



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2020/0076P

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50832007

Dated: 16 January 2020

Date of Hearing: 09 December 2020 - Determination on the Papers

**Before
JUDGE ROBERT GOOD**

**TRIBUNAL MEMBER(S)
MICHAEL JONES AND ANNE CHAFER**

**Between
STAFFORDSHIRE UNIVERSITY**

APPELLANT

**and
THE INFORMATION COMMISSIONER**

FIRST RESPONDENT

**and
JULIAN TODD**

SECOND RESPONDENT

Subject Matter:

Freedom of Information Act 2000 (FOIA)

Section 43(2) (Commercial Interests)

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal allows the appeal. The withheld information is not disclosable under S43(2) FOIA. It is not in the public interest for this information to be disclosed.

REASONS FOR DECISION

Factual background

1. Mr Todd requested, on 7 January 2019, from the University of Staffordshire (the University) the following information:
“Please provide me with the following information relating to each of the 20-or-so active sub-contracting institutions providing educational services for the Financial Year 2017
 1. A copy of the up to date contract(s) between the Staffordshire University and the Sub-contracting institution.
 2. The number of full-time equivalent students being provided for or on behalf of Staffordshire University
 3. The gross student fees income received by Staffordshire University on behalf of these students
 4. The invoices paid to the sub-contracting institution for the educational services.”

2. Mr Todd also included, at the end of his request, a comment that a fuller set of accounts which contains the above information would be acceptable if that was more convenient for the University. He also set out the reason for the requests, namely that he was interested in the profitability and governance of the UK franchises of the University.

3. In response, the University refused to disclose this information relying on the qualified exemption set out in S. 43(2) FOIA. This deals with commercial interest exemption. In the view of the University the request sought additional information other than that already provided, and publicly available, by the Office for Students and, if provided, would be likely to prejudice the University's commercial interests. The University, while acknowledging there was a legitimate public interest in both transparency and accountability, considered that there was greater public interest in protecting the ability of Universities to compete on a level playing field and in ensuring fair competition.
4. Mr Todd sought an internal review, stating that he understood there was a precedent for contracts by public bodies being disclosed and that his understanding of a level playing field was that all public body franchise contracts should be published. He offered to assist the University to make similar requests to other universities.
5. On review the University's decision was not changed. They re-iterated that the contracts are commercially sensitive and are negotiated separately with different sub-contractors and have different fee structures. The University also said that it does not hold the information of the full costing and would not be able to determine any profit or loss on such agreements.
6. Mr Todd contacted the Information Commissioner (ICO) on 22 March 2019 to complain about the decision and the ICO investigated. The decision of the ICO on 16 January 2020 was that the S.43(2) exemption was not engaged in relation to parts 1 and 2 of the request but was engaged in relation to parts 3 and 4 of the request. In relation to part 3 and 4 the public interest favours the exemption.
7. The University appealed the ICO decision relating to part 1 and 2 of the request. Mr Todd did not appeal. In their appeal the University states that it is illogical

to find that the number of full-time equivalent students (FTE) at each sub-contracting institution should be disclosed (part 2 of the request) but that the fee income should not be disclosed (part 3 of the request). In their appeal submission the University stated “gross fee income for each student cohort is the product of fees per course (which competitors can readily obtain) and the number of FTEs per course. If gross fee income is exempt, then the corresponding number of FTE’s must by the same token also be exempt.”

8. In response, the ICO accepted this argument and agrees that part 2 of the request is being lawfully withheld. However, having issued a decision, the ICO cannot then amend or revise that decision. The ICO can only indicate in a further submission that her view has changed. In relation to part 1 of the request the ICO stated that she has not seen the witness evidence explaining the commercial value of these contracts and would be willing to review her position in light of such evidence. The grounds of appeal stated that, at a hearing, witnesses would be able to explain the commercial value of these contracts.
9. Mr Todd was joined as a second respondent. His view was that the appeal should be determined on the papers because he was sceptical of the value of oral testimony. Having received the witness statement submitted by the University from Professor Ieuan Ellis, the ICO reviewed her position and in an email of 2 November 2020, accepts that S.43(2) FOIA was engaged in respect of part 1 of the request and that public interest in maintaining the exemption outweighed the public interest in disclosure of the information.
10. The effect of these two reviews is that now the ICO is in agreement with the University and Mr Todd has not submitted an appeal. As a result of the second review, the appeal which was to be listed for a hearing was changed, with the consent of all the parties, to that of a paper determination.

11. Mr Todd wrote to the tribunal stating that because the ICO was no longer attending a hearing and because he was not permitted to see the withheld documents he considered the hearing would be one-sided “with no-one I can trust to make true and accurate statements about the disputed material”. He then made the suggestion that he should be allowed to see the closed bundle on the understanding he would not publish it or share it with anyone. The tribunal, in Case Management Directions, explained that the tribunal has an investigatory role to consider whether FOIA is being applied correctly. Mr Todd was asked in these Directions to consider if he still wishes to challenge the decision notice.

12. In response, Mr Todd provided a Final Written Submission, attaching parts of a UK Collaborative Contract between the University of Derby and The College of Osteopaths with fee information redacted. His argument is that, if this agreement has been made available then so should the agreements made by the University. He ends his submission by asking the tribunal to uphold the decision notice which ordered disclosure of his requests 1 and 2.

13. The appeal is by way of a re-hearing and the tribunal considers whether the decision notice was made in accordance with the law. That decision notice covers all 4 requests. However, in respect of request 3 and 4, the appellant is in agreement with the decision notice. Because Mr Todd has not exercised his right of appeal, it can be assumed that he accepts this part of the decision. This is consistent with his final submission. As a result, the arguments to this tribunal and the evidence provided have concentrated on requests 1 and 2. The four requests are linked. The requests are seeking information about the commercial arrangements the University makes with its sub-contractors. The tribunal has had the benefit of considering the agreements with the sub-contractors in the closed bundle and the evidence from Professor Ellis. The tribunal is able to use this evidence to form a view about the exemption in

respect of commercial interest for all four requests and to perform the balancing exercise in respect of public interest.

14. The open appeal bundle consists of 261 pages. The original open bundle contains 200 pages and the tribunal was provided with a further 61 additional pages. There was also a closed bundle, of some 1300 pages, which consisted of the University agreements with sub-contracting institutions and the unredacted witness statement from Professor Ellis.

Findings, Reasons and Conclusions

15. The issues in this appeal are relatively straightforward. In respect of request 3 and 4, the ICO and the University are in agreement that the S.43(2) exemption applies and that public interest favours non-disclosure. Mr Todd has not challenged this view by putting in an appeal.
16. The basis for this decision is set out clearly in the ICO decision notice and there is nothing in that decision which the tribunal considers not to be in accordance with the law.
17. The tribunal also accepts the logical connection between request 2 and 3. If request 2 is granted then that gives the information sought in request 3. The ICO in her response accepts this as well, acknowledging that the decision notice should have included request 2 in the S.43(2) exemption.
18. The tribunal in its consideration focussed most of its attention on request 1, the request for the contracts. However, it is the tribunal's view that the consideration of whether S43(2) applies to the contracts applies equally to the other requests because they are all closely connected.

19. Mr Todd appears to accept that S.43(2) FOIA is engaged. His submissions concentrate on the public interest in seeing this information. He is concerned about what students know about the course they are undertaking and the arrangements for providing the teaching. In particular, he is concerned that the arrangements may provide students with a poor deal, allowing the University make money through contracting with other education providers and that students should know about these arrangements.

20. The tribunal did not have the benefit of hearing directly from Professor Ellis or being able to ask him questions. However, his written statement clearly sets out the competitive commercial framework which the University is operating in. Education appears, at first glance, to be a co-operative effort where best practice might be shared in a common goal of improving educational practice, standards and achievements and the quality of the student experience. However, the witness statement reveals a different picture. Universities compete for students. They compete to link with the best partners to deliver the highest quality education and this competition involves, like any business, a process of constant improvement and innovation. It is an environment where to stand still is to move backwards and decline.

21. The tribunal accepts that higher education is a competitive market, which is changing and developing. The agreements the University has made with its sub-contractors are specific to each institution. The agreements are detailed and are the result of significant investment by the University. There would be commercial advantage in competitors to see the type, scope and detail of such contracts and being able to replicate them without incurring any significant investment. The field of education is also competitive in respect of the specialist providers and disclosure of the contracts would give a commercial advantage to a rival organisation seeking to use that specialist provider in preference to the University. The disclosure would also undermine the University's ability to individually negotiate with each provider.

22. The tribunal accepts the evidence of Professor Ellis. It was detailed, comprehensive, consistent and persuasive. In that statement he describes the regulation of the higher education sector and the purpose of academic partnerships. He makes the point that these partnerships now operate not just in this country but across the world. On review, the ICO was sufficiently influenced to change her position and agree that the contracts should not be disclosed.
23. The tribunal accepts that disclosure to 'the world at large' of all of the requested information would likely to be of significant commercial advantage to other higher education institutions and specialist providers.
24. The tribunal went onto consider the public interest test. This has to be considered in relation to the specific contents being withheld. There is already significant public disclosure of information to students about courses and how the learning is provided and delivered, who is providing the learning, the fees charged for the course and qualifications awarded on successful completion. The accounts of the University are published and there is independent monitoring of the quality of the education provided.
25. The tribunal find that there is limited public interest in knowing the precise details of the contractual arrangements, the number of students and fees involved as well as the invoices raised. Mr Todd indicated that he wanted to know about profitability and governance. It is not clear how disclosure of this information would inform about governance. The disclosed information would not reveal profitability. The University stated that this is information which it does not have, presumably because of the complexity of such an exercise. On the other side, there is considerable public interest in maintaining the exemption. It allows the University to develop and to protect the progress it has made in widening the choice and range of educational provision.

26. The tribunal accepts Mr Hopkins' final submission for the University at paragraphs 12 and 13 which sets out the commercial harm disclosure would do to the University, undermining its competitive advantage. It is not in the public interest for this to take place.

Signed

R Good

Judge of the First-tier Tribunal

Date: 15 December 2020

Date Promulgated: 18 December 2020