

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 February 2021

Public Authority: The University Council
Address: University College London
Gower Street
London
WC1E 6BT

Decision (including any steps ordered)

1. The complainant has requested information relating to the Mathematical Computation Programme at University College London (UCL). UCL provided information in response to the first thirteen questions of the request but withheld the information requested in the final unnumbered part of the request – documentation relating to applications - citing section 43(2)(commercial interests).
2. The Commissioner's decision is that UCL has correctly cited section 43(2) of the FOIA to withhold the requested information. However, UCL has breached section 10(1) of the FOIA by failing to respond to the information request within the statutory timeframe.
3. The Commissioner does not require the public authority to take any further steps.

Request and response

4. On 24 April 2020 the complainant wrote to UCL and requested information regarding applications for the Mathematical Computation programme at UCL in the following terms -
1. *How many applications were received for a place on the course?*
 2. *How many students were invited to interview for a place on the course?*
 3. *How many places were awarded on the course?*
 4. *Of those invited to interview, how many applicants had obtained the same and lower GCE grades as this applicant?*
 5. *Of those awarded places on the course, how many applicants had obtained the same and lower GCE grades as this applicant?*
 6. *What percentage of all applications received for a place on the course were made by foreign national students?*
 7. *What percentage of applicants invited to interview were foreign national students?*
 8. *What percentage of applicants awarded a place on the course were foreign national students?*
 9. *What percentage of applications received for a place on the course were made by female students?*
 10. *What percentage of applicants invited to interview were female?*
 11. *What percentage of applicants awarded a place on the course were female?*
 12. *How many applicants had been invited to interview prior to this applicant's application being considered?*
 13. *How many applicants had been invited to interview after the applicant's application had been considered?*

Additionally, the Applicant requires disclosure of all documentation of all internal documentation retained on file in relation to her application including guidance for decision-makers, emails, notes, memoranda and any other correspondence that led to the decision to refuse admission.

5. There was some delay in responding to the request, partly due to UCL wanting further evidence in order to respond to a subject access request, and the complainant sent several chaser emails. However, the FOIA request was acknowledged on 7 May 2020.
6. UCL responded on 4 June 2020 and provided the information requested at numbers 1-13 but refused to provide the admissions template which fell under the final part of the request and applied to all applicants, withholding it under section 43(2) – commercial interests. The complainant made a request for an internal review on 25 June 2020.
7. UCL provided an internal review on 14 July 2020 in which it maintained its original position.

Scope of the case

8. The complainant contacted the Commissioner on 20 August 2020 to complain about the way the request for information had been handled.
9. The Commissioner considers the scope of this case to be UCL's citing of section 43(2) to the requested information in the final part of the request.

Reasons for decision

Section 43(2) – commercial interests

10. 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.
11. UCL has provided the Commissioner with the withheld information – the admissions template for the relevant course.
12. 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.

13. This exemption is subject to the public interest test which means that, even if the Commissioner considers the exemption to be engaged, she then needs to assess whether it is in the public interest to release the information.
14. 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

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

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.
15. 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).
 16. To meet the threshold of "would be likely to prejudice" is a lower threshold. This means that there must be more than a hypothetical or remote possibility of prejudice occurring. There must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50 per cent.
 17. UCL states that its own commercial interests would be likely to be prejudiced if the withheld information was disclosed. It stated that the Higher Education market is very competitive and in a competitive market each competing entity is always looking for opportunities to gain a competitive edge over the others.
 18. UCL explained that it competes with other higher education institutions nationally and globally to recruit high calibre students. To disclose information as to how it selects students for specific courses for the forthcoming years would affect UCL's ability to be competitive in the area of student recruitment because it would provide other institutions with otherwise undisclosed knowledge concerning UCL's recruitment strategy. UCL contends that other higher education institutions could adopt more aggressive marketing and selection strategies to counter this.
 19. UCL suggested to the Commissioner that the fact that the Higher Education market was competitive had been accepted by the First Tier Tribunal (FTT) in *EA/2009/0034 University of Central Lancashire v IC and Professor Colquhoun* which noted that the university operated "in competition with other institutions of higher education in seeking to sell its products, namely undergraduate courses, to potential students. The

Tribunal also noted (in agreement with EA/2008/0092²) that "commercial interests" is a term which deserves a broad interpretation which will depend largely on the particular context.

20. Disclosure of the template would assist competing universities in understanding how UCL recruits and assesses students. UCL argues that it would be likely to give competing universities a competitive advantage by enabling them to adapt their own strategies for marketing and selection to attract students that might otherwise apply to UCL.
21. UCL's view is that if applicants gained access to the template it would enable them to tailor applications to target specific requirements, resulting in a manufactured answer that artificially promotes certain applicants over others. If the template was publicly available it is likely that personal statements would be substantially the same, creating homogeneity in the pool of applications which the personal statement is intended to prevent. As the course is oversubscribed, the personal statement is a vital tool to enable UCL's admissions team to select specific individuals who show aptitude for and interest in the course.
22. The matters set out in paragraphs 20 and 21 above would be likely to have a prejudicial effect on number management and/or the quality of applicants offered places. This would impact on UCL's reputation and revenue generation which, UCL argues, play fundamentally important roles in the operation of the institution as a whole.
23. The complainant's view is that no causal link has been established between disclosure and UCL's commercial interests and questions why information about a university's decision-making responsibilities would be withheld from the public. The complainant also questions why the university would claim that this was harmful and cause prejudice without evidence that any harm is real, actual or of sufficient substance.
24. The Commissioner does not accept that a causal link has been established that the disclosure of this information could be used by other universities to undermine UCL by employing aggressive marketing and selection strategies as a result.
25. However, the Commissioner agrees that the disclosure of a template utilised by UCL for admission to a particular course would be likely to prejudice its commercial interests at the lower level. It is a vital tool in the selection of students and, as universities exist in a highly

² *Student Loans Company Ltd v IC*, paragraph 42

competitive market, its disclosure is likely to reduce the effectiveness of its selection process, casting doubt on the robustness of a process that could subsequently be manipulated by applicants. The Commissioner accepts the view of UCL that its finances are largely dependent on its student numbers and its academic reputation, both of which could be affected by disclosure of the requested information. It could be argued that student applications might increase but it is likely to make the best applicants harder to select, undermine the selection process and, by extension, the calibre of its students and the academic standing of UCL.

26. The Commissioner has therefore concluded that the exemption is engaged.

Public interest test

27. Although the Commissioner agrees that the exemption is engaged, she also needs to consider the public interest as it might be in the public interest to disclose the information, even if it is not in the commercial interests of UCL.

Public interest arguments in favour of disclosure

28. UCL set out the arguments that it had taken into account in favour of disclosing the requested information. Firstly, it accepted that the general public should be aware that value for money is being obtained by a public authority and that financial operations are being conducted appropriately.
29. UCL also put forward the general public interest argument that lies in transparency and openness regarding decisions made by public authorities.
30. Finally, UCL said that there is a further interest in the public having confidence in the objectivity of its student recruitment processes.
31. The complainant argues that the public interest in maintaining the exemption has to outweigh that in disclosure and questions whether commercial interests can really outweigh transparency, accountability and the public interest in disclosure. Disclosure would promote public engagement, understanding and confidence.
32. The complainant contends that a robust complaint procedure should extend to the scrutiny of the public. The public interest lies in wider public awareness of the university's aims and criteria and their relative importance in the university's selection procedure. When considering choice on application, applicants should be aware of the selection process and, post application, to understand the reasons for acceptance or rejection. The fact that the university has a complaint procedure to

launch a complaint in relation to its approach demonstrates the reason why it should be shared as, without disclosure, a complaint system is not viable.

33. The complainant further argues that UCL's assertion that it has robust procedures and that it is compliant with the Equality Act (2010) is not evidence. The complainant asserts that UCL is seeking to avoid legitimate and serious Equality Act challenges under section 91 (admission and treatment of students) and that it is illegal to withhold this information.
34. Finally, the complainant states that UCL has provided no evidence to support its view that the release of the requested information would be commercially prejudicial. Even if harm could be proved, it is contrary to the public interest to withhold the information.

Public interest arguments in favour of maintaining the exemption

35. UCL stressed that the disclosure of the requested information is not in the public interest because of the negative impact on UCL's market position, making it harder for public money to be utilised prudently and distorting the marketplace it operates in. UCL considers that disclosure of this information would not be in the public interest due to the prejudice that would occur to it in a competitive market environment.
36. Disclosure of the criteria by which personal statements are assessed is likely, in practice, to favour applicants who have gained access to the template and disadvantage those who have not. Disclosure is therefore likely to lead to unfairness.
37. UCL points out the fact that it has general information on selection via the course prospectus web page and provided links both to the complainant and the Commissioner.³ Further general information on how UCL selects students was provided to the complainant. Therefore UCL believes that the public interest has been met by this provision.
38. UCL considers that the disclosure of the information is more likely to serve the narrow interests of the complainant than a genuine public interest. Public awareness of specific selection criteria is not so clearly in

³ <https://www.ucl.ac.uk/prospective-students/undergraduate/degrees/mathematical-computation-meng/2020>

<https://www.ucl.ac.uk/prospective-students/undergraduate/application/selection-students>

the public interest that its disclosure would justify the likelihood of actual harm to UCL's commercial interests.

39. UCL contends that, although disclosure under FOIA is to the world at large, certain applicants would come across it and tailor their applications accordingly and others would not. Though this would be unfair to those applicants who had not seen the template, it would also impede UCL's ability to find the most suitable candidates for the course which would not be in the public interest. UCL considers that the most substantial beneficiary would not be the public interest but UCL's competitors.

Balance of the public interest

40. The Commissioner does not accept the argument that some individuals would benefit from the disclosure of the template and others would not for reasons of ignorance. The Commissioner suggests that it is not unknown or unusual for prospective students to use various sources and methods to gain an advantage. Clearly, the admissions template could be provided along with the selection criteria it already provides to any prospective students, either via the website or by whatever means UCL chooses for correspondence.
41. However, the Commissioner does not accept that releasing the requested information would be in the public interest. Her view is that there are complaint mechanisms in place for applicants to take advantage of should they need to do so, without disclosing an admissions template that UCL might reasonably expect to utilise, either in whole or in part, in future years and keep commercially confidential. Disclosing the template would aid transparency and potentially boost the chances of prospective students but it would be likely to increase the pool of 'suitable' applicants whilst places would still be limited. Should the standard of accepted candidates lower as a result, UCL's reputation could be affected which has potentially unforeseen or unknown commercial consequences. Ultimately, unless every university disclosed its admissions template, it would place UCL at a disadvantage with its competitors that is likely to affect it financially. The Commissioner has decided that this is not in the public interest.

Section 10 – time for compliance

42. Section 1(1) of the FOIA states that a public authority should confirm whether it holds relevant recorded information and, if so, to communicate that information to the applicant.

43. Section 10(1) of the FOIA requires that a public authority complies with section 1(1) promptly and, in any event, not later than 20 working days following the date that a request was received.

44. The request was made on 24 April 2020. UCL did not respond until 4 June 2020 and was consequently late in providing its response. UCL therefore breached section 10(1) of the FOIA.

Right of appeal

45. 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

46. 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.
47. 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
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