

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 July 2020

Public Authority: College Council
Address: Royal Holloway, University of London
Egham Hill
Egham
Surrey
TW20 OEX

Decision (including any steps ordered)

1. The complainant has requested information from Royal Holloway, University of London (the "university") about its planning for a "no-deal" Brexit. The university refused to confirm or deny ("NCND") whether it held the requested information under section 43(3) by virtue of section 43(2) - the exemption for commercial interests.
2. The Commissioner's decision is that the university was not entitled to issue a neither confirm nor deny response to the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The university is required to confirm or deny whether information falling within the scope of the request is held and either disclose that information or issue a valid refusal notice in respect of that information.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 13 September 2019 the complainant made the following request for information under the FOIA:

"Can you tell me what no deal planning has been done by the college and provide me the documents in regards to Brexit?"

"Can you tell me have there been any changes with the election of Boris Johnson?"

6. The university responded on 11 October 2019 and refused to confirm or deny that the requested information was held citing section 43(3) by virtue of section 43(2) of the FOIA.
7. The complainant requested an internal review on the same date.
8. The university provided an internal review on 15 November 2019 in which it maintained its original position.

Scope of the case

9. The complainant contacted the Commissioner on 15 November 2019 to complain about the way his request for information had been handled. He did not provide any reason for his complaint but the internal review made it clear that he was not content with a NCND response.
10. Therefore the Commissioner considers the scope of this case to be whether the university was correct in neither confirming or denying that the requested information was held.

Reasons for decision

Section 43(3) – Would confirmation or denial result in prejudice to commercial interests?

11. Section 1(1)(a) of the FOIA requires a public authority to inform a requester whether it holds the information specified in the request. However, there may be occasions when complying with the duty to confirm or deny under section 1(1)(a) would in itself disclose sensitive or potentially exempt information. In these circumstances, section 2(1) of the FOIA allows a public authority to respond by refusing to confirm or deny whether it holds the requested information.

12. The NCND response is not affected by whether a public authority does or does not in fact hold the requested information. The focus for NCND in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.
13. Section 43(2) of the FOIA states that -
 - (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).*
 - (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).*
14. A public authority's duty to confirm or deny whether it holds information requested by an applicant is imposed by section 1(1)(a) of the FOIA. A public authority may however exclude itself from complying with section 1(1)(a) on the basis of section 43(3).
15. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met –
 - Firstly, the actual harm that the public authority alleges would or would be likely to occur if the withheld information was disclosed has to relate to commercial interests.
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Any prejudice that results must also be real, actual or of substance.
 - Thirdly, there is a need to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, whether disclosure would or would be likely to result in prejudice or there is a real and significant risk of the prejudice.
16. The university neither confirmed nor denied whether it held information concerning no-deal planning relating to Brexit or whether there had been any changes following the election of Boris Johnson. The Commissioner needs to consider a scenario where, if the information was held, it would meet these three criteria.

17. The university explained that it believed it to be germane that the request was received on 13 September 2019. It describes the national situation at that time –

"...the UK Brexit date stood at 31 October 2019 and a 'Brexit deal' had not been finalised despite a series of votes by the government. During this time, Boris Johnson won the Conservative Party leadership race and formally took over as Prime Minister from Theresa May on 24 July 2019. It is noteworthy that, on 25 July 2019, the Prime Minister refused to rule out the possibility of a 'no-deal' Brexit. The Benn bill became law on 9 September 2019 and parliament was prorogued (a state which continued to 25 September 2019)."

The university goes on to say that the request was received at a time of significant political tension and uncertainty which had an effect on a wide range of sectors, including the higher education sector.

18. In its response to the Commissioner, the university pointed to the Commissioner's decision in [FS50739085](#). Whilst not making a direct comparison, the university suggested that information pertaining to Brexit had the potential to affect a public authority's commercial interests. The Commissioner notes that this decision did not relate to a NCND response from the public authority, though it does state that information relating to a no-deal Brexit can be commercially prejudicial.
19. The university further explained that it is a higher education provider which relies upon income through student fees. The recruitment of students is highly competitive, and it pointed to another of the Commissioner's decision notices¹ where it had previously been accepted that this activity is commercial in nature. The Commissioner notes that this decision was in relation to marketing. The university suggests that details of tactical marketing activities are not shared between institutions nor are they publicised or made public in any way. It also says that to be singled out in this way puts them at a disadvantage to other universities. The university argues that confirming or denying whether the requested information is held has the potential to affect the university's marketing activity – particularly that which pertains to the recruitment of overseas students. Its view is that the study options and student appetite for study in the UK may be affected by whether there is a 'deal' or 'no-deal' Brexit.

¹ [FS50668371](#)

20. The Commissioner agrees that requesting information about 'no-deal' Brexit plans could affect the university's marketing activity and the recruitment of foreign students which clearly relates to its commercial interests. She questions though whether planning information for a 'no-deal' Brexit can be said to be entirely related to commercial interests, were it to be held.
21. The university believes that to confirm or deny planning for a 'no-deal' Brexit would inform competitors, and allow them to adopt marketing approaches and undermine recruitment strategy which could reduce its competitiveness. However, the Commissioner does not accept that the university has established a causal link that is real, actual or of substance by confirming or denying that it holds this information, even at the lower level of prejudice.
22. The Commissioner is not aware if the university does or does not hold the information, her view is therefore theoretical. She is not persuaded that confirmation or denial in this context would cause commercial prejudice. Her view is that it would not be unexpected for any public authority to have made plans in the event of a 'no-deal' Brexit. The Commissioner does not accept that confirming or denying whether it holds the requested information is commercially prejudicial.
23. The university must now take the action set out in paragraph 3 of this decision notice.

Right of appeal

24. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

25. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
26. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
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