottingham-College-signed-accounts-18-19.pdf?mtime=20200107084939>

relates to the first type. The college explained that it publishes the contracted out staffing costs because it is required to do so in its financial statements. It does not publish the consultant costs because it explained that there is no category directed related to the term.

25. Ultimately, the college's position is that disclosure of the withheld information would harm its commercial position when negotiating salaries for both temporary and permanent members of staff.
26. Regarding the second criterion, the Commissioner is satisfied that the college demonstrated that a causal relationship exists between the potential disclosure of the information being withheld, and the prejudice to its commercial interests. The college's position is that disclosure of this information would harm its negotiating position and this in turn would be likely to lead to the college having to pay higher salaries to future staff. Therefore, the Commissioner considers that the second criterion has also been met.
27. Turning to the third criterion, the college relied on the higher threshold of prejudice, arguing that disclosure "would" prejudice its commercial interests. It argued that disclosing the withheld information "*would reach the higher threshold of having a prejudicial effect on the commercial interests of the college, rather than this just being a possibility*".
28. Having considered the withheld information and the arguments put forward, the Commissioner does not accept that the college has clearly demonstrated that the disclosure of the information "would" have a detrimental impact on its commercial activities. However, the Commissioner accepts that the college was entitled to rely upon the lower threshold of prejudice. The Commissioner accepts that disclosure of the information "would be likely" to have a detrimental impact on its commercial activities. Specifically, that disclosure would be likely to prejudice the college's bargaining position in respect of salaries for future postholders. The Commissioner accepts that this would be likely to prejudice the college's commercial activities in this area as it would affect the salaries it would be able to agree upon.
29. Having viewed the withheld information and considered the arguments made, the Commissioner accepts that prejudice to the commercial interests of the college would be more likely than not to result through disclosure of the information in question. She therefore finds that disclosure of the information would be likely to result in prejudice to the commercial interests of the college and, on this basis, section 43(2) of the FOIA is engaged.

Public interest test

30. Having found that the exemption is engaged, the Commissioner has gone on to consider the public interest factors in favour of disclosing the withheld information and of maintaining the exemption. Although the Commissioner has found the section 43(2) exemption is engaged, the information must still be released if the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

Public interest arguments in favour of disclosing the withheld information

31. In his internal review request the complainant argued that in his view, the college does not want to disclose the figure because he believes that it, *"will be absolutely shocking in a time when the college can't afford to pay its own staff and is facing financial hardship"*. He also stated that, in his view, a publicly funded institution, *"should have no problem with divulging how much it pays to non-permanent staff"*. He added:

"When staff are losing their jobs and not having pay increases for years, that information in my view should be made available. As someone directly affected, I believe I am well within my right to know how much of the annual wage bill has been spent on non-college staff.

If the college was serious about protecting staff during financial hardship, it would cease all contract work or at least be seen to make some real effort to do so. Yet it continues to employ a large/growing number of external staff whilst making staffing cuts."

32. In bringing this complaint to the ICO, the complainant stated, *"this is a publicly funded institution which I believe is not getting best value out of the public purse and is a major reason why it is financially struggling"*.
33. In favour of disclosure, the college stated that it is conscious of the fact that it provides a public service funded by public money and it therefore seeks to be transparent about how this money is spent.
34. The Commissioner recognises that there is a significant public interest in disclosure of information concerning the spending of public funds. The Commissioner also acknowledges that this information is of public interest because of the context of the college's public financial position. This is a valid factor in favour of disclosure of the requested information.

Public interest arguments in favour of maintaining the exemption

35. In favour of maintaining the exemption the college stated that it needs to recruit interim leadership positions due to its financial situation which

means that the permanent salaries it can offer are often low compared particularly to the private sector.

36. It argued that, *"public funds are best protected by the college being able to negotiate the best price for consultancy and agency costs it needs to take on, which can only be done if its negotiating position can be maintained by confidentiality."*
37. It argued that the positions recruited into temporarily are all essential, and that to have the recruitment into these positions made more difficult, and potentially have important leadership vacancies open at what is a critical time for the college, would have a detrimental effect on the college continuing to carry out its function of teaching. It therefore argued that the public is best served by the college being able to function to the best of its ability and therefore it does not consider that it is in the public interest to disclose this information.
38. In favour of maintaining the exemption, the Commissioner recognises that there is a public interest in protecting the ability of the college to use its public funding in the best value way.
39. The Commissioner also recognises that there is a public interest in preventing prejudice to the commercial interests of the college. Specifically, in protecting its ability to negotiate salaries in a competitive market. The Commissioner understands that disclosure would be likely to have detrimental effect on the college at a critical time for its finances where it is under an NTI from the EFSA.
40. The Commissioner also notes the college's arguments about the difference in salaries in public and private sector staff and that it is only using private staff as an interim measure while it seeks permanent and stable resolutions. The Commissioner considers that if these salaries were to be disclosed, it may prejudice the college's negotiating position when securing permanent staff and may cause further financial detrimental impact. Therefore, the Commissioner considers that this is a valid factor in favour of maintaining the exemption which carries significant weight.

Balance of the public interest arguments

41. The Commissioner accepts that there is a strong and legitimate public interest in the openness and transparency of public authorities with regard to decision-making processes and finances. This is because it promotes the aims of transparency and accountability, which in turn promotes greater public engagement and understanding of decisions taken by public authorities.

42. However, the college has to some extent demonstrated its openness and accountability by referring the complainant to the overall contracted out staffing costs that are available on its website.
43. In view particularly of the difficult financial position that the college is in, the view of the Commissioner is that the balance of the public interests favours maintaining the exemption.

Conclusion

44. The Commissioner's conclusion is that the public interest in disclosure of the withheld information is outweighed by the public interest in maintaining the section 43(2) exemption. Therefore, the college was not obliged to disclose the requested information.

Section 17 – time for compliance

45. Section 17(1) of the FOIA requires that, where a request is refused, a refusal notice must be provided within 20 working days of receipt of the request.
46. In this case the college did not provide a refusal notice within 20 working days of receipt. Therefore, the Commissioner's decision is that the college has breached section 17(1) of the FOIA.

Right of appeal

47. 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

48. 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.
49. 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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