



Neutral citation number: [2024] UKFTT 331 (GRC)

Case Reference: EA/2023/0199

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

Determined, by consent, on written evidence and submissions.

Considered on the papers on 16 April 2024

Decision given on: 25 April 2024

Before

**TRIBUNAL JUDGE Stephen Cragg KC
TRIBUNAL MEMBER Dr Aimée Gasston
TRIBUNAL MEMBER Kerry Pepperell**

Between

GARRETT HARGAN

Appellant

and

**THE INFORMATION COMMISSIONER
ULSTER UNIVERSITY**

Respondent

Decision: The appeal is allowed

Substituted Decision Notice: Ulster University must disclose the requested information to the Appellant as explained below.

REASONS

MODE OF HEARING AND PRELIMINARY MATTERS

1. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.
2. The Tribunal considered an open bundle of 62 pages, and a closed bundle. There have also been further submissions from the parties since the Tribunal first considered this matter and adjourned it with directions on 30 October 2023.

BACKGROUND

3. The Appellant requested information from Ulster University (UU) on 6 July 2022 as follows:-

[1] Can Ulster University provide a financial breakdown on what each student enrolment, on each campus, generates for UU?

[2] How many full-time equivalents (FTEs) are based at each of UU's campuses?

[3] Can you provide documentation for the FTE figures you have shared with DfE and HESA?

[4] Can you also provide the number of MasN places you have allocated to each campus?

4. The UU's final position was to withhold the information requested in part 1 under section 43(2) of Freedom of Information Act 2000 (FOIA)(which relates to commercial interests), to withhold the information requested in parts 2 and 3 under section 21(1) FOIA (which relates to the availability of the information from other sources, and to confirm that it does not hold the information requested in part 4. The Appellant complained to the Information Commissioner (the Commissioner)

THE DECISION NOTICE

5. The decision notice (IC- 207109-L7Q5) is dated 13 March 2023. The Commissioner explained his approach to part 1 of the request as follows:-

25. In its response to the request the University said that disclosing this information would mean placing detailed financial information into the hands of other universities. This would give them an unfair commercial advantage in their ability to compete with the University. The University confirmed disclosing the information would therefore prejudice Ulster University's commercial interests.

26. The Commissioner considers three tests when he is considering whether a party's commercial interests may be prejudiced by disclosure. First, he is satisfied that the harm the University envisages relates to commercial interests; its own.

27. Second, the Commissioner accepts that a causal link exists between disclosure and commercial prejudice; those the University explained above and which it discussed further in its submission to the Commissioner. In its submission the University explained that disclosing how much income each student enrolment generates for the University would weaken its position in a competitive environment. This is because it would reveal market sensitive information or information of potential usefulness to its competitors.

28. The University noted that the higher education market is very competitive, with each competing entity always looking for opportunities to gain a competitive edge over the others. In this context, Ulster University competes with other higher education institutions regionally, nationally, and globally to recruit high calibre students.

29. The University confirmed that it felt that providing detailed information on student income would give new or existing competitors key information about its operations and would affect its ability to be competitive in the area of student recruitment. Disclosing the information would provide other institutions with otherwise undisclosed knowledge about its potential future recruitment strategies.

30. Finally, the likelihood of prejudice occurring. In its correspondence to the complainant and its submission to the Commissioner the University indicated that the envisioned prejudice would happen. The Commissioner does not consider that the University has presented a compelling case that disclosing the information would be more likely to prejudice its commercial interests than not. However, he will accept that disclosure would be likely to prejudice the University's commercial interests. Since the three tests have been met, the Commissioner's decision is that the University is entitled to apply section 43(2) to the withheld information.

6. The Commissioner went on to consider the public interest test and said:-

31. The complainant has not presented any specific public interest arguments for the information's disclosure, in their request for an internal review or complaint to the Commissioner. However, they have indicated that they do not consider that the University is as transparent as it could be.

32. In its response to the request the University acknowledged that there is a public interest in transparency and disclosure. It considered this was outweighed by the public interest in the University being able to protect its commercial interests to ensure it is able to compete fairly in a commercial environment.

33. In a very competitive environment, and in the absence of compelling arguments for the information's disclosure, the Commissioner considers that there is greater public interest in the University being able to compete from as strong a financial position as possible. Ultimately this helps to make sure that there is a good choice of well performing higher education providers for prospective students to choose from. On balance therefore, the Commissioner finds that the public interest favours maintaining the exemption.

7. In relation to parts 2 and 3 of the request the Commissioner decided as follows:-

14. In order for section 21 of FOIA to be engaged, the University must first hold the requested information itself.

15. The University has confirmed to the Commissioner that it holds the number of FTE students at each of its campuses which is requested in part 2 of the request.

...

17. ...the Commissioner is satisfied that the University also holds the information requested in part 3.

8. The Commissioner set out the explanation from UU as follows:-

11. In response to part 2, the University advised that, "student numbers are returned annually to HESA" and so the information was available from HESA directly. In response to part 3, the University advised that, "HESA provide detailed guidance for Universities on the information required for their annual returns" and so, again, the information was available from HESA directly.

12. In their request for an internal review, the complainant said that information that the University and HESA had previously provided did not align. They therefore considered the HESA figures were unreliable which is which is why they were requesting a breakdown of the figures from the University.

13. In its internal review, the University explained the discrepancy (having, it said, already done so previously) and maintained its reliance on section 21.

9. Further the Commissioner said that:-

18. For section 21 to be engaged, the requested information must also be already reasonably accessible to the complainant.

19. The University has explained to the Commissioner that the complainant requests information on student headcounts on a regular basis. They have, in the past, secured this information directly from the HESA Tailored Datasets Service. In light of this the University says it applied section 21 as the requested information is already in the public domain and accessible through HESA. The University also says that the HESA data is also a particularly reliable source of information of this nature given that it is verified and audited by the University prior to submission.

20. The University noted that in their request for a review the complainant quotes figures they secured from HESA in arguing that these differ from those the University previously provided. Based on this, the complainant has proved they have access to the HESA service and that they have used it effectively in the past.

21. The Commissioner is satisfied that the information requested in parts 2 and 3 of the request is accessible to the complainant via the HESA website, through which they have accessed similar information in the past.

10. The Commissioner therefore decided that UU correctly applied section 21(1) FOIA to the information requested in parts 2 and 3 because the requested information is already reasonably accessible to the Appellant.

11. In relation to part 4 of the request the Commissioner decided as follows:-

6. In part 4 of their request the complainant has requested the number of “MaSN” places the University has allocated to each of its campuses. The University advised that it does not hold this information.

7. The University has explained that “MaSN” is short for Maximum Student Number. It says that, unlike the remainder of the UK, universities in NI have a cap on the number of Northern Ireland/EU students they can enrol – this is called a MaSN. If a university exceeds its MaSN, it can face a financial penalty from the government. The University says that the government gives the MaSN to each university – MaSNs are not allocated, either by the government or the University, on a per campus basis.

8. The Commissioner accepts that the University does not hold the information requested in part 4 of the request and complied with section 1(1) of FOIA. It is not clear from the way part 4 is phrased whether the complainant considered that the University allocated the MaSN or whether they considered the University had the MaSN allocated to it. However, either way, they had requested the allocation by campus and the University has confirmed that the MaSN is not allocated by campus – by either the University or government.

THE LAW

12. Section 1(1)(b) FOIA provides for a general right of access to information held by public authorities, upon request. S.2(2) of FOIA provides that:

(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.

13. As stated above, the relevant exemption relied on by the Health Board is in section 43(2) FOIA which, materially, reads as follows:-

43.— Commercial interests.

(1) ...

(2) 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).

14. S.43(2) FOIA is not a provision conferring absolute exemption listed under s.2(3) FOIA. Therefore it is a qualified exemption, subject to the public interest assessment in s.2(2)(b).

15. In relation to the test for prejudice in s43(2) FOIA, in *Hogan v Information Commissioner* (EA/2005/0026, 17 October 2006)(upon which all the parties rely) it was stated as follows:-

28. The application of the ‘prejudice’ test should be considered as involving a number of steps.

29 First, there is a need to identify the applicable interest(s) within the relevant exemption...

30 Second, the nature of the ‘prejudice’ being claimed must be considered. An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, as Lord Falconer of Thoroton has stated, “real, actual or of substance” (Hansard HL, Vol. 162, April 20, 2000, col. 827). If the public authority is unable to discharge this burden satisfactorily, reliance on ‘prejudice’ should be rejected. There is therefore effectively a *de minimis* threshold which must be met. ..

31 When considering the existence of ‘prejudice’, the public authority needs to consider the issue from the perspective that the disclosure is being effectively made to the general public as a whole, rather than simply the individual applicant, since any disclosure may not be made subject to any conditions governing subsequent use.

32...

33 ...

34 A third step for the decision-maker concerns the likelihood of occurrence of prejudice. A differently constituted division of this Tribunal in *John Connor Press Associates Limited v Information Commissioner* (EA/2005/0005) interpreted the phrase “likely to prejudice” as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk. That Tribunal drew support from the decision of Mr. Justice Munby in *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin), where a comparable approach was taken to the construction of similar words in Data Protection Act 1998. Mr Justice Munby stated that ‘likely’: “*connotes a degree of probability where there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there ‘may very well’ be prejudice to those interests, even if the risk falls short of being more probable than not.*”

35 On the basis of these decisions there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not. We consider that the difference between these two limbs may be relevant in considering the balance between competing public interests (considered later in this decision). In general terms, the greater the likelihood of prejudice, the more likely that the balance of public interest will favour maintaining whatever qualified exemption is in question.

16. Section 21 FOIA reads:-

- (1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
- (2) For the purposes of subsection (1) –
 - (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
 - (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

17. As section 21 FOIA is an absolute exemption it is not subject to public interest considerations.

18. The Commissioner has issued guidance on the application of s21 FOIA¹ which includes the following:-

...when relying on section 21(1) to refuse a request on the basis that the information is publicly available, we expect you to show that:

- the information in the public domain matches what the applicant asked for;
- you have given precise directions to the applicant to enable them to find it without difficulty and without a great deal of searching necessary to locate it; and
- you have considered the applicant's particular circumstances of the applicant and you are satisfied that they can reasonably access the information.

19. When a public authority says that it does not hold the information requested (or any further information), the Commissioner (and now this Tribunal) has to consider the searches made by the public authority and the explanations given and decide, on the balance of probabilities, whether the public authority is holding the information requested.

20. The Commissioner (and now this Tribunal) also have to decide on the correct interpretation of the request and the scope of the information sought. In *Berend v Information Commissioner and LB Richmond* (EA/ 2006/ 0049, 12 July 2007), the First-tier Tribunal held that requests 'should be read objectively', that a request is 'applicant and motive blind and as such public authorities are not expected to go behind the phrasing of the request' (para 46).

THE APPEAL AND SUBSEQUENT EVENTS/EVIDENCE/SUBMISSIONS

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-21-information-accessible-to-the-applicant-by-other-means/>

21. The Appellant challenged these decisions in an appeal notice dated 9 April 2023. He said:-

The specific issue around the Maximum Student Numbers (MaSN) cap which exists in Northern Ireland. I understand Ulster University is allocated around 13,400 from the Department for the Economy NI. What I am seeking is the number UU then allocates to its Belfast campus, Coleraine campus and Magee campus. It is ludicrous for the university to say it does not know and for the ICO to accept that.

To say MaSN is not allocated by campus is correct. However, the commissioner's office has completely missed the point. Ulster University like other institutions is allocated its total number of MaSN places (circa 13,400). It then obviously has to decide how many to use at each campus because it has to balance them out with post-graduate and international numbers. In order to fill out financial statements Ulster University would have to know how many MaSN places are based at each campus, that is a fact.

How can UU provide me with a specific breakdown down international students and post-graduate students but not those (MaSN) allocated by the NI Government/Department for the Economy?

To operate effectively, UU would have these figures to hand because it will have to know that it is staying within its limits. Ie an even breakdown would be approximately 4,466 MaSN places for each campus.

ICO keeps referring to HESA. But what use is HESA if a previous UU FoI response shows it has over 5000 students at Magee but HESA details around 10000. All HESA figures are therefore shrouded in doubt.

HESA doesn't provide a breakdown of MaSN numbers so I want UU to tell me. Why is ICO then justifying it's decision by saying I have used HESA in the past. Yes, I have and said they figures are wrong. Why would I use HESA figures I know to be wrong?

On the same basis I would like UU to provide me with the number of Full Time Equivalent students at each campus because I cannot rely on the HESA figures to which they're referring me.

22. The Commissioner responded to the appeal on 3 July 2023. The Commissioner supported the approach in the decision notice. It was said that the Commissioner had correctly identified that MaSN were not 'allocated' to particular campuses:-

The mere fact that the University receives a total pool of MaSN across its different campuses does not, of itself, entail that those places be 'allocated' to those campuses.

23. In relation to the information being available from other sources, the Commissioner said:-

In his DN, the Commissioner took account of the Appellant's complaint that the 'information that the University and HESA had previously provided did not align' and that the Appellant 'therefore considered the HESA figures were unreliable which is which is why they were requesting a breakdown of the figures from the University' (para 12). However, the Commissioner also took account of the University's statement that the 'HESA data is also a particularly reliable source of information of this nature given that it is verified and audited by the University prior to submission' (DN, para 19). Given the findings that the Commissioner made under s21 FOIA, it was unnecessary for the Commissioner to go behind the accuracy of the University's figures since they were audited by HESA in any event.

24. The Appellant replied to this and said, in part:-

There is a degree of semantics at play here. Ulster University know perfectly well what information I am seeking: I have asked for the MaSN places at each campus.

Now, whatever way they are distributed (and they have to be, they don't just magically float to each campus, a number is based at each campus and they'd have to be known), whether it be to specific courses, for example, the university would have to record this information on a central database to inform financial decision making.

The commissioner and UU argue that HESA is a reliable source of information because it is audited. As mentioned previously, the HESA numbers are of no use to me as a journalist who wants to report accurately.

The HESA website says UU has 34,550 students. I've just quoted you the figures UU provides in FoIs above (25,985). I believe the HESA site actually includes London and Birmingham branches under the banner of NI students – those campuses are in England, not NI. Hence why I need FoIs to show me the real picture.

I believe HESA also has Magee down as having over 9,000 students. Quite simply, it doesn't, people who sit a competency exam but are not studying on the campus should not be counted as students. The true figure is 5,227.

And UU doesn't include those sitting the competency exam in its own FoIs so why is HESA? And if doing so, HESA should add a caveat to explain they aren't full-time or even part-time students.

For the reasons set out above, I would ask the Tribunal to find in my favour and insist that Ulster University provides the figures I have asked for. This is a matter of national interest, as the lack of a sizeable university in Derry is affecting lives and livelihoods.

There is no independent oversight of universities in Northern Ireland, which there should be given past decision-making and those in more recent times which I pointed to.

It is grotesque that one city has 83% of students and another a tiny 9.7%. If people cannot see how these student places are distributed then there can be no trust in the system.

25. The Appeal was initially considered on the papers by the Tribunal on 30 October 2023 but the consideration was adjourned because the Tribunal ‘found it had insufficient information on which to reach a Decision’. UU were joined to the Appeal ‘in order to obtain the best possible evidence in support of the exemptions claimed. [UU] may now wish to apply to provide the Tribunal with closed evidence consisting of the withheld information.

26. The Commissioner was also invited to file further submissions because:-

We disagree with the First Respondent’s submission in its Response that the Notice of Appeal does not challenge the engagement of s. 43(2) FOIA and would be assisted by its submissions on all the exemptions about which conclusions were reached in the Decision Notice. In particular, the Tribunal would be assisted by the Information Commissioner’s submissions on his basis for concluding that the ‘would be likely to’ limb of the exemption was met in the face of the public authority’s sole reliance upon the ‘would’ limb.

27. Thus the Commissioner filed further submissions on 18 December 2023. The submissions relied on what was set out in the decision notice. The Commissioner explained that:-

...the Commissioner noted the University’s position that the envisioned prejudice to its commercial interests would happen. While the Commissioner did not consider that the University had shown that the disclosure would be more likely to prejudice its commercial interests than not, he did conclude that the disclosure “would be likely” to prejudice those interests. Specifically, the Commissioner considered that, while the risk of other universities using this information was high, he was not convinced that prejudice was more likely to occur than not. He nonetheless considered that there was a real and significant risk that such information could be used to the University’s detriment and, on that basis, concluded that the exemption was engaged.

...

The Commissioner did...accept the University’s concession that there was a public interest in transparency and disclosure, albeit that he agreed with the University that this was outweighed by the public interest in the University “being able to protect its commercial interests and compete fairly in a

commercial environment” (DN, para 32) and “being able to compete from as strong a financial position as possible” (para 33). The University’s Response to the Appellant’s appeal provides further details of its concerns, particularly vis-à-vis its “its attempts to compete with its significantly larger and more established neighbour in Queen’s University, as well as those universities more farther afield.

28. UU did not disclose the withheld material to be considered in CLOSED by the Tribunal, even though this had been suggested. One document only has been sent to be considered in CLOSED and this relates to 2023-24 Maximum student numbers (MaSN) and post-dates the request in this case.

29. UU has provided a long email as its response to the Appeal. It repeated that it does not ‘allocate’ MaSN students on a per campus basis. It says:-

The University does not determine in advance how many places there will be in each programme (other than Medicine, Dentistry and ITI) nor does it determine an allocation of, or cap on, places on each campus. Instead, the programmes run by the University are determined by the demand for places and their allocation through UCAS. As the UCAS process works through each year, there is a significant flux in the number of students accepted to study at each campus and accurate figures on how many students end up studying at each are not produced until enrolment has been completed in early October of any given year.

30. Thus UU has confirmed that by early October each year it does have accurate figures of numbers of students ‘accepted to study at each campus’.

31. In relation to s43(2) FOIA and the financial breakdown of what income each student enrolment, on each campus, generates for the University, UU states that disclosing this information would mean placing detailed financial information into the hands of other universities, allowing each an unfair commercial advantage in their ability to compete with the University:-

The University operates in a very competitive higher education market. There are only two main universities in NI – Queen’s, a well-established Russell Group university with a significant stronghold in the international student recruitment market, and Ulster University, which is relatively new to the international market and competing against Queen’s to secure traction and increase associated income streams in this area.

With cuts to government funding, and a MaSN cap on domestic recruitment, NI universities are required increasingly to diversify their income through the

recruitment of GB/international students. Whilst international tuition fee levels are available online, it is important to note that most international student recruitment is supported by recruitment agents who are paid a fee for their services.

... the University was mindful that by detailing the amount generated to the University by individual international students, an analysis could be undertaken to review this against the published tuition fee level to ascertain the level of payments made to agents.

32. This was the first time that UU had raised the issue of agents as a matter which had been considered under s43(2) FOIA, and it is not something that was referred to by the Commissioner in the decision notice or in any of his submissions for this appeal.

33. UU make reference to a previous Commissioner decision notice in which the Commissioner accepted 'that information relating to the University's strategies for recruiting international students and for managing any agencies that recruit international students is likely to be commercially sensitive'. The Commissioner added 'Disclosing the information ... would give the University's competitors valuable information about where and how it recruits. That would allow other, larger, institutions to outbid or undercut it'. UU wants to rely on that decision to support its case on s43(2) FOIA.

34. We have looked up that decision DN Reference: IC-94401-V8H0 (21 October 2021). It can be seen that very specific information about the use of agents by a small university was sought. The requested information included (a) a list of international agents based in India and the breakdown of applications made by each agent for specific years; (b) details of applications received from India, in terms of course applied for and name of agent; (c) success rates of the applications and assessment of agents.

35. Although UU argues that the Commissioner accepted commercial prejudice given that disclosing how much income each student enrolment generated for the University would weaken its position in a competitive environment, that is not in fact what the Commissioner said. The Commissioner found that:-

25. Given the highly competitive nature of the market, the Commissioner accepts that information relating to the University's strategies for recruiting international students and for managing any agencies that recruit international students is likely to be commercially sensitive.

...

31. In respect of the agents themselves, the Commissioner recognises that the requested information could be seen as equivalent to performance metrics – allowing each agent to see how it was performing relative to its competitors.

36. UU ended by stating that:-

...the University maintains its position that providing detailed information on student income would give new or existing competitors (and, in particular, its neighbour Queen's University) key information about its operations which would affect its ability to be competitive in the area of student recruitment. Our position stands that disclosing the information would provide other institutions with otherwise undisclosed knowledge about our potential future recruitment strategies.

37. The Appellant responded shortly making many of the points he has made before, and noting that UU has said that it does have the figures for the number of MaSN at each campus.

DISCUSSION

38. We deal with each of the requests in turn as different considerations apply in relation to each. However, our conclusion is the same in relation to each request, namely that there will be a substituted decision notice issued and the appeal is allowed.

[1] Can Ulster University provide a financial breakdown on what each student enrolment, on each campus, generates for UU?

39. UU does not claim that it does not hold this information, but that the exemption in s43(2) FOIA applies to it. UU was invited by the Tribunal when it was joined as a party to share the withheld information with the Tribunal but, as noted, it has chosen not to do so.

40. As we understand it, what the Appellant is asking for is the generation of funds for UU for each student, divided into a list for each named campus. The Appellant is not asking for the names of students and is not asking for the information to be divided into subject or course areas. He is not asking for a breakdown as to whether students are from Northern Ireland, from the rest of the UK, or from abroad.

41. UU claims that this information would prejudice its commercial interests. The Commissioner does not accept this formulation, but does accept that prejudice would be 'likely', as defined above.
42. UU claims that the information would be of benefit and interest to its competitors and rivals, in particular to Queen's University (QU), which is described as the more successful university in Northern Ireland.
43. Belatedly, UU has raised in its response to this appeal (but not to the Commissioner at the time of the decision notice or in response to the request), the issue of payments made to agents who assist UU attract overseas students. UU has not provided any further explanation but claims that the disclosure of details of payments to agents might be deducible from the information disclosed. It is impossible for the Tribunal to assess if this is the case in the absence of the withheld information, or further explanation from UU.
44. UU says this would be one of the factors which increased the risk of prejudice to its commercial interests. UU prays in aid a previous Commissioner's decision notice where very specific details of payments made to agents in a particular country by a small university, and other activities of those agents were found to be exempt under s43(2) FOIA.
45. The Tribunal is unable to agree with the Commissioner and UU that the test for exemption under s43(2) FOIA is made out. The Tribunal does not have the withheld information and no submissions have been made on the detail of the information sought. It has not been explained at all how what of commercial interest (other than maybe agent payments) could be deduced from the information requested, nor why the withheld information would be of use, in particular, to QU.
46. Even if it can be deduced from the information that agents are paid, this is a common practice, and we have no evidence as to why this would be of specific interest to QU or any other university. It would not be possible from the requested information to tell which country a student had come from, and it would not be possible to tell whether any other factors impacted on the income generated for a particular student. This case is not analogous to the other case cited by UU (see above) where the requested information included (a) a list of international agents based in India and the breakdown of applications

made by each agent; (b) details of applications received from India, in terms of course applied for and name of agent; (c) success rates of the applications and assessment of agents. In that case, the university's whole agent strategy in a specific country would have been revealed if the information had been disclosed, clearly undermining its commercial interests. The current request is a very long way away from the detailed specifics raised in the previous case.

47. Our view is that UU, on the information and evidence we have seen, has not established that disclosure of the information either would, or would be likely (as defined above) to prejudice UU's commercial interests. We note that the Commissioner was not convinced that commercial interests would be prejudiced, but was prepared to accept that prejudice was 'likely'. In our view, not even that lower test has been established by UU. All we know is that a long list of payments (each payment relating to a student) is available, but we have seen no analysis as to how it could be used by competitors to cause likely prejudice. In our view the evidence provided is not sufficient for the Tribunal to find that the exemption is engaged.

48. Having reached the conclusion that the exemption is not engaged, we do not go on to consider whether, if it were engaged, the public interest would favour disclosure in any event.

[2] How many full-time equivalents (FTEs) are based at each of UU's campuses?

49. We have found this the most difficult of the three requests to decide. UU relies on the availability of the information from HESA and therefore on s21 FOIA on the basis that it is reasonably accessible to the Appellant. The Commissioner found that the information is held by UU and so is available for disclosure if we find s21 FOIA does not apply. UU has chosen not to share the information with the Tribunal.

50. The Appellant's case is that the information from HESA is not the same as the information which has previously been available from UU, and that is one of the reasons he is requesting the information from UU.

51. In response, UU has explained the discrepancy between the figures from HESA and its own figures. It said in its internal review, for example, [at C43 in the bundle] it was

explained that ‘we were excluding enrolments at the Nursing Competency Testing Centre (CTC)’ so that the figures would align with previous requests from the Appellant.

52. It seems to us that, even if UU has tried to assist the Appellant with an explanation, the fact that it has had to explain the differences between its figures and those available from HESA, mean that the information sought is not reasonably accessible from another source, and therefore s21 FOIA does not assist UU. The issue is not whether the Appellant can access information from HESA but, as he says, the fact that the information from HESA does not match that from UU. If UU had been able to show that the same information was available from HESA, we could understand its argument, but that has not been done.

[3] Can you provide documentation for the FTE figures you have shared with DfE and HESA?

53. UU does not say that it does not hold this information, but it has not provided it to the Tribunal as suggested, and the Tribunal has not seen it. UU’s response to the request is that the information has been sent to HESA in accordance with guidance issued by HESA and therefore the information is reasonably accessible to the Appellant otherwise than through a request to UU pursuant to FOIA: UU says that the information will be available from HESA.

54. The Tribunal does not agree with UU or the Commissioner on this issue. The Appellant does not want to see the information currently held by HESA. What he wants to see is the information sent to HESA by UU. It may be that when HESA receives the information from UU then it processes it or audits it before making it available (if it does) on its website. It appears that the Appellant may be interested whether this has happened, which is why he is made the request to UU. In our view s21 FOIA does not apply to this request because the Appellant has requested the information sent to HESA, and not the information currently held by HESA.

[4] Can you also provide the number of MasN places you have allocated to each campus?

55. In our view UU and the Commissioner are both wrong to focus on the word ‘allocated’ in this request. It seems to us clear that the Appellant is not interested in whether either UU or the DoE have formally ‘allocated’ in advance MasN places to each campus. What he has made clear is that he wants to know how many MasN places are actually to be found at each campus.
56. The email from UU explains that those figures are known by the start of October each year, but not before, when it says that students are ‘accepted to study at each campus’ but that ‘accurate figures on how many students end up studying at each are not produced until enrolment has been completed in early October of any given year’.
57. UU appears to be making a distinction between whether students are allocated or accepted for study. In our view, the correct and reasonable interpretation of the Appellant’s request is that he was asking for disclosure of the figures as to where students end up and are to be found. UU has accepted that these figures are held.
58. The approach to this request by the Tribunal needs to be a little different. As it has claimed not to hold the information requested, it has not considered whether any of the FOIA exemptions apply to it. Therefore, our substituted decision notice will say that UU does hold the information requested and it must now consider whether any of the FOIA exemptions lead it to the conclusion that it will not be disclosed. If not, then the information will be disclosed to the Appellant. If an exemption is claimed, then that should be communicated to the Appellant in a new decision about which the Appellant can complain afresh, if he so wishes, to the Commissioner.
59. The following substituted decision notice is made. The Tribunal requires UU to take the following steps to ensure compliance with the legislation:-

- **Reconsider the Appellant’s request afresh in relation to part 4 on the basis that the information is held by UU as explained above.**
- **Disclose the information held in relations to requests parts 1, 2 and 3 to the Appellant.**

- **UU must take these steps within 35 calendar days of the date of this decision and inform the Appellant of the outcome from taking those steps within the same time period.**

60. Failure to comply may result in the Tribunal making written certification of this fact to the Upper Tribunal, in accordance with rule 7A of the First-tier Tribunal (General Regulatory Chamber) Rules² and may be dealt with as a contempt of court.

Recorder Stephen Cragg KC

Sitting as a Judge of the First-tier Tribunal

Date: 24 April 2024

Date Promulgated: 25 April 2024

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