

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 March 2022

Public Authority: The Governing Body of the University of Nottingham

Address: University Park
Nottingham
NG7 2RD

Decision (including any steps ordered)

1. The complainant has requested the interview score that would have guaranteed entry into the course 'Medicine A100' for 2021.
2. The University of Nottingham ('the University') withheld this information under section 43(2) (commercial interests) of FOIA.
3. The Commissioner's decision is that the exemption is engaged and the public interest lies in maintaining the exemption.
4. The Commissioner does not require the University to take any steps to ensure compliance with the legislation.

Request and response

5. On 23 May 2021, the complainant wrote to the University and requested the following information:

"Medicine A100 2021

Could you please let me know the interview score that would have secured an offer for 2021 entry."
6. The University responded on 22 June 2021 and refused to provide the requested information citing section 43 of FOIA as a basis for that refusal.
7. Following an internal review the University wrote to the complainant on 30 June 2021. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 23 July 2021 to complain about the way that their request for information had been handled.
9. The complainant was concerned that, without the disclosure of this information, candidates have no way of assessing their performance. The complainant also noted that other Universities had disclosed this information.
10. The scope of the Commissioner's investigation is to determine whether section 43(2) applies and, if so, whether the public interest lies in disclosure or in maintaining the exemption. Reasons for decision

Section 43(2) – commercial interests

11. Section 43(2) of FOIA states:

'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).'

12. The Commissioner's guidance 'Section 43 - Commercial interests'¹ states 'A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent.'
13. In order for a prejudice based exemption such as section 43(2) to be engaged there must be likelihood that disclosure would, or would be likely to, cause prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met in order to engage a prejudice based exemption:
 - Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - 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

¹ [Section 43 - Commercial interests | ICO](#)

designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and,

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

14. Consideration of the exemption at section 43(2) is a two-stage process: even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

The applicable interests

15. The University believes disclosure would damage its own commercial interests. The University has explained 'Releasing thresholds will alert other Medical Schools to our proprietary scoring system and allow them to understand our applicant numbers, they could adjust to then try and attract students away from us.'
16. The University is in direct competition with other Universities in the UK for students who wish to study medicine. The funding and commercial interests of the University are increasingly dependent on student fees rather than public sector funding.
17. The Commissioner is satisfied that the arguments presented by the University outline how disclosure would prejudice the applicable interests within the relevant exemption.

The nature of the prejudice

18. The Commissioner must now consider if there is a causal link between the information that is being withheld and the prejudice that section 43(2) is designed to protect.
19. The University has explained that 'Medical Schools also run application cycles over a period of months for home and overseas students, so there is not one set entry date as with other courses. This means that the cycle is not over until all applicants are assessed and scored against the thresholds for that year.'
20. The University has also explained that 'The thresholds, based on applicant numbers and calibre of students in any given year also move up and down.'
21. The University is not arguing that disclosure of the entry score for 2021 would somehow assist applicants in achieving said score. According to the University disclosure might allow a competitor to draw conclusions

about the University's applicant numbers. A competitor may use this information strategically for its own benefit and at the expense of the University.

22. The University refutes the complainant's concern that other Universities have published this information. It has explained 'the University, alongside all UK Universities, does not provide any in cycle interview scores.' To reiterate, at the time that the request was made the admissions cycle for 2021 had not concluded.
23. The Commissioner understands that medicine attracts a high number of applicants and is a course that is never entered into clearing places. Each Medical School sets its own interviews, scoring criteria and thresholds and the Commissioner notes that there is a huge amount of costly and proprietary information that goes in to developing the application process, including the interview.
24. The University has also explained that 'Disclosure of the scores would mean our scoring criteria, and many aspects of the recruitment process would all have to be re-written,' to ensure that applicants who had already been through the interview score were not disadvantaged. The University envisages that 'This will also result in all applicants being re-assessed to ensure all students have undergone the same recruitment process. The impact of undertaking this at this time would have a catastrophic impact on the current year's recruitment, both financially and in Officers time, and would also delay the commencement of the Academic year significantly. It will also result in a large volume of complaints from those who would have to undertake the process for a second time.'
25. The Commissioner accepts that, to disclose the threshold for 2021, at the time that this application cycle had not yet concluded, could potentially alert the University's competitors to the volume, and calibre, of applicants that it had received. This information could then be used to promote a competitor's own course at the expense of the University's. For example, a competitor may choose to lower its interview score to attract more applicants or increase it, to indicate that their own course is more prestigious than the University's.
26. The University has also indicated that 'Any information disclosed relating to the scoring and entry process would be strategically useful to our competitors in the higher education sector, as they would gain understanding to what the University's priorities are when selecting candidates.' The Commissioner is less convinced by this argument. He is unclear how disclosure of the interview score could allow competitors to draw any conclusions about the criteria in said interviews.

27. However, having considered the University's previous arguments, and the withheld information, the Commissioner accepts that a causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect.

Likelihood of the prejudice

28. The University references the consequences of disclosure, rather than the possible consequences of disclosure, to both complainant and the Commissioner.
29. Whilst the Commissioner would have preferred the University to explicitly state which threshold of prejudice, the higher or lower, it is relying upon, the Commissioner is satisfied by the language that the University uses that it is engaging the higher threshold of prejudice.
30. The Commissioner's guidance 'The Prejudice Test'² defines the higher threshold of prejudice as 'the chain of events is so convincing that prejudice is clearly more likely than not to arise.'
31. Taking into account the competitive nature of medicine, and the increasing reliance of University's upon student tuition for operational purposes, the Commissioner is satisfied that the the chance of prejudice occurring is more than a hypothetical possibility and there is a real and significant risk.
32. The Commissioner's guidance also states 'Establishing the appropriate level of likelihood is also important because it has an effect on the balance of the public interest test.'

Is the exemption engaged?

33. The Commissioner is satisfied that the three part test as outlined in paragraph 12 has been met. Therefore, he is satisfied that the exemption is engaged.
34. He will now go onto determine whether the public interest lies in disclosure or in maintaining the exemption.

Public interest test

Public interest arguments in favour of disclosing the information

² [the prejudice test.pdf \(ico.org.uk\)](https://ico.org.uk/for-the-public/transparency/the-prejudice-test/)

35. In its submission to the Commissioner the University has failed to identify any public interest arguments, or details of any balancing test that it conducted, despite being asked to do so.
36. However, the University did provide details of the public interest arguments it considered in its refusal notice to the complainant. The University acknowledged that disclosure would demonstrate a fair and transparent application and interview process.
37. The Commissioner also notes that there is always an inherent public interest in promoting transparency and accountability, the principles that underpin FOIA.

Public interest arguments in favour of maintaining the exemption

38. Again, the University has failed to include in its submission to the Commissioner details of any public interest arguments or balancing test. Therefore the Commissioner has considered those included within the University's refusal notice.
39. The University has stated that 'it is operating in a highly competitive environment and in incredibly challenging times. As Student Recruitment underpins all business operations here at the University, we must be able to participate freely and competitively in all our commercial activities, and must protect our business activities, being able to generate commercial revenue and reduce reliance on public sector funding.'

Balancing the public interest arguments

40. Ultimately, whilst it is an important educational institution the University is also a commercial enterprise which must be able to operate in a competitive market.
41. The complainant has not brought to the Commissioner's attention any specific concerns about, or wrongdoing by, the University or its medical course that might tip the balance in favour of disclosing the requested information even though doing so would be likely to prejudice the University's commercial interests.
42. The University has indicated that it proactively publishes information about the course,³ including details of the application process, which explains why the interview scores for the current application cycle cannot be provided. The University believes it is as transparent as

³ [Medicine BMedSci and BMBS - University of Nottingham](#)

possible about this application process without prejudicing its commercial interests.

43. The University proactively publishes information about its courses and application processes to allow prospective students to make an informed choice. However, it would put the University at a disadvantage to disclose information that may then be used against it by its competitors. It would be unfair to disclose information that would prejudice the commercial interests of the University when its focus should be to create a robust and fair application process which is designed to accept the most suitable candidates.
44. The Commissioner is satisfied that disclosure would result in the redirection of University time and staff to deal with the consequences. Such diversion is likely to come at a cost, in both monetary terms and quality, to the University and its students. The Commissioner notes that the role of the course in question is to produce the new generation of medical professionals. It is in the public interest to allow the University to do so to the best of its ability.
45. The Commissioner is satisfied that there is greater public interest in the University being able to compete fairly with other higher education providers than in the disclosure of the information. The public interest lies in maintaining the exemption.

Other matters

46. When considering a request for information a public authority must make its decision with the specifics of the case in mind; this includes the timing of the request, whether the issue is still live and the content and sensitivity of the information in question. The fact that the application cycle for medicine for 2021 was ongoing at the time that the request was made was particularly relevant.
47. However, the Commissioner notes that this application cycle is now over. The University might consider it appropriate to disclose the interview score for 2021 in response to a future request, since the threshold will have been revised for 2022.

Right of appeal

48. 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

49. 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.
50. 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

Alice Gradwell
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