

Freedom of Information Act 2000 (FOIA) Decision notice

Date: 19 July 2023

Public Authority: University of Birmingham
Edgbaston
Birmingham
B15 2TT

Decision

1. The complainant made a four-part request for information relating to clinical targets the University of Birmingham (UoB) may have set. For parts one and two UoB supplied information about the General Dental Council's (GDC) website and an external link to a previous report, citing section 21(1) of FOIA. It refused to release any further information in scope of the request citing section 43(2) of FOIA to withhold the information.
2. The Commissioner's decision is that UoB was entitled to cite section 21(1) of FOIA regarding information available on the GDC's website. He also finds that UoB was entitled to rely on section 43(2) to withhold the remaining information.
3. No steps are required as a result of this decision.

Request and response

4. The complainant made the following information request to UoB on 10 February 2023:

“For your primary dental degree programme (BDS or equivalent):

 - Do you have any clinical targets that students are required to achieve in order to graduate (e.g. do they need to have performed a certain number of specific procedures)?
 - Please could you provide a copy of the clinical targets for the current academic year (2022-23)
 - Have the clinical targets changed over the last 5 years?
 - If the targets have changed, please could you provide a copy of the targets for the previous four academic years (2018-19, 2019-20, 2020-21, 2021-22).”
5. UoB responded on 29 March 2023 and cited section 21(1) for the first two parts of the request and section 43(2) of FOIA in response to the remaining two parts of the request.
6. Following an internal review UoB upheld its reliance on section 43(2) to withhold the requested information.

Reasons for decision

Section 21(1) - information reasonably accessible by other means

7. Section 21 of FOIA provides that information which is reasonably accessible to the applicant is exempt information. It is an absolute exemption which means that there is no requirement to carry out a public interest test.
8. The purpose of section 21 is to protect the resources of public authorities. Public authorities do not have to respond to requests for information where the requestor could have found the requested information elsewhere. Section 21 also acts as an incentive for public authorities to be proactive in publishing information as part of their publication schemes.
9. In its response, UoB provided advice around registration with the GDC and its requirements to offer a programme of study that ensures dental

students are capable of reaching the high professional standards of a dentist as required by the GDC. It also provided a link to the Education and Quality Assurance Inspection Report (EQA report)¹ and explained the GDC's website gave general information regarding clinical requirements and the regulation to which they adhere. Within the report are sections that deal specifically with student competencies and course expectations for example: Standard 3- Student Assessment, which includes the levels required to be attained within the course (targets) in order to successfully graduate.

10. The Commissioner believes that in providing advice, a link to the previous report and information regarding clinical requirements and the regulation on the GDC's website, UoB has provided directions to information with regard to part one of the request.
11. As this information is reasonably accessible to the applicant and UoB has directed the complainant to where it can be located, the Commissioner is satisfied that section 21(1) of FOIA was correctly applied in this case.

Section 43(2) – commercial interests

12. Section 43(2) 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).”

13. The Commissioner's guidance² 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.'
14. In order for a prejudice-based exemption, such as section 43(2) to be engaged the Commissioner considers that 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 were disclosed, has to relate to the applicable interests within the relevant exemption.

¹ [university-of-birmingham-programme-report-with-observations-2019.pdf \(gdc-uk.org\)](https://www.gdc-uk.org/education-quality-assurance-inspection-report-2019)

² <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-43-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. 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 – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
15. The Commissioner acknowledges the complainant's argument around the three-part criteria set out in section 43(2) of FOIA and their public interest arguments.
 16. However, from the information provided to the Commissioner during his investigation, he agrees with UoB that: "release of this information would be likely to damage or undermine its commercial interests and therefore, likely adversely impact on future business. Disclosure of the clinical targets could enable other universities to adopt UoB's unique clinical targets. UoB believes there to be a more probable than not risk of harm to its commercial interests by way of disadvantaging its ability to compete in the higher education market if this information was released." Furthermore, "It specifically considers this due to its high reputation and position in the Dentistry higher education market, particularly after the feedback received in the 2019 GDC report."
 17. In its refusal notice UoB said "Clinical requirements are set and assessed by individual universities and vary across the sector. Therefore, the requirements are not shared outside of the University. Specific details of these clinical requirements, and how they have changed, are deemed to be commercially sensitive as they are reviewed in the internal programme approval and review process. These requirements therefore help form internal policy decisions behind the specific course structure and content, which is different to other universities. These internal course policies and decisions aim to ensure that the University's dentistry graduates remain highly sought after and exceed the required expectations. This, in turn, allows the University to attract the best students and staff. Release of the specific clinical requirements, and how they have changed, would enable other universities to adapt similar

approaches. This would disadvantage the University's commercial interests regarding the calibre of graduates it produces, and the attraction of staff to teach on the Dentistry course."

18. The Commissioner accepts that the amount of clinical experience a course offers will be a significant factor in an applicant's decision where to study dentistry. An applicant might be swayed more by a course that offers and requires more practical experience in order to graduate over one that requires less. He accepts that, if a competitor of the University were to become privy to the clinical targets that make up its course, it may attempt to replicate this formula. The clinical targets have been created and refined over many years and are a component of the curriculum and assessments that have been accredited by the GDC.
19. However, the Commissioner must consider what information is actually being requested and the circumstances at the time that the request was made.
20. The complainant has requested the clinical targets for the current year, 2022-2023, and a copy of the targets for the previous four academic years 2018-19, 2019-20, 2020-21, 2021-22 as the clinical targets had changed over the years. The requested information relates to targets that students must hit in order to graduate – the Commissioner considers that disclosure of the specific clinical targets for these academic years could influence a competitor to change their own clinical targets in line with UoB's changes in order to replicate these and potentially be more competitive.
21. With regard to the first criterion of the three-limb test set out in paragraph 14, the Commissioner accepts that the harm alleged to occur, as described above, relates to the commercial interests which the exemption is designed to protect.
22. The Commissioner is satisfied that the second criterion of the test has been met as he accepts the explanation provided by UoB demonstrates that disclosure of the information has the potential to prejudice the commercial interests of UoB.
23. In the circumstances of this case the Commissioner agrees with UoB's determination that the resultant prejudice from disclosure of the information, is more probable than not. He accepts that the lower threshold of 'would be likely' to cause commercial prejudice has been met.
24. Even though UoB is a public authority, it must still be able to operate in a commercially competitive environment. Any information that may

strengthen an organisation's commercial position also has the potential to prejudice UoB's ability to maintain its standing.

25. Since the Commissioner considers the exemption is engaged, he will now go onto consider whether the public interest lies in maintaining the exemption or in disclosure.

Public interest test

26. As mentioned in paragraph 15, the Commissioner has considered the public interest arguments provided by the complainant in their complaint.

27. To summarise the complainant contends that there is significant public interest in;

- understanding the level of training dentists require in order to graduate;
- ensuring that universities produce high-quality graduates, openness and transparency is not binary, where they can be either fully "met" or "unmet";
- it would be impossible for these principles to ever be fully met when there is a withholding of disclosure;
- there is a real and obvious public interest in further disclosures being made as the actions in the report identify issues with UoB's clinical targets, the report relates to an inspection over 4 years ago, and therefore out of date. Much has changed in that time, including a global pandemic.

28. UoB recognises the public interest in transparency and accountability in its activities. It is accountable to how it spends public money received through the annual accounts on its website:

<https://www.birmingham.ac.uk/university/leadership/governance/council/accounts.aspx>

29. It also states that: "In addition to the annual accounts linked above, the University is open and transparent regarding the Dental Surgery (BDS) A200 programme to ensure it is rigorous and challenging, so that students are fully equipped, and exceed expectations when they graduate. Openness and transparency is met here through the EQA Report."

30. In its public interest arguments in favour of maintaining the exemption, UoB contends that: "disclosure of the information would prejudice its

commercial interests by preventing UoB's ability to compete. As explained, it is the current policy of the Government that the higher education market should be competitive in the interests of students and the wider public and indeed, this is why it regulates markets and anti-competitive practices."

31. As part of its internal review, UoB also explained in detail the context of clinical targets, which it set in order to meet the requirements and regulations set by the GDC that all dentists and dental care professionals must meet in order to practise. The University explained how quality assurance was carried out by the EQA and provided the latest EQA Report in its response.
32. Whilst the Commissioner understands these arguments and the wider context, he is satisfied that UoB has demonstrated accountability with the information in the public domain and through its explanations around quality assurance, and meeting of the regulatory requirements.
33. The Commissioner agrees that there is a strong public interest in maintaining the integrity of UoB's own business model which has enabled it to be competitive in the marketplace whilst producing dentists of the standard required by the GDC. He also considers that the wider issues surrounding this matter will not be solved by the release of the withheld information.
34. Ultimately, bearing in mind UoB has to remain competitive with other universities and has its own internal policies on how it does this, the Commissioner considers that the balance of the public interest lies in maintaining the exemption and not compromising UoB's ability to provide the service it does to students and business in general.
35. Therefore, there is a clear public interest in ensuring that the commercial interests of UoB are not harmed and fairness of competition is not undermined.

Right of appeal

36. 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

37. 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.
38. 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

Susan Duffy
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