

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 August 2024

Public Authority: The Governing Body of Ulster University
Address: Cromore Road
Coloraine
BT55 7EL

Decision (including any steps ordered)

1. The complainant requested from Ulster University (the University), information relating to architecture staff meetings and for External Examiner reports from June 2023. The University withheld some of the information and cited section 43(2) (commercial interests) of FOIA.
2. The Commissioner's decision is that the University was entitled to withhold the information under section 43(2) of FOIA and the public interest favours maintaining the exemption. Therefore, the Commissioner does not require the University to take any steps as a result of this decision.

Background information

3. The University provided the Commissioner with background information relating to a specific External Examiner report which the complainant is seeking. External Examiner reports – all external examiners are required to write reports on the procedure, conduct and outcomes of the examination. The University referred to a link¹ on its website which has information on the roles and responsibilities of an External Examiner in producing such a report.

¹ <https://www.ulster.ac.uk/learningenhancement/cea/external-examiners>

4. The University said the External Examiner process involves the finalised report being made available to all students enrolled, and staff teaching the relevant courses, via internal processes, and within internal secure systems.
5. The University stated External Examiners' reports are not a publicly available document, and it would have concerns about the release of External Examiners' reports under FOI and therefore, to the public at large. In light of this, the University applied section 40 (personal information) and section 43(2) of FOI to the original request.

Request and response

6. On 14 December 2023 the complainant wrote to the University and requested information in the following terms:
 1. "Minutes/records of architecture staff meetings for this semester, most recently a meeting on 12th December
 2. External Examiner Reports from June 2023"
7. On 16 February 2024 the University responded. It confirmed information to part 1 of this request is not held, and confirmed information is held for part 2. However, the University withheld it under section 43(2) (commercial interests) and section 40(2) (personal information) of FOIA.
8. On 19 February 2024 the complainant asked for an internal review regarding the response to part 2 of his request "the decision not to release all External Examiner reports from June 2023..."
9. On 8 March 2024 the University provided its review response and maintained its original position. It also said it had been assured that the report will be released through the appropriate channels in due course.
10. During the Commissioner's involvement with this case, the University released the requested information – External Examiner report to the complainant on 4 June 2024 but with some information redacted.
11. The University said this was released through the standard internal processes and channels, following the conclusion of the other processes. It also said that a copy of the report was received by all permanent staff through this release, including the complainant. The University provided a copy of the report to the Commissioner, which it refused to disclose to the complainant under sections 43(2) and 40(2) of FOIA.

12. The University explained there had been delays in the release of the report, and that this was due to another internal process running parallel to the release of this report. The University said this secondary internal process involved sensitive discussions with stakeholders, including staff and trade unions which resulted in a delay in the report's release.

Reasons for decision

13. This reasoning covers why the University was entitled to rely on section 43(2) of FOIA to refuse some information to part 2 of the request.

Section 43 – commercial interests

14. Section 43(2) of 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.

15. The Commissioner has defined the meaning of the term “commercial interests” in his section 43 guidance² as follows:

“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. The University relied on this exemption for withholding the information, as it considers disclosure would be prejudicial to its commercial interests. The University confirmed the withheld information is the full External Examiners report.
17. The University said releasing this information into the public domain could potentially undermine its position in the sector. It said other Universities could use this information to their advantage in this competitive environment.
18. The University reported that it operates in a very competitive higher education market, in which there is a degree of autonomy afforded to institutions in terms of how they develop their own curricula and assessments.

² <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

19. The External Examiner process, the University said, is a key mechanism for upholding academic standards in UK higher education. The University said information relating to the External Examiner mechanism would provide useful insights for competitor institutions that run similar courses across the UK and also local competition. To freely share this level of information, would therefore undermine the competitive environment in which the University operates. The University strongly argued that disclosure of External Examiner's report into the public domain would prejudice its commercial interests. This it said, would create a commercial disadvantage.
20. Within its submissions to the Commissioner, the University referred to a decision notice – IC-165469-L9N5 where the Commissioner found and recognised the commercial sensitivity of examiner reports. The University reiterated disclosure of the information into the public domain would be prejudicial to its commercial interests, creating an imbalance in which its competitors, both locally and nationally would be able to exploit to the University's detriment. The University said its competitors would be able to explore areas of current strengths and weaknesses which would create an unfair market advantage.
21. The University confirmed that disclosure of the requested information would prejudice its own commercial interests and not those of a third party.
22. The Commissioner accepts that the risk of prejudice occurring is real and significant. He therefore finds the University was entitled to apply section 43(2) of FOIA to the withheld information.

Public interest test

23. As the Commissioner is satisfied the exemption is engaged in this case, he will consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

24. The University recognises that disclosure would promote accountability and transparency. It would also give public assurance that assessment methods are fair and meet standards.

Public interest arguments in favour of maintaining the exemption

25. The University argued that placing the information contained within an External Examiner's report into the public domain, would present other higher education institutions with a significant commercial advantage.

26. Although a redacted copy of the report was later released to several people within the University, at the time the request was made, it was not in the public domain.
27. The University further argued, information and detail included in the External Examiner's report would provide useful insights for competitor institutions that run similar courses. The University stated, sharing this information would undermine its operations within a competitive environment.
28. The University referred the Commissioner to a case (University of Central Lancashire EA/2009/024) in which the Tribunal noted that universities operated "in competition with other institutions of higher education in seeking to sell its products, namely undergraduate courses, to potential students." The University emphasised how the Higher Education market is very competitive, and that it competes with other higher education institutions regionally, nationally and globally to recruit high calibre students.
29. The University stated it has one local direct competitor in Northern Ireland, and the competition between both universities to attract students is very high. The University is of the view the public interest is better served in maintaining its competitive advantage, and that there is a public interest in the University remaining competitive in this market.

Balance of the public interest test

30. In balancing the public interest arguments, the Commissioner accepts that disclosure would help to increase openness and transparency. He understands the complainant's concerns, and recognises there's public interest in ensuring transparency of subject monitoring activities which are relevant to staff and prospective students, as well as public funding bodies and tuition fee-paying members of the public. The Commissioner also acknowledges disclosure would reassure the public the assessment methods are reasonable, and that they meet the guidelines.
31. The Commissioner is aware that information about universities' performance is generally published, such as on their websites. He accepts the University's explanation regarding External Examiners' reports which are made available (paragraphs 9 - 11), and the Commissioner considers this rationale adequately addresses the public interest in transparency.

Conclusion

32. The Commissioner finds the public interest in disclosure of the withheld information is outweighed by the public interest in maintaining the exemption. Therefore, section 43(2) of FOIA is engaged and the University was entitled to rely on the exemption. In view of this decision, the Commissioner has not found it necessary to consider the other exemption cited by the University in this case.

Right of appeal

33. 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

34. 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.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Joanna Marshall
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF