

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 25 February 2022

**Public authority:** The Governing Body of the University of London

**Address:** Senate House

Malet Street

London

WC1E 7HU

### **Decision (including any steps ordered)**

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1. The complainant has requested the marks achieved by students on Masters of Law (LLM) modules for 2017-2021.
2. The University of London ('the University') disclosed the award classifications for each year but withheld the remainder of the information that fell within the scope of the request, citing section 43(2) (commercial interests) of FOIA.
3. The Commissioner's decision is that section 43(2) does not apply to all of the information that the University is withholding. The Commissioner therefore requires the public authority to take the following steps to ensure compliance with the legislation:
  - To disclose the information requested in part 3 of the request.
4. Furthermore, in failing to disclose all non-exempt information within twenty working days, the University has breached section 10 (time for compliance with request) of FOIA.
5. The University 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

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6. On 28 April 2021 the complainant wrote to the University and requested information in the following terms:

"I would like to request the following information in relation to the LLM distance learning course (this course: <https://london.ac.uk/courses...><sup>1</sup>) for the years 2017-2020, where it is available:

1. The number of students awarded an LLM in the years 2017-2020; the number of students receiving each classification of the award (e.g. Distinction, Merit, Pass, Fail); and the average overall grade attained in each year.
  2. The highest grade attained by a student in any single LLM module and/or course, and the name of that module and/or course across examination sessions in 2017-2020.
  3. The highest average mark for the top distinction for each year 2017-2020.
  4. The highest grade and the average grade attained for each of the 4 modules from the LWM75 (Derivatives) course in the examination session Sep/Oct 2020."
7. The University responded on 26 May 2021. It stated that the information was exempt from disclosure under section 43(2).
8. Following an internal review the University wrote to the complainant on 25 June 2021. It upheld its original position.

## Scope of the case

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9. The complainant contacted the Commissioner on 20 July 2021 to complain about the way that their request for information had been handled.
10. The complainant was concerned that section 43(2) had been applied to all of the information within the scope of the request in a blanket fashion. The complainant was also concerned that the University had

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<sup>1</sup> [Postgraduate Laws LLM | University of London](#)

failed to conduct an adequate prejudice test or explain precisely how disclosure would prejudice its commercial interests.

11. During the scope of this investigation, the University decided that part 1 of the request could be disclosed as 'This information is general and aggregated and having reviewed this request, the University feels it would be appropriate to release this.'
12. The University disclosed this information to the complainant on 15 February 2022 and 17 February 2022. It confirmed that parts 2, 3 and 4 of the request remained exempt from disclosure.
13. The Commissioner therefore considers the scope of his investigation to be to determine if the University is entitled to withhold the remainder of the information under section 43(2).

## **Reasons for decision**

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### **Section 43(2) – commercial interests**

14. Section 43(2) of FOIA states:

'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).'

15. The Commissioner's guidance 'Section 43 - Commercial interests'<sup>2</sup> states '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.'
16. In order for a prejudice based exemption such as section 43(2) to be engaged there must be likelihood that disclosure would, or would be likely to, cause prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met in order to engage a prejudice based exemption:
  - 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 the applicable interests within the relevant exemption;

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<sup>2</sup> [Section 43 - Commercial interests | ICO](#)

- 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. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and,
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

17. Consideration of the exemption at section 43(2) is a two-stage process: even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

### **The applicable interests**

18. The University has explained how it believes disclosure would damage its own commercial interests. The University has explained 'Releasing specific grades and marks provide a level of insight into our outcomes and activities which we would not provide on request to a competitor and which could clearly be used by competitors to present statistics in order to promote another provider at the University of London's expense.'
19. The Commissioner is satisfied that the arguments presented by the University outline how disclosure would prejudice the applicable interests within the relevant exemption.

### **The nature of the prejudice**

20. The Commissioner must now consider if there is a causal link between the information that is being withheld and the prejudice that section 43(2) is designed to protect.
21. The complainant noted that the University appeared to be relying upon a previous case<sup>3</sup> as a 'a blanket excuse to refuse all provide information remotely similar.' The Commissioner notes that information in response to part 1 of the request has since been provided.
22. The University has explained that 'The statistics direct our strategy and investments in both global and regional markets for education. It allows other providers to target regions around specific subjects or perceived

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<sup>3</sup> [ic-42264-q8p7.pdf \(ico.org.uk\)](#)

strengths and weaknesses. In Freedom of Information responses, made as public disclosures, the University has little control in how information is re-purposed and no resources to police the re-use of the information.'

23. To reiterate, part 2 of the request asks for "The highest grade attained by a student in any single LLM module and/or course, and the name of that module and/or course across examination sessions in 2017-2020" and part 4 asks for "The highest grade and the average grade attained for each of the 4 modules from the LWM75 (Derivatives) course in the examination session Sep/Oct 2020."
24. Having reviewed the withheld information, the Commissioner accepts that a competitor might be able to draw conclusions, accurate or not, about the University's performance or perceived strengths and weaknesses in specific modules. This information may be used to promote the modules or programmes of another education provider over the University.
25. The University has explained that it operates in a competitive environment, competing with other universities both within and outside the UK and private education providers. Some of these bodies are subject to FOIA and some are not.
26. The University has also explained that "In the University of London's case, the competition is very intense as the University's "Worldwide" distance learning provision operates in a competitive international environment where students study and are assessed in their own countries. The University is competing with education providers in a truly global context."
27. Ultimately, whilst it is an important educational institution the University is also a commercial enterprise which must be able to exist in a competitive market in order to remain viable. Having considered the University's arguments, and the withheld information, the Commissioner is satisfied that section 43(2) is engaged in response to parts 2 and 4 of the request.
28. To reiterate, part 3 of the request asks for 'The highest average mark for the top distinction for each year 2017-2020.' Having compared this information to that disclosed in response to part 1 of the request, the Commissioner is not convinced that it engages the exemption.
29. Part 1 of the request breaks down the classification of awards given for 2017-2020 and the average grade for each. Part 3 of the request breaks down the number of distinctions awarded in the years 2017-2020 and the average grade for each year.
30. The University has failed to explain to the Commissioner how the part 3 information differs to the part 1 information. The Commissioner does not

see how details of the average distinction grade for 2017-2018 would prejudice the University's commercial interests. This information is generic, aggregated and does not seem to provide any opportunity for a competitor to draw any detailed conclusions about the University's activities that may be exploited.

### **Likelihood of the prejudice**

31. The University has confirmed to both the complainant and the Commissioner that it has applied the exemption on the basis of the lower threshold of prejudice, that disclosure '*would be likely*' to result in prejudice.
32. The lower threshold is defined in the Commissioner's guidance<sup>4</sup> as '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%.'
33. The University has explained that, 'there is a plausible causal link between the disclosure of the detailed mark and grade information and the use of this information by competitors to derive insight into our outcomes and activities to the detriment of the University of London. The University considers that this would be likely to occur as a result of disclosure, given the public nature of Freedom of Information responses.'
34. The University 'has provided distance learning since 1858 and therefore through generations of change and upheaval. The technological developments of the last 10 years have seen the pace and scale of this change (it's Worldwide distance learning provision) increase dramatically, and the last few years of the pandemic have accelerated this.'
35. The Commissioner acknowledges that virtual learning is now more common than ever. As a result, the University now finds itself in competition for students, and therefore funding, with more establishments.

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<sup>4</sup> [the prejudice test.pdf \(ico.org.uk\)](#)

## **Is the exemption engaged?**

36. To reiterate, the University believes that section 43(2) covers parts 2, 3 and 4 of the request. The Commissioner disagrees; he does not believe the exemption is engaged in relation to part 3 of the request. Therefore he has ordered the disclosure of this information.
37. Since the Commissioner has determined that the exemption is engaged in relation to parts 2 and 4 of the request, he will now go onto determine whether the public interest lies in disclosure or in maintaining the exemption.

## **Public interest test**

### **Public interest in disclosing the information**

38. The University acknowledges that there is a general public interest in promoting transparency and accountability, the principles that underpin FOIA.
39. The Commissioner notes that transparency would provide a greater understanding of the LLM distance learning course and its associated modules and grades. It may help prospective students make a decision as to where they wish to study, or help current students see how the performance of their year has compared to others.

### **Public interest in maintaining the exemption**

40. The University has indicated that there is no accusation or suspicion of wrongdoing or maladministration surrounding the LLM distance learning course. The University does not consider there to be a strong public interest in the requested information.
41. Furthermore, the University has noted that 'There is a significant public interest in universities protecting their commercial interests, enabling them to compete fairly with other providers.'
42. The University recognises the need for transparency around its courses, aggregated grades and expenditure<sup>5</sup>. The University notes that it publishes this information proactively without prejudice to its own commercial interests.

## **Balancing the public interest arguments**

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<sup>5</sup> [University strategy, annual reports and financial statements | University of London](#); [Office for Students Transparency Return | University of London](#)

43. The University believes 'the public interest in transparency is met by our already public disclosures around this type of information, and that the detailed information requested would be likely to prejudice the University's commercial interests by giving information about our outcomes to competitors in a way that enables them to promote other courses and providers in the same area of distance learning.'
44. As the University has noted, there don't appear to be any specific concerns about, or wrongdoing by, the University that might tip the balance in favour of disclosing the requested information even though doing so would be likely to prejudice the University's commercial interests.
45. The Commissioner considers that Universities, including the University of London, proactively publish information about their courses and performance to allow prospective students to make an informed choice. However, it would put the University at a disadvantage to disclose information that may then be used against it by its global competitors, some of whom will not be public authorities under FOIA.
46. The Commissioner is satisfied that, in this case, there is greater public interest in the University being able to compete fairly with other higher education providers than in the disclosure of the part 2 and part 4 information. The public interest lies in maintaining the exemption.

### **Section 10 – time for compliance with request**

47. Section 1(1) (general right of access to information held by public authorities) states that:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

48. Section 10 time (for compliance with the request) of the FOIA states that:

"...a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

49. Since the University failed to disclose all non-exempt information within twenty working days, the University has breached section 10 (time for compliance with request) of FOIA.



## **Right of appeal**

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50. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

51. 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.
52. 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**

**Alice Gradwell**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**