

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 September 2022

Public Authority: The Council of Imperial College of Science,
Technology and Medicine

Address: South Kensington Campus
London
SW7 2AZ

Decision (including any steps ordered)

1. The complainant has requested information relating to Bachelor's and Master's degrees in computing. The Council of Imperial College of Science, Technology and Medicine ("the College") relied on section 43 of FOIA (commercial interests) to withhold the requested information.
2. The Commissioner's decision is that the College has failed to demonstrate that section 43 of FOIA is engaged and is therefore not entitled to rely on this exemption.
3. The Commissioner requires the College to take the following steps to ensure compliance with the legislation.
 - Disclose, to the complainant, the information it has relied on section 43 of FOIA to withhold.
4. The College must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 22 July 2021 the complainant requested information of the following description:

“[1] Please could you provide copies of all of the exam papers sat by students studying BEng Computing or one of the MEng Computing courses in academic years 2017-18, 2018-19, 2019-20 and 2020-21.

“[2] Please could you also provide any mark schemes, model answers or marking guidance provided to examiners to assist in marking these papers.”
6. On 20 August 2021, the College responded. It refused to provide the requested information. It relied upon section 36 of FOIA (prejudice to the effective conduct of public affairs) as its basis for doing so because disclosure would undermine the integrity of the examinations.
7. The complainant requested an internal review on the same day. He appeared to accept that the College was entitled to withhold the information within the scope of element [2], but was not persuaded that those arguments applied to element [1]. In particular, he noted that some past papers were already available to students via the College’s website.
8. The College carried out an internal review and revised its position. It now relied on section 43 of FOIA (commercial interests) to withhold the information falling within the scope of element [1].

Scope of the case

9. The complainant contacted the Commissioner on 10 December 2021 to complain about the way his request for information had been handled. He was only concerned about the way the College had dealt with element [1] of the request.
10. The Commissioner considers that the scope of his investigation is to determine whether the College is entitled to rely on section 43 of FOIA to withhold the information.

Reasons for decision

Section 43 – commercial interests

11. Section 43(2) of FOIA states that

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

12. The exemption can be engaged on the basis that disclosing the information either “would” prejudice commercial interests, or the lower threshold that disclosure only “would be likely” to prejudice those interests. For the Commissioner to be convinced that prejudice “would” occur, he must be satisfied that there is a greater chance of the prejudice occurring than not occurring. To meet the threshold of “would be likely to” occur, a public authority does not need to demonstrate that the chance of prejudice occurring is greater than 50%, but it must be more than a remote or hypothetical possibility.

13. The College drew the Commissioner’s attention to the decision of the First Tier Tribunal in *University of Central Lancashire (UCLAN) v ICO & David Colquhoun (EA/2009/0034)* (“Colquhoun”), in which the Tribunal had determined that higher education providers, though not seeking to make a profit, still had “commercial interests” and that they were required to compete with each other to sell their “product” (ie. a course of study) to students.

14. The College then went on to explain why it considered that its ability to attract students would be undermined by disclosure:

“The funding and commercial interests of universities are increasingly dependent on student fees rather than public sector funding. Imperial College is in direct competition with other Universities in the UK and overseas to attract the most talented and able students. In addition, the College has invested in attracting the most distinguished academics in the field who have developed world-class teaching, learning and assessment materials, of which the past papers form a part. These materials amount to a property asset of the College and are part of what sets the College apart from our competitors; the College has a commercial interest in maintaining those assets.

“In addition, the Department of Computing has expressed concern that disclosure of past papers could give a misleading impression of the nature of the computing programme offered at Imperial College and potentially discourage students from applying. In the highly competitive environment in which we operate, it is vital that our

educational offerings are presented to the public in a way that is fair, inclusive, and most accurate so that prospective applicants and general members of the public can make sound decisions on whether and how to engage with our educational offerings. While most of our computing modules still have exams, the role of an exam varies across modules. Computing is a continuously evolving field of study; past exam papers on a particular module could give a very inaccurate indication of the content and assessment of current instances of the same module. An exam often does not assess all learning outcomes of our modules, coursework and lab-based activity form additional assessments. For example, the Computing Practical 1 is a core requirement for first-year students. It has no exam, but lab-based programming tests in which students complete tasks in controlled computer environments. Past papers therefore are a poor and potentially misleading means of supporting the decision making of whether to apply for our courses or whether to take a particular module once at College.

“Disclosure into the public domain of Computing past exam papers could give our competitors insight into the College’s teaching and assessment methodology and enable them to plagiarise the materials to their own commercial advantage and to the detriment of the College’s commercial interests. While conventional paper examinations form only a part of the assessment process, they nonetheless contain material, such as examples and scenarios developed by Imperial College academics, that could be exploited by competitors offering alternative qualifications.”

The Commissioner’s view

15. The Commissioner is not persuaded that the College has demonstrated that there is more than a hypothetical risk of harm arising from disclosure.
16. Turning to the first issue raised by the College, the Commissioner accepts that the College, whilst not a profit-making body, can still have commercial interests of its own – and that the protection of those interests is capable of attracting this exemption. Whilst the Colquhoun judgement is not binding on the Commissioner, it is nevertheless one with whose logic he agrees.
17. However, the Colquhoun judgement provides only partial assistance to the College. In that case, the requestor was seeking some of the teaching materials used to deliver a particular degree course offered by UCLAN. Whilst the Tribunal (and the Commissioner in his original decision) agreed that the UCLAN had commercial interests in principle, it was not convinced, on the facts of the case before it, that those

commercial interests were likely to be harmed by disclosure. In finding that section 43 was not engaged, the Tribunal commented that:

"The D.I.Y. student who might use disclosed course material to pursue his qualification at home seemed to us a rare, indeed speculative species, who would, if he existed, study under vast disadvantages (no tuition, no case studies, no degree to aim for) which would deter him fairly swiftly from such a venture.

"We were not impressed by the claim that third parties with copyright in the disclosed materials would be alienated by UCLAN's compliance with a decision that this information must be provided. None gave evidence to that effect.

"It was not clear to us how a competitor could significantly exploit access to this material, without infringing UCLAN's copyright or brazenly aping the content of a course, which would surely attract the scorn of the wider academic community. Moreover, it seemed to us likely that most potential students would be attracted to a particular course by the reputation of the teaching staff and a range of extra – curricular factors at least as much as by a comparative study of the powerpoint presentations and notes provided to current students."

18. The Commissioner considers that this assessment also holds in the present case.
19. The "product" that the College is offering is not limited to a set curriculum of knowledge that it imparts to all those who enrol. Assessing the value of any course involves not just the curriculum of knowledge, but also the quality of the teaching, the resources available (particularly relevant for a course such as computing) as well as the extra-curricular activities offered by that provider. Students also (assuming they complete the course successfully) receive an accreditation at the end. This accreditation forms an integral part of the College's "product."
20. The Commissioner is not convinced that a student who might otherwise have enrolled at the College is likely to take the view that the course does not represent value for money, simply because they can complete a past paper – especially when they must do so without access to the marking scheme which would allow them to see how they would have scored. It is difficult to imagine a prospective employer or investor being impressed by an individual who says "I have no qualification, but once answered a past paper published by Imperial College." The accreditation forms a crucial part of the College's product and cannot be replicated – no matter how many past papers a person reviews.

21. Equally, as the Tribunal pointed out in Colquhoun, any other higher education provider that tried to pass off the College's work as its own would not only be likely to find itself on the wrong end of a copyright suit, but would be likely to attract the scorn of an academic community where plagiarism is taboo. Disclosing information under FOIA does not strip that information of any copyright which protects it.
22. As the University has pointed out, it has invested in ensuring that is able to offer teaching of the highest quality. That is likely to be one of, if not the most significant factor in persuading any student to enrol and it will be unaffected by disclosure.
23. As the Commissioner often reminds public authorities: there is no provision within FOIA that prevents any public authority from providing additional material to help a requestor understand the information they have requested or to place that information in its proper context. To the extent that disclosing past papers may give a misleading impression of how any particular course or module is assessed, the Commissioner is satisfied that this issue could easily be overcome by the College explaining how its assessments are carried out.
24. The Commissioner is thus not persuaded that disclosure would present a real and significant risk of prejudice to the College's commercial interests. It thus follows that the College is not entitled to rely on section 43 of FOIA to withhold it.

Right of appeal

25. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

26. 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.
27. 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

Roger Cawthorne
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Information Commissioner's Office
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