



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2013/0124

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50453565
Dated: 22 MAY 2013**

**Appellant: THE UNIVERSITIES AND COLLEGES
ADMISSIONS SERVICE (UCAS)**

1st Respondent: INFORMATION COMMISSIONER

2nd Respondent: THE LORD LUCAS

Heard at: FLEETBANK HOUSE, LONDON, EC4

Date of hearing: 2 DECEMBER 2013

Date of decision: 15 JANUARY 2014

Before

ROBIN CALLENDER SMITH
Judge

and

MELANIE HOWARD and ANDREW WHETNALL
Tribunal Members

Attendances:

For the Appellant: Monica Carrs-Frisk QC and Jane Collier, Counsel.
For the 1st Respondent: Christopher Knight, Counsel instructed by the Information
Commissioner.
For the 2nd Respondent: The Lord Lucas, in person

Subject matter

FOIA

Meaning of Public Authorities s.3 and Schedule I
Authorities to which the Act has limited application s.7

Freedom of Information (Designation as Public Authorities) Order 2011 (SI 2011/2598)

Cases:

R v Smith [1975] QB 531; *Waugh v British Railways Board* [1980] AC 251; *Peach v Commissioner of Police of the Metropolis* [1986] QB 1064; *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687; *A-G's Reference (No 5 of 2002)* [2005] 1 AC 167; *Svenska Petroleum Exploration v Government of Republic of Lithuania* [2006] EWCA Civ 1529 [2007] QB 886; *Department for Education and Skills v ICO & Evening Standard* EA/2006/0006 [2011] 1 Info LR 689; *Veolia v Nottinghamshire County Council* [2010] EWCA Civ 1214 [2011] Env LR 12; *NML Capital v Republic of Argentina* [2011] UKSC 31 [2011] 2 AC 495; *Dowling v ICO & PSNIEA/2011/0118*; *BBC v Sugar (No 2)* [2012] UKSC 4, [2012] 1 WLR 439; *Appger v JC and Foreign and Commonwealth Office* [2012] 1 Info LR 258 (FTT decision) and [2013] UKUT 0560 (AAC).

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 22 May 2013 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. UCAS (the Appellant) is a registered charity providing various higher education-related services to the public. The most well-known is its undergraduate applications and admissions service used by many students and Higher Education Institutions (HEIs).
2. The 2nd Respondent – who made the original information requests – is author and publisher of *The Good Schools Guide*.

3. Whatever the outcome of this appeal, Lord Lucas will not have access to the information he requested. This is because the Information Commissioner (IC) and UCAS, respectively the 1st Respondent and Appellant, agree that information within the scope of one of the requests which is the subject of this appeal (Request 5) is exempt from disclosure under section 43 FOIA because it is commercially confidential and because no information was held within the scope of the other request (Request 6).
4. The two contentious issues in this appeal relate to the way in which public authorities - subsequently designated with FOIA responsibilities after the passage of the original statute and its schedules – do or do not have protection in the context of further enabling legislation and when considered in the light of the principles set out in the Supreme Court case of *BBC v Sugar (No 2)* [2012] UKSC 4.
5. The IC's approach to this area in the Decision Notice is challenged, as a matter of law and principle, by UCAS. These two parties' positions are diametrically opposed and each relies on statutory wording and *BBC v Sugar (No 2)* for the stance it has taken.

The request for information

6. On 18 February 2012 Lord Lucas submitted five separate requests to UCAS. Only Request 5 in that series is relevant to this appeal. That was:

Please could you supply me with an Excel spreadsheet (or with data in an electronic form which may readily be loaded into such a spreadsheet, such as a tab delimited file) containing the columns described below:

 1. For the three academic years from 2009/10 to 2011/12 (to date) together
 2. For each course at each university
 1. University name
 2. Course name
 3. JASC code(s) for the course

4. Number of applications
5. Number of confirmed accepted applications

Only students who were 21 or under at the beginning of the academic year when they were expected to be admitted.

If data elements are missing please leave the relevant cell or column blank. Please do not summarise data - one line per student is what I am after. Please do not clean or glam up the presentation of the data. I want it in its raw form. Data may be provided in multiple tables if that requires less effort - e.g. perhaps show DCSF code, school name and postcode as lookup tables linked to the UCAS school code.

7. He made a further request on 9 March 2012 (Request 6) in the following terms:

How good are schools at predicting grades:

Please could you supply me with an Excel spreadsheet (or with data in an electronic form which may readily be loaded into such a spreadsheet, such as a tab delimited file) containing the columns described below:

1. For the three academic years from 2009/10 to 2011/12 (to date) together
2. For each pupil** applying to university through UCAS
3. For each Level 3 exam for which they have offered a predicted grade School ID
 1. Qualification
 2. Subject
 3. Predicted grade
 4. Actual grade

** Only students who were 21 or under at the beginning of the academic year when they were expected to be admitted

As before:

If data elements are missing please leave the relevant cell or column blank.

Please do not summarise data one line per examination is what I am after.

Please do not clean or glam up the presentation of the data. I want it in its raw form. Data may be provided in multiple tables if that requires less effort.

The complaint to the Information Commissioner

8. Lord Lucas contacted the IC on 22 June 2012 to complain about the UCAS' handling of requests 5 and 6. During the course of the IC's investigation UCAS' position in relation to requests 5 and 6 shifted significantly. The IC clarified with UCAS that whilst requests 4 and 5 had been refused on the basis that the aggregated cost of complying with them exceeded the appropriate cost limit of £450, UCAS could answer request 5 on its own within the cost limit. Lord Lucas confirmed that he wished UCAS to proceed with request 5 on that basis. UCAS stated that it still considered the information sought by request 5 to be exempt from disclosure on the basis of section 43(2).
9. UCAS then explained to the IC that it had reconsidered the extent to which it believed it was subject to FOIA in accordance with the section 5 Designation Order under which it was, to a limited extent, designated a public authority. UCAS concluded that it was not a public authority in relation to the majority of the information falling within the scope of requests 5 and 6. In the alternative, if the IC concluded that - if all of the information falling within the scope of requests 5 and 6 was held by UCAS for the purposes of FOIA - then UCAS argued that in relation to request 5 the information was exempt from disclosure on the basis of section 43(1), 43(2) and 41(1). In relation to request 6, UCAS' alternative position was that providing the Information falling within the scope of the request would involve the creation of new Information, something which public authorities were not under a duty to do, and thus its position was that it did not hold the requested information.
10. In the Decision Notice the IC considered whether UCAS was a public authority for all of the information falling within the scope of requests 5 and 6. He concluded that it was. He then went on to consider UCAS's alternative positions in respect of these requests.
11. UCAS's submissions in respect of these issues are dealt with in greater detail in the body of the Tribunal's decision in this appeal.

12. In respect of UCAS' FOIA designation, given the way in which the Designation Order was drafted, the IC agreed with the concept of the two part test as described by UCAS in determining whether any Information was held, at the time of the request, for the purposes of FOIA. The IC accepted that consideration needed to be given to what purposes UCAS holds requested Information for at the time of a request and that this involved consideration of what UCAS described as 'live' and 'historic' data.
13. The Supreme Court decision in *Sugar* provided both a precedent and directly relevant guidance in determining whether requested information was held by UCAS for the purposes of FOIA. Supreme Court found that if information was held by the BBC *'to any significant degree'* for its derogated purposes then the information was outside the scope of FOIA, even if it was held predominantly for other, non-derogated purposes. In case of doubt, the test was *'whether there remains any sufficiently direct link between the BBC's continuing holding of the information and the achievement of its journalistic purposes'* (per [104] and [106] of *Sugar*).
14. The IC, applying the *Sugar* decision to this case, believed the correct approach was to determine if there was a 'sufficiently direct link' between UCAS' designated FOA function and the requested information. If there was a 'sufficiently direct link' then the Information was held by UCAS for multiple functions as long as there remained a sufficiently direct link between the requested Information and UCAS' designated FOIA function. That remained the case even if the dominant purpose of holding the information was not for the designated purpose. That approach clearly diverged from UCAS' position.
15. It had the potential to bring more information held by UCAS within the scope of FOIA and that included information that could be potentially – or primarily - used for UCAS' commercial activities. It took into account, however, both the principles of the *Sugar* decision and the different ways

in which UCAS and the BBC were designated as public authorities under FOIA. It was also consistent with the IC's position on s.3 (2) of FOIA covering when information was held by a public authority.

16. The IC believed that it was vital to note the different ways in which the BBC and UCAS were actually listed. The BBC was listed in schedule I of FOIA as a public authority but only in respect of information held for purposes other than its derogated activities. UCAS was not listed as public authority in schedule I but covered by a section 5 Designation Order but in respect on one specific function.
17. For the BBC, the impact of the applying the 'to any significant degree' test had the effect of taking considerable amounts of information outside of FOIA.
18. As long as information was used to any significant extent for the BBC's derogated functions, it fell outside of FOIA.
19. For UCAS, however, given the way it was designated as a public authority the impact of applying the 'to any significant degree' test had the effect of making considerable amounts of information potentially fall within the scope of FOIA. As long as requested information was used to any significant extent for UCAS' designated function, it fell within the scope of FOIA.
20. As a result the IC concluded that the correct test to apply when determining whether UCAS held Information for the purposes of FOIA was to consider whether there was a sufficiently direct link between the requested Information and UCAS' designated function.
21. There could still be a sufficiently direct link between the requested information and UCAS' designated function even if the immediate purpose for which that information was held was not the provision and

maintenance of a central applications and admissions service in respect of the institutions referenced in the Designation Order.

22. The IC was not persuaded that it was reasonable or plausible to argue that as soon as a particular cycle ended then all data associated with that cycle automatically became 'historic' in the manner described by UCAS. He acknowledged that UCAS had explained that the historic admissions data was not critical and necessary to delivering the current and future applications and admissions service. That did not mean that admissions data from recent years, such as that which was the focus of these requests, was not used for some element of management planning purposes in order to support the current and future implementation of the designated function. The Commissioner believed that was the case for the admissions cycles 2009/10, 2010/11 and 2011/12.
23. The provision and maintenance by UCAS of a central applications and admissions service would inevitably involve operational management decisions and the IC could not understand how UCAS could provide and maintain such a complex administrative system without taking such operational decisions. He did not accept that UCAS provided and maintained the application and admissions service for each live cycle in some sort of vacuum that was in no way influenced or guided by the data for cycles from recent years.
24. As a consequence the IC determined that all of the information falling within the scope of requests 5 and 6 met the first limb of the two stage test. For the Information for the academic years 2009/10, 2010/11 and 2011/12 that was because although such information is no longer held for the immediate purpose of fulfilling the UCAS' designated function there remained a significant link between this information and UCAS' designated function.

25. The IC then considered, in sequence, whether under FOIA UCAS was under a duty to disclose such Information in respect of request 5 and request 6.

26. In request of request 5 he concluded that UCAS could rely on s.43 (2) as the basis not to disclose the withheld information.

27. In respect of request 6 he concluded that UCAS did not hold the information because providing it would require the creation of new information, something UCAS was not obliged to do under FOIA.

The Legal Framework

28. Section 1 FOIA provides:

General right of access to information held by public authorities.

(1) 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.

29. Section 2 FOIA provides:

Effect of the exemptions in Part II.

....

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

30. Section 3 FOIA addresses the definition of “public authority”

Public authorities.

(1) In this Act “public authority” means—

(a) subject to section 4(4), any body which, any other person who, or the holder of any office which—

(i) is listed in Schedule 1, or

(ii) is designated by order under section 5, or

(b) a publicly-owned company as defined by section 6.

31. Section 5 FOIA provides:

Further power to designate public authorities.

(1) The Secretary of State may by order designate as a public authority for the purposes of this Act any person who is neither listed in Schedule 1 nor capable of being added to that Schedule by an order under section 4(1), but who—

(a) appears to the Secretary of State to exercise functions of a public nature, or

(b) is providing under a contract made with a public authority any service whose provision is a function of that authority.

(2) An order under this section may designate a specified person or office or persons or offices falling within a specified description.

(3) Before making an order under this section, the Secretary of State shall consult every person to whom the order relates, or persons appearing to him to represent such persons.

(4) This section has effect subject to section 80.

32. Section 7 FOIA provides:

Public authorities to which Act has limited application.

....

(5) An order under section 5(1)(a) must specify the functions of the public authority designated by the order with respect to which the designation is to have effect; and nothing in Parts I to V of this Act applies to information which is held by the authority but does not relate to the exercise of those functions.

33. By virtue of **The Freedom of Information (Designation as Public Authorities) Order 2011 (SI 2011 No. 2598)** UCAS is designated as a public authority for:

The provision and maintenance of a central applications and admissions service in relation to:

a) an institution listed in paragraphs 53(1)(a) to (e) and 55(1)(a) and (b) of Part 4 of Schedule 1 to the Freedom of Information Act 2000(e);

b) an institution listed in Part 5 of Schedule 1 to the Freedom of Information (Scotland) Act 2002(f);

c) the College of Agriculture, Food and Rural Enterprise.

Grounds of Appeal

34. The Appellant's Ground of Appeal are as follows:

- (1) The IC misdirected himself as to the test to be applied as to whether the Information falls within the scope of FOIA.
- (2) The IC consequently erred in finding that the section 1 (1) obligation applied to UCAS in respect of information held for the dominant purpose of UCAS's non-designated (commercial) functions.
- (3) The IC failed to apply the correct test.
- (4) The IC erred in deciding that the historical admissions cycle data requested were used for management planning purposes of the designated function.

Evidence

35. We heard detailed evidence from Mary Curnock Cook, the Chief Executive of UCAS and Dr Mark Corver, Head of Analysis and Research (the policy and research unit of UCAS) in respect of the 650,000/700,000 undergraduate applications processed by UCAS during an average year.

36. They adopted their written witness statements, gave oral evidence, were cross-examined and answered questions from the Tribunal.

37. The effect of that evidence is dealt with in the Conclusions section below.

Submissions on the Grounds of Appeal

38. The IC's submissions followed, in greater detail, the positions adopted and arguments used in his 28-page, 113 Paragraph Decision Notice – which is publicly available - and will not be repeated.

39. UCAS contended that, under the Designation Order, when information was requested from it, then the correct approach required a two-stage test to be applied to determine whether the information was potentially within the scope of the Designation Order. Namely:

- (a) Was UCAS exercising its designated function i.e. was the information held for the provision and maintenance of a central applications and admissions service?

(b) Was UCAS doing so in relation to specific institutions which were cited in the Designation Order?

40. If that two-stage test was satisfied, was the relevant information also held to a significant extent for some other (commercial) purpose which is outside the designation? If so, was the immediate object - or direct purpose - of UCAS's holding the information related to UCAS's non-designated (commercial) activities? If the answer to that was "yes", then the information did not fall within the scope of FOIA.
41. That analysis gave effect to the statutory purpose of the legislation and was consistent with the decision of the Supreme Court in *Sugar*.
42. When interpreting the Designation Order, the starting point should focus on the normal meaning, derived from the words that the Parliamentary draughtsman had chosen to use. However, the intention of the legislator was of paramount importance when ascertaining the meaning of the statutory provisions. See *A-G's Reference (No 5 of 2002)* [2005] 1 AC at [31]: No explanation for resorting to a purposive construction is necessary. One can confidently assume that Parliament intends its legislation to be interpreted not in the way of a black-letter lawyer, but in a meaningful and purposeful way giving effect to the basic objectives of the legislation.
43. In *Sugar*, the Supreme Court strongly endorsed that purposive approach (see [63] per Lord Phillips - "*The answer to the issue must lie in adopting a purposive approach to the definition*").
44. In *Sugar*, the BBC was listed as a public authority in Part VI of Schedule 1 to FOIA. Part VI provided that as regards the BBC, FOIA applies "*in respect of information held for purposes other than those of journalism, art or literature.*" The Supreme Court was concerned with the question of how widely or narrowly the phrase "purposes other than those of journalism" were to be construed. It held that, having regard to the language *and* legislative purpose of FOIA, information that was held by the BBC to any significant degree for the purposes of journalism was *not* "held for

purposes other than those of journalism" within the meaning of Part VI Schedule 1 - even if, as a matter of fact, that information was also held for other, possibly more significant purposes. Therefore that information was exempt from production under FOIA.

45. The Supreme Court also held that, in determining whether information was held by the BBC for those purposes, consideration should be given to whether there remained any sufficiently direct link between the continued holding of the information and the achievement of its journalistic purposes.
46. The *ratio* of *Sugar*, UCAS maintained, was that information held for the excluded purpose (journalism in that instance) should be protected and not made subject to the obligations imposed by FOIA - even if that information was also held for other, non-excluded purposes, and even if those other non-excluded purposes were more significant.
47. *Sugar* meant that the legislative purpose of the protection was to prevent interference with the performance of the excluded functions. Accordingly – UCAS's argument ran - statutory definition was to be construed purposively to prevent disclosure of information when this would risk interference with those excluded functions (Lord Phillips, [64-65]).
48. Although the wording of the Designation Order was different from the wording of the BBC's 'designation', the Designation Order bringing UCAS into the FOIA regime needed to be construed purposively, to prevent disclosure of information when this would risk interference with UCAS's excluded (commercial) functions. Although the wording of the Order was different, both designations had the same substantive focus, in that they set out the information in respect of which FOIA will apply - in the case of the BBC, by reference to information held for purposes other than those of journalism etc. In UCAS's case, while the structure of FOIA (and in particular Schedule I) meant that the BBC would be presumptively subject to FOIA in all respects but for the qualification set out in Schedule I, UCAS was one of only three entities

that had, exceptionally, been made subject to FOIA only as regards specific functions.

49. In *Sugar*, the qualifications to the right to information under FOIA were as significant as the rights to the information (Lord Walker [77]). Here the exclusion from the scope of FOIA should be accorded just as much significance as the right to the information that did fall within the scope of the Designation Order. So *Sugar* - as applied to this Appeal and to the Designation Order - resulted in the information which UCAS held for *excluded* (commercial) functions or purposes having similar protection (i.e. not made subject to the obligations imposed by FOIA). That case even where that information was also held for other, non-excluded, functions or purposes, and even if those other non-excluded functions or purposes were more significant.
50. It also gave effect to section 7 (5) FOIA which clearly demonstrated that Parliament's intention was only to extend the obligations imposed by FOIA to organisations that were made the subject of an Order under section 5, to the strictly limited extent set out in the Order.
51. It was still open to UCAS to disclose the information if it considered it appropriate to do so. The advantage of that approach was that it provided protection to "commercial" information while leaving it open for such information to be disclosed where that was appropriate.
52. In the alternative, UCAS maintained that, if the test was not as argued to this point, then a 'dominant purpose' test operated. Was the dominant purpose for which the information was held the function for which UCAS was designated under the Designation Order or was it some other (commercial) purpose or function? If it was the latter, the information fell outside the scope of FOIA. UCAS accepted the 'dominant purpose' test had not been accepted in *Sugar* but – in that case - the Supreme Court had been considering a different exclusion. It was open to the Tribunal to distinguish *Sugar* in this different situation and to hold that the dominant purpose test was the correct one in this case.

53. In respect of the fourth and final Ground of Appeal – that the IC erred in deciding that all historical admissions cycle data requested were used for management planning purposes of the designated function – that matter was addressed in the witness statement of Dr Corver.

54. He had explained that historical admissions cycle data were used only in the ‘analytical’ function, and not in the ‘apply’ function - with very limited exceptions. Although certain analysis conducted from historical admissions cycle data was used to a very limited extent in providing context for management planning for future live cycles, such analysis was based on summary published statistics or trends i.e. previously published historical data and the use of such data is not a necessity. The historical admissions cycle data at the level requested by Lord Lucas in Requests 5 and 6 played no part in planning or operational decision making in the core applications and admissions service. He had stated that, although historical admissions cycle data might be looked at in order to form a view on what UCAS's IT systems might need to be able to cope with on A level results day in the next live cycle, this was historical data at a much more aggregated or summary level than that sought by Lord Lucas. It did not correspond in any way to the historical admissions cycle information actually sought by him.

55. UCAS did not hold data in the form requested by Lord Lucas in Request 5, even for that part of the request that might arguably have related to live cycle data. For Request 6, UCAS did not hold that type of information on its operational database. Significantly, there would be no need to look at data in that form for the purposes of the ‘apply’ function. Considerable time and effort were required to convert the data when they were transferred from the operational database to the analytical database.

Conclusions

56. There was no dispute that UCAS falls within the scope of FOIA in relation to the Institutions set out in paragraphs 53 and 55 of Schedule I to FOIA only. This means that a FOIA request could be made to UCAS

for information which could otherwise be sought, under FOIA, from the individual institutions. It was common ground that a significant majority of institutions for which UCAS provided services were caught by Paragraphs 53 and 55.

57. The first part of our determination in this appeal relates to the correct test to be used when considering whether information held by UCAS falls within the scope of the 2011 Designation Order and, as a consequence, FOIA. As was mentioned in the introduction, the Supreme Court decision in *Sugar* is relied on as the primary beacon of guidance and authority on the test to be applied when considering the scope of FOIA in respect of bodies which are partly designated and partly excluded.

58. Historically the BBC and UCAS feature in FOIA at different stages of the life of the Act. The BBC's "derogation" in Schedule I, Part VI FOIA was won after significant representations were made on its behalf during the passage of the original Bill on to the statute book. The issue that was ultimately protected in that "derogation" when it became law – information held for the purposes of journalism, art or literature – applied equally to other public service broadcasters like Channel 4 and S4C. UCAS' designation comes in Statutory Instrument 2011 No.2598 in the form of The Freedom of Information (Designation as Public Authorities) Order 2011 made on 31 October 2011. The two bodies designated as Public Authorities in that order – apart from UCAS - were The Association of Chief Police Officers of England, Wales and Northern Ireland (ACPO) and The Financial Ombudsman Service Limited (FOS).

59. It will be noted that issues of journalism, art or literature did not feature in any of these three 2011 designations.

60. In our view this creates, from the start, a different and distinctive divide between *Sugar* in its BBC (and journalism, art or literature) context and the interpretation which should properly be derived from the Supreme Court's *Sugar* decision when considered in respect of UCAS's position.

61. It is the difference between public broadcasters being given the space provided by the “derogation” to get on with their duties dealing with issues of journalism, art or literature as unencumbered by the effect of the Act as is appropriate and UCAS being brought into the body of Public Authorities which now have certain carefully defined duties and protective exclusions under an Act whose primary focus is in its name, the Freedom of Information Act.

62. In *Sugar* the Supreme Court considered the nature of the test for determining 'the scope of the BBC exception". By a majority of 4-1, the Court applied a test that if the information was held to any significant degree for the purposes of journalism then it was not held for purposes other than journalism, even if it was held for other, possibly more important, purposes. Consideration needed to be given to whether there remained any sufficiently direct link between the continuing holding of the information and the achievement of the journalistic purposes.¹

63. Information held by UCAS falls into one of two categories. It is either in no way held in relation to the Designated Function, or it is held in relation to the Designated Function even if it is also held in relation to other (possibly more important) functions. The sequence for applying *Sugar*, is as follows:

(1) Is the information held by UCAS to any significant degree (not *de minimis*) in relation to the exercise of the Designated Function, even if it is also held in relation to other (possibly more important) functions? Where there is doubt over the degree to which it is held, the relevant question is whether there is a sufficiently direct link, sufficient proximity, between the holding of the information and the exercise of the Designated Function.

(2) If yes, is the information held in relation to a listed institution within the meaning of the 2011 Order? If yes, then information falls within the scope of FOIA.

¹ Lord Brown [104], Lord Phillips [67] and [75] Lord Walker.

(3) Does an exemption within Part I or II of FOIA apply?

64. We agree with the IC's consistently-held position that he has correctly applied the *Sugar* test to UCAS and not turned the Supreme Court's decision on its head. UCAS' position is the reverse of the BBC. The BBC is designated as a public authority in relation to all of its functions, except for those exempted by the wording of its designation in Schedule I. UCAS is not designated as a public authority generally, except for the functions included by the wording of its designation in the 2011 Order.
65. The starting points of the two bodies are manifestly different. The focus of construction is on the specific words. The purpose of those specific words is different. The focus of the phrase "for purposes other than those of journalism, art or literature" is on what is *not* caught by FOIA. The purpose of that wording is to exclude information.
66. The focus of the phrase "the provision and maintenance of a central applications and admissions service", taken with section 7(5) FOIA, is on what is actually caught by FOIA and the purpose of that wording is specifically to *include* information.
67. That construction reflects the wording of section 7(5) of FOIA, which only excludes "information which is held by the authority but does not relate to the exercise of those [designated] functions". The focus is on the express inclusion, not the implicit exclusion. There is no *Sugar*-significant relationship between the information and the Designated Function. The wording is different to that in the *Sugar* case, where the question revolved around the purpose for which the information was held.
68. This applies a purposive construction to the provision. The primary purpose of the 2011 Order was to bring UCAS within the scope of FOIA and subject it to the principles of greater openness and transparency that such a designation was designed to bring. UCAS was being made subject to FOIA for the first time. Nowhere in the 2011 Designation Order does the word "commercial" appear.

69. The passages from *Hansard* relied on by UCAS cannot bear the weight the Tribunal is urged to place on them. The two Ministers, in their respective Houses, stated that "UCAS's other commercial functions can be seen as distinct from the central applications services that it provides and are not considered to be functions of a public nature". They did not purport to prescribe an approach to be taken in respect of information which is held partly for the Designated Function and partly (even predominantly) for another commercial function.
70. It is clear that UCAS has commercial functions and that they are not caught by the 2011 Order. Nor is information held solely for those functions caught by FOIA. However the 2011 Designation Order sought to bring the admissions function of UCAS within the scope of FOIA in relation to information which UCAS held in respect of institutions who were themselves already subject to FOIA. The designation of UCAS assists requestors in obtaining information relating to the Designated Function from a single source, rather than having to make individual requests to a whole series of individual higher education institutions.
71. Most persuasive is the IC's point that, in construing the scope of the 2011 Designation Order, it is important to recall that Parliament would have been well aware of the existing exemptions provided in FOIA. There is no need to read the 2011 Designation Order narrowly to ensure there is no overlap with a commercial function of UCAS because section 43 FOIA itself provides protection to UCAS in relation to information which prejudices its commercial interests.
72. The approach of UCAS in this case would have the result that only admissions data relating to the currently live admissions round would fall within the scope of FOIA. This surprisingly narrow result is unlikely to have been the one intended by Parliament when designating UCAS as a public authority for FOIA, not least because the "provision and maintenance of a central applications and admissions service" does not suggest such an outcome.

73. The Tribunal declines UCAS' suggestion that it adopts the "predominant purpose" test that failed before the 4 – 1 majority in the Supreme Court.
74. In relation to the Historic Disputed Information the Tribunal finds that it is unlikely that the applications and admissions service for each live cycle is carried out in a vacuum that is in no way influenced or guided by the data for cycles from recent years despite the written and oral evidence of the two witnesses. It is difficult to see how the Historic Disputed Information does not relate to the Designated Function, in the sense of being connected with or arising out of it.
75. The evidence from UCAS is that its functions fall into four types: "inform" (providing information about courses); "search" (searching for courses on a database); "apply" (the admissions process); and "analytical" (analysis on data collected from the apply function). The Designated Function is the "provision and maintenance of a central applications and admissions service". Clearly this encompasses the "apply" function. It is difficult to see how information held for the "inform" and "search" functions is not also closely related to the carrying out of the Designated Function. A key aspect of a central applications and admissions service is that people who wish to use it can adequately search it for what it may encompass, and are provided information about how it works and the way that it works. The approach of UCAS to the scope of FOIA is unduly narrow. It is difficult to see how UCAS can "maintain" the service without having access to data collected from historic admissions cycles.
76. We find, considering the evidence in the round, that the Historic Disputed Information relates to some significant degree and not *de minimis* to the Designated Function. There is a sufficiently direct link, sufficient proximity, between the information and the "provision and maintenance of a central applications and admissions service" to engage FOIA as applied by the Designation Order. A test based on the purposes to which UCAS itself currently applies the information, whether for example it uses the historic information to inform management decisions to a greater or lesser extent,

is not determinative because the "held for" construction is not used in the Designation Order. Although the information is also held for commercial purposes, there is no general exclusion for information relating to commercial purposes in the Order, as there is for the journalistic and other purposes of the BBC in the terms of its partial designation. Any protection for UCAS' commercial functions falls to be provided (as for any other body within FOIA) through the application of relevant exemptions in Part II of FOIA. The Information Commissioner's application of such exemptions in order to avoid disclosure which would injure commercial interests of UCAS is the correct approach. We do not accept UCAS' submissions that the difference in the form of words used in the BBC partial exclusion from FOIA, and the UCAS partial inclusion through designation is immaterial. In practical terms, an interpretation of the provisions which excludes all requests relating to a closed admissions round is likely to be unduly restrictive. We see no justification for this either in the terms of the Designation Order, or the explanatory and Parliamentary material drawn to our attention.

77. It would be open – but laborious – for Lord Lucas (or any individual at any specific school) to seek the Historic Disputed Information from the individual institutions under FOIA. That such information could not be sought from UCAS as the central service provider seems to the Tribunal to be an artificial construction and erroneous conclusion.

78. Because the information within the scope of request 5 is exempt from disclosure by virtue of s.43 FOIA and no information is held in respect of request 6 the information is either not at risk or not with scope of the request.

79. The Tribunal has applied the balance of probabilities as the standard of proof in this appeal.

80. For all the reasons set out above the Appellant's appeal fails.

81. Our decision is unanimous.

82. There is no order as to costs.

Robin Callender Smith

Judge

15 January 2013