

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 October 2021

Public Authority: The Board of Governors of the University of Chichester

Address: College Lane
Chichester
West Sussex
PO19 6PE

Decision (including any steps ordered)

1. The complainant requested details of contracts with recruitment agents. The Governing Body of the University of Chichester ("The University") variously relied upon section 21 (reasonably accessible), section 41 (actionable breach of confidence), section 43 (commercial interests) and 14 (vexatious) of the FOIA to refuse to provide information.
2. The Commissioner's decision is that section 43(2) of the FOIA is engaged in respect of the withheld information and that the balance of the public interest favours maintaining the exemption.
3. The Commissioner does not require further steps

Request and response

4. On 6 December 2020, the complainant requested information of the following description:

"I would like the information below from the University of Chichester under the Freedom of Information Act 2020.

- 1) *Current list of international agents based in India.*

- 2) *Number of student applications you received from India including name of course, name of agent who submitted the application for Sep and Jan intake for 2018,2019, and 2020*
 - 3) *The status of each application for Sep and Jan intake for the year 2018, 2019 and 2020.*
 - 4) *Number of student applications submitted by each agent.*
 - 5) *Status of the application: offered a place, how many applications were rejected and reason of rejection, how may CAS' issued, how many students got visa and how many got rejected and reason for rejection.*
 - 6) *Name of the agents' contracts terminated in the year 2018,2019 and 2020 and the reason of termination. How long each terminated contract was active for?*
 - 7) *How do you assess whether your agents are using the sub-agent model?"*
5. On 18 December 2020, the University responded. In respect of element [1], it directed the complainant towards information on its website. In respect of element [7], it denied holding any information within the scope of the request. In respect of the remaining elements it relied on section 41 and 43 of the FOIA to withhold the information.
6. The complainant requested an internal review on 21 December 2020. The University sent the outcome of its internal review on 3 March 2021. Whilst the University maintained its stance that section 41 and section 43 were engaged, it now also refused the request as vexatious.

Scope of the case

7. The complainant contacted the Commissioner on 16 March 2021 to complain about the way her request for information had been handled.
8. Given that the University had cited section 14(1) of the FOIA – which is an exemption from the duty to comply with a request at all – the Commissioner was obligated to deal with this exemption first. She therefore wrote to the University on 2 September 2021, asking it to explain why it considered the request to be vexatious.
9. The University responded on 28 September 2021. It set out arguments as to why sections 41 and 43 were engaged in relation to the information falling within the scope of the request. However it also stated that it wished to rely on section 14(1) of the FOIA “in the alternative” and provided arguments to support its position that the request was vexatious.

10. Having considered the University's arguments, the Commissioner responded on 30 September 2021. She noted that it was not permissible to rely on section 14(1) "in the alternative" and that the University must decide whether it wished to rely on this exemption first. She also expressed her initial view that the evidence supplied was unlikely to meet the high bar of vexatiousness. Having looked at the other parts of the submission, the Commissioner considered that there was a strong possibility that either section 41, section 43, or both exemptions, would apply to the information being withheld, but the University had not been asked the questions specific to these exemptions that she would normally ask – because the initial investigation letter had focussed on section 14. Rather than issue a decision notice ordering a fresh response, the Commissioner reasoned that it would be more practical for all concerned if the University would drop its reliance on section 14 and provide her with more detailed submissions in respect of section 43. The University provided a fresh submission on 13 October 2021.
11. Whilst the University originally cited both section 41 and 43 of the FOIA in respect of all the withheld information, having viewed the withheld information, the Commissioner does not consider that all of it would be covered by section 41 as some has not been provided "by another party." As such, she intends to look at section 43 first and, if any of the information is not covered by that exemption, she will look at whether that information is covered by section 41.

Reasons for decision

12. Section 43(2) of the FOIA states that:

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).

13. The exemption can be engaged on the basis that disclosing the information either "would" prejudice commercial interests, or the lower threshold that disclosure only "would be likely" to prejudice those interests. For the Commissioner to be convinced that prejudice "would" occur, she must be satisfied that there is a greater chance of the prejudice occurring than not occurring. To meet the threshold of "would be likely to" occur, a public authority does not need to demonstrate that the chance of prejudice occurring is greater than 50%, but it must be more than a remote or hypothetical possibility.
14. In the Commissioner's view it is not sufficient for a public authority to merely assert that prejudice would be likely to occur to another party's commercial interests to engage the exemption. Nor is it sufficient for the

other party to assert that such prejudice would be likely to occur. The public authority must draw a causal link between disclosure of the information and the claimed prejudice. It must specify how and why the prejudice would occur.

The University's position

15. The University provided a detailed submission setting out why the different information covered by the different elements of the request would engage the exemption.
16. In respect of elements [2] and [4], the University noted that its own commercial position was at risk from disclosure. It noted that:

"Implications would likely be drawn by the University's competitors as to its recruitment strategy and the areas where it focuses (or relies) on international recruitment if the number of students recruited by country and by programme were disclosed. Other universities and colleges would likely use this information to gain a competitive advantage by targeting these students with equivalent programmes, or by seeking to 'poach' the University's more effective agents. Given the small number of [redacted] students brought in by the University each year, this would likely prejudice the University's ability to recruit, with obvious financial implications. This is exacerbated as the University is a small institution in a market dominated by larger competitors; international recruitment strategy is an area of intense competition between universities, particularly following Brexit and the impact of pandemic. The University's strategy is carefully considered and kept strictly confidential in furtherance of its commercial interests.

"The number of applications received via each agent is also commercially sensitive. The University seeks to manage agent performance closely, and would likely find it much harder to do so if its agents (or potential agents) could draw inferences as to the performance metrics applied to other agents. The agency performing best, for example, would be able to push back against University management on the basis that the knowledge of their relative position would give them commercial security."

17. The University also noted that disclosure might harm the interests of its agents too:

"The number of student applications attributable to agents is a key performance metric in the student recruitment market. This is a highly competitive field, with many small businesses that are highly vulnerable to otherwise minor competitive advantages. The

disclosure of this information would therefore be much more detrimental to our recruitment agents than would be expected of similar information about agent performance in other markets."

18. In respect of the information within the scope of elements [3] and [5], the University argued that that relatively small sample size meant that the data could easily be skewed by the unique circumstances of particular students – presenting a misleading picture of the University:

"The information requested is complex and highly sensitive as a result of the subject matter. If disclosed, inferences would likely be drawn by prospective students as to the likelihood of an applicant to the University being successful; the University's ability to guide students through the UKVI [UK Visa and Immigration Service] processes and its ultimate success rates, and the performance of each of the University's recruitment agents.

"The international student recruitment market is very competitive and much depends on an institution's perceived ability to get the applicant through the requirements of UKVI and into the country. The University is currently a small player within this market, and so is particularly vulnerable to adverse inferences.

"Based on the University's assessment and the input received from its specialist marketing team, if this information was made public, and thus made available to international students researching the University, there is a real likelihood that students would be deterred from applying. University rankings, application success rates and student testimonials are key decision-making tools used by students when applying to University."

19. Once again, the University noted that disclosure would indicate its strategic priorities – exposing it to competitors.
20. The University also argued that disclosure of this data would harm the commercial interests of its agents noting that, if the data suggested a particular agent was less successful at placing students compared to its competitors – that would harm its ability to attract business from other higher education institutions.
21. Finally, in respect of element [6], the University argued that disclosure of the information would prejudice its ability to manage its agents – noting that:

"In addition to the details of the contract terminations of the named agents, the absence of information on other terminations is also valuable commercial information. It allows inferences to be drawn as to the circumstances in which the University has not terminated

agent contracts, and thus the levels of substandard service the University will accept before taking action.

"This is commercially sensitive information and disclosure would be likely to limit the University's ability to manage its agents freely by making it harder to apply differing standards to different agents where commercially sensible to do so, or by making it harder to enforce contracts against underperforming agents. It would likely also make it more difficult for the University to recruit new agents, who are less likely to work with an institution that discloses this information. The University's international recruitment is an important part of its strategy for growing student numbers (and thus maintaining financial viability) and the recruitment and management of good agents is difficult and time-consuming, particularly as a small institution in a market dominated by the Russell Group. The potential for harm is thus magnified by the University's particular circumstances."

22. The University also argued that disclosure would be likely to prejudice the commercial interest of any firm whose contract had been terminated because it would cause reputational damage to that firm and affect its ability to compete for contracts from other institutions.

The Commissioner's view

23. Although the University has used both the terms "would" and "would be likely to" cause prejudice during the course of its communications, the Commissioner considers that the University is applying the lower bar. The Commissioner is satisfied that this lower bar is met.
24. The Commissioner recognises that the higher education market is a very competitive one. It is particularly competitive in respect of international students because institutions are able to charge such students the full tuition fee (up to around £38,000 per year) whereas fees for UK students are capped at £9,250 per pupil.
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.
26. The Commissioner recognises that the University is a relatively small institution without the same reputational draw or financial resources of some of the UK's older and larger institutions. In short, it must rely on smart targeting in order to recruit students.
27. Disclosing the information within the scope of elements [2] and [4] 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. Disclosing the identities of the agents would also indicate where the University was focusing its resources.

28. In relation to application status data, the Commissioner recognises that the sample size is relatively small and, as a result, vulnerable to being skewed by exceptional circumstances. The visa application process can be a complex one and applications can be rejected for any number of reasons.
29. The Commissioner therefore accepts that disclosure of this data has the potential to create a misleading picture of the University's success at recruiting students from overseas. This could dissuade potential students from applying to the University – prejudicing its commercial interests.
30. Finally, in respect of element [6], the Commissioner accepts that disclosure of details of contracts terminated would be likely to affect the University's ability to manage its contracts effectively to achieve value for money and to terminate contracts of under-performing agents.
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.
32. The Commissioner accepts that this market is also one which is highly competitive and where the disclosure of information could harm the commercial interests of those concerned. Disclosure of performance metrics (and particularly of contracts that had been terminated) could make it more difficult for the agents concerned to compete for business.
33. The Commissioner therefore accepts that section 43 is engaged in respect of this information.

Public interest test

34. Even where information would be likely to harm the commercial interests of a party, that information must still be disclosed unless the balance of the public interest favours disclosure.
35. Because the Commissioner has accepted that some degree of prejudice is likely to result from disclosure, there will always be some inherent public interest in preventing this from happening. How strong that interest is will depend on the likelihood and severity of the envisaged prejudice.

36. In this case, the Commissioner had found that the lower bar of “would be likely to” cause prejudice is engaged. This means that the likelihood of prejudice is lower than 50% but remains more than a remote or hypothetical possibility. Whilst it is easier to demonstrate that the lower bar is met, this carries less weight in the balancing exercise.
37. The Commissioner considers that there will always be a public interest in understanding how publicly-funded bodies are operating and in ensuring that they are both transparent about how they spend their money and accountable for that money.
38. In particular, in this case there is a significant public interest in understanding how the money of both taxpayers and fee-paying students is being spent on recruitment agents. Disclosure would reveal some information about whether the University is getting value for money from the contracts it is operating.
39. The complainant in this case is in dispute with the University. That is clearly of importance to her, but the Commissioner does not consider that the dispute, of itself, has wider public significance beyond the factors already identified.
40. In favour of maintaining the exemption, the University noted that:

“the University is entitled to manage its business in a commercial context and to compete fairly without being required to reveal its strategy and market focus. In context, there is a public interest in permitting universities to compete and to manage their suppliers effectively...

...there is also a public interest in the provision of public education, and in the promotion of fair competition, including within the mixed markets in which the University operates.
41. The University also noted that:

“The University considers that the ability for the recruitment agents mentioned to compete in the industry and to generate income would be seriously threatened by disclosure. The reputational impact is also be relevant. The University therefore considers that the public interest does not outweigh the likely harm.”
42. Having considered the competing interests, the Commissioner is satisfied that, in the circumstances of this case, the balance of the public interest favours maintaining the exemption.
43. Fees paid by international students are, as the Commissioner has noted above, highly sought after by universities. There is a strong public

interest in allowing the University to compete on an even basis with other institutions – which it would not be able to do if its competitors were aware of its recruitment strategies.

44. Equally, there is a strong public interest in the University being able to manage contracts in an effective way – which would be undermined by disclosure of the withheld information. The various governing bodies within the University are able to scrutinise the way in which it spends its money.
45. The Commissioner is therefore satisfied that section 43 of the FOIA is engaged in respect of this request and that the balance of the public interest favours withholding the information

Right of appeal

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

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

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

47. 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.
48. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF