

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 October 2013

Public Authority: Department for Business, Innovation and Skills
Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainant has requested information relating to the system of specific designation of courses for higher education student support. The Department for Business, Innovation and Skills (BIS) provided most of the information it held, or otherwise directed the complainant to where relevant information could be located, but withheld the remainder under section 40(2) (third party personal data), section 42(1) (legal professional privilege) and section 43(2) (commercial interests) of FOIA. The complainant has confirmed that he does not require the Commissioner to consider the information withheld under section 40(2) of FOIA. It has therefore been left to the Commissioner to consider DBIS' application of the other exemptions. The Commissioner has found that section 42(1) of FOIA is engaged and that the public interest favours maintaining the exemption. However, he has also decided that section 43(2) of FOIA is not engaged and therefore requires BIS to disclose the information to which this particular exemption has been applied.
2. 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

3. On 18 September 2012 the complainant wrote to BIS and requested information in the following terms:
 1. *Copies of all documents, minutes, case notes and other material relating in any way to the application made by [named organisation] for the designation of a 2 year full-time HND in Business and 4 year part-time HND [Higher National Diploma] in Business for student funding.*
 2. *The names of all private colleges that have had courses designated for student funding between 1st January 2011 and the present date and the date on which the designations were granted.*
 3. *Copies of all rules, policies and internal guidance used in the process of deciding whether a college is suitable for having courses designated for student funding.*
4. After an earlier unsuccessful attempt to send a reply, BIS provided its substantive response on 29 October 2012. This addressed each of the requests in turn. (1) BIS provided some information but advised that further information relating to its correspondence with the Higher Education Funding Council for England (HEFCE) was being withheld under the exemption set out at section 36 (prejudice to the effective conduct of public affairs) of FOIA. (2) BIS supplied a spreadsheet with the names of the relevant higher education institutions. (3) BIS informed the complainant that it did not hold a single definitive document that addressed the full terms of the request but in its absence directed him to various sites where pertinent information could be accessed.
5. The complainant wrote to BIS again on 18 February 2013 and asked it to reconsider the responses to each of the requests. BIS subsequently carried out an internal review, the outcome of which was provided to the complainant on 18 February 2013. This found that the information captured by request 1 and withheld under section 36 of FOIA should have been disclosed. Accordingly, a copy of this information was enclosed.

Scope of the case

6. The complainant initially contacted the Commissioner on 2 April 2013 to complain about the way BIS had handled his requests. In particular, he was dissatisfied about the extent of the information that BIS had identified and provided in response to his requests.
7. Upon being informed of the complaint to the Information Commissioner, BIS decided to revisit the requests in an effort to address the complainant's concerns. This resulted in the release of further information to the complainant. BIS did, however, inform the complainant that it was also now seeking to withhold other information covered by request 1 under variously sections 40(2), 42 and 43 of FOIA.
8. The complainant has subsequently asked the Commissioner to consider BIS' handling of request 1 and particularly its decision to withhold information captured by the request. Accordingly, he has confirmed that the Commissioner can disregard requests 2 and 3 for the purposes of his investigation. Furthermore, the complainant has clarified that he is not seeking the disclosure of any personal data contained within the withheld information. This effectively meant that the application of section 40(2) – the exemption that covers personal data – has been disposed of and, instead, the Commissioner has gone on to consider the information to which sections 42 and 43 of FOIA have been applied.

Reasons for decision

Section 42 – legal professional privilege

9. Section 42(1) of FOIA provides that information is exempt from disclosure if it is protected by legal professional privilege. As a qualified exemption, the provision is subject to the public interest test.
10. There are two types of privilege within the concept of legal professional privilege; litigation privilege and advice privilege. BIS has claimed that the category of privilege that applies in this case is advice privilege. This covers communications between a client and lawyer, made for the dominant purpose of seeking or giving legal advice, where litigation is not in progress or being contemplated. Advice privilege will also extend to any part of a document that evidences the substance of such a communication. However, the fact that information once attracted privilege does not mean that the confidentiality associated with privilege cannot be lost. This will occur whether a client shares the information with a third party on an unrestricted basis, thereby stripping it of its confidential nature.
11. The disputed information in this case comprises a chain of correspondence between BIS officials, acting as the client, and BIS

lawyers. BIS has confirmed that the communications between the parties was made for the sole purpose of obtaining legal advice. The Commissioner has had sight of the information in question and is satisfied that it reflects an exchange between a client seeking advice and legal advisers giving advice in a professional capacity. He therefore agrees with BIS that the information was subject to advice privilege. The Commissioner must next consider whether privilege was still in place at the time the request was made.

12. As already mentioned, information may no longer be protected by legal professional privilege where its quality of confidence is lost owing to an unrestricted disclosure. In his guidance¹ on section 42 of FOIA, the Commissioner explains at paragraph 29 what constitutes an unrestricted disclosure:

This refers to a disclosure of information made to the world at large or without any restriction on its future use. This would mean that it is capable of entering the public domain [...]. As a result, the original holder or owner of the information (eg the legal advice) can no longer expect it to remain confidential. [...] Where confidentiality is lost, the authority cannot claim that s42 applies.

13. BIS has informed the Commissioner that the communications making up the withheld information have been shared with members of the HEFCE under a common interest privilege. In other words, BIS has admitted to disclosing the disputed information to parties that are not the client or the lawyer but considers this was on a restricted basis.

14. The Commissioner allows (see, for example, paragraph 33 of his guidance) that a disclosure to a limited audience may in reality mean

¹http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/legal_professional_privilege_exemption_s42.pdf

information remains confidential from the world at large. As such, the information shared in this context would retain its legally privileged status. In this case, the Commissioner does not find it unreasonable that BIS will on occasion have to share information with its partners in HEFCE, a non-departmental public body of BIS. Flowing from this, the Commissioner has not seen any evidence indicating that through this disclosure BIS effectively 'lost control' of the information with the result that it had inadvertently been made available to the wider world.

15. The consequence of this is that the Commissioner has decided that legal professional privilege applied to the disputed information and that this privilege was still intact at the time of the request. Allowing that section 42(1) of FOIA is therefore engaged, the Commissioner has gone on to consider the balance of the public interest.

Public interest test

Arguments for disclosure

16. BIS has recognised that there is an inherent public interest in transparency, which in principle allows public authorities to be held accountable for the decisions they make. It has also accepted that the public is likely to benefit from having a better understanding of the issues that a public authority manages as part of its role.
17. In addition, the complainant has argued that the specific circumstances of the case greatly strengthen the case for disclosure. This is because of the far-reaching consequences that BIS' position has for institutions applying for designation of courses for higher education student support and, equally, the members of the public seeking to continue their education.
18. In making this finding, the complainant recognises that request 1 only asks for information relating to a single application, which would seem to diminish the wider usefulness of the information. However, he considers that the issues arising from this example of how an institution's application was handled and the lessons learnt from this can be extrapolated to the wider system in which higher and further education providers operate. According to the complainant, transparency in this area is especially vital because of the possibility that the current system acts against the interests of small and private organisations.

Public interest arguments in favour of maintaining the exemption

19. To support its position that the information should not be disclosed, BIS has referred to the importance of legal professional privilege as a concept. As the Commissioner acknowledges at paragraph 45 of his guidance, privilege safeguards openness in all communications between client and lawyer to ensure full and frank legal advice, which in turn is fundamental to the administration of justice. The natural corollary of this is that there will always be a strong public interest in keeping intact the confidentiality attached to legal professional privilege.

Balance of the public interest

20. The Commissioner recognises that the significance of legal professional privilege to the administration of justice is such that in many cases it is only proper to conclude that information captured by section 42 of FOIA should not be disclosed. However, the Commissioner is also reminded that the authors of the legislation did not intend to rule out the very possibility of accessing such information; evidenced by the fact that section 42 is included as a qualified exemption, which is subject to the public interest test, rather than an absolute exemption, which is not. However, following the approach adopted by previous First-tier Tribunals, the Commissioner considers that there must be some clear, compelling and specific justification for disclosure.
21. In previous cases, factors that have helped sway the public interest in favour of disclosure have included occasions where a large number of people are affected by the issue at hand, a large amount of money is involved or the advice itself has been misrepresented. In this case, the complainant has argued that disclosure is necessary because of the numbers of people affected by, and the costs connected to, the strategy adopted in respect of further and higher education. The Commissioner, however, respectfully disagrees with this analysis.
22. In particular, the Commissioner does not share the view that disclosure would significantly enhance the debate about the education strategy being pursued. This is because of the extent to which the disputed information focuses on the application in question rather than wider issues of policy. Nor can the Commissioner envisage a way in which the information could be used by the public to form a view on the overall effectiveness of the education policy. There is also no suggestion that the advice has been misapplied in this case. The combination of these points, to the Commissioner's mind, weakens the public interest argument in disclosure.
23. Taking this into account, the Commissioner has found that the strength of the arguments for disclosure suffer in comparison to the weight

invested in legal professional privilege, which is predicated on the faith that a client and legal adviser have that their frank discussions will be kept confidential. Put simply, the Commissioner considers there is not clear, compelling and specific justification for disclosure that would warrant breaching privilege.

24. The Commissioner has no doubt that the complainant has entirely legitimate reasons for wanting access to the disputed information. However, this in itself is not sufficient to find that the public interest favours disclosure. Consequently, in the absence of other compelling arguments, the Commissioner has decided that the public interest lies on the side of maintaining the exemption.

Section 43 – commercial interests

25. BIS has withheld a limited amount of information under section 43(2) of FOIA. This comprises the names of colleges who are in the process of applying or appealing the designation process.
26. Section 43(2) states that information is exempt information if its disclosure under FOIA would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). A commercial interest relates to a person's ability to participate competitively in a commercial activity, ie the purchase and sale of goods or services.
27. The exemption is prejudice-based, which customarily means that a three-stage test must be met for section 43(2) to be engaged. First, the harm that is envisaged would, or would be likely to, occur relates to the applicable interests described in the exemption. Second, there is a causal relationship between the potential disclosure of the withheld information and the prejudice that the exemption is designed to protect against. Third, there is a real risk of prejudice arising through disclosure. This means the public authority must be able to demonstrate that either disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice; 'would' plainly imposing a stronger evidential burden than the lower threshold of 'would be likely'. Section 43 is qualified by the public interest test, which means that the release of information will only be appropriate under FOIA if, and only if, all three conditions are satisfied *and* the public interest favours disclosure.
28. BIS has argued that disclosure of the names of the colleges would harm both its own commercial interests and the commercial interests of the colleges in question. In terms of BIS' interests, the Commissioner has

been directed to the damage that the release of the information could do to its business reputation and the confidence that customers have in it. This may have the effect of making customers reluctant to provide BIS with commercially sensitive information in the future. Regarding the colleges' commercial interests, BIS claims that until results are confirmed it would be detrimental to release information about the stage of a college's application or whether BIS has concerns over certain aspects of the application. This is because competing colleges could utilise the information to gain a competitive advantage.

29. The Commissioner accepts that the prejudice cited by BIS is applicable to the exemption. His next step is therefore to consider whether BIS has successfully made a link between disclosure and the commercial interests of any party. The Commissioner has initially examined the grounds upon which BIS has found that disclosure would be prejudicial to the commercial interests of the colleges.
30. Where it is claimed that commercial interests of a third party are at stake, the Commissioner does not consider it appropriate to take into account speculative arguments presented by a public authority regarding the nature and severity of any prejudice. Rather, any arguments for the engagement of section 43(2) should be supported by evidence or input from the third party in question.
31. This approach reflects the one adopted by the Information Tribunal in *Derry City Council v Information Commissioner* (EA/2006/0014)². In respect of the arguments advanced in connection with a third party's interests, in this case Ryanair, the Tribunal imagined that there may be good reason for the third party fearing disclosure. However, the Tribunal continued by saying that they were "not prepared to speculate whether those fears may have any justification" (paragraph 24) in the absence of evidence on the point.
32. In this case BIS has not presented the Information Commissioner with any evidence that specifically testifies to concerns raised by the colleges. BIS, however, has argued that the colleges would have had a

² <http://www.informationtribunal.gov.uk/DBFiles/Decision/i69/Derry.pdf>

reasonable expectation that the names of refused applicants would not be made public, even if it was not expressly stated that the information in question would be kept confidential.

33. The Commissioner understands that it will not always be possible for a public authority to obtain the views of a third party in response to a request. However, where such a situation arises, the Commissioner considers that a public authority's arguments should be based on its prior knowledge of a third party's concerns about the potential release of information.
34. In the Commissioner's view, there is nothing to suggest in BIS's submissions that the colleges have even indirectly expressed a view on the potential release of their names in this context. Accordingly, in the absence of further evidence substantiating or clarifying the third parties' position, the Commissioner has decided that the arguments relating to their commercial interests should be disregarded. The Commissioner has therefore gone on to consider the prejudice claimed in respect of BIS' own commercial interests.
35. The Commissioner accepts that damage to an organisation's reputation and the confidence that stakeholders have in that organisation may be a legitimate factor for the purposes of the exemption. This is evidenced in the Commissioner's guidance on section 42³ of FOIA, where he states:

There may be circumstances where the release of information held by a public authority could damage a company's reputation or the confidence that customers, suppliers or investors may have in a company. It may be that releasing such information has a significant impact on revenue or threatens its ability to obtain supplies or secure finance. In these circumstances the commercial interest exemption may be engaged. However it should be noted there is no exemption for embarrassment, only where there is a real risk of such harm being caused could the exemption be engaged.

36. The Commissioner acknowledges the possibility that colleges may assume that information relating to the application process will be kept

³http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx

confidential, particularly when that process has yet to be decided. It could therefore be imagined that there is a reputational risk attached to disclosure. On the basis that the second condition has therefore been satisfied, the Commissioner has gone on to the next step of the prejudice test.

37. The third stage of the test requires the consideration of the likelihood that the argued prejudice will occur. BIS has claimed in this instance that the release of the information 'would be likely' to have a prejudicial effect. As stated, this places a weaker evidential burden on a public authority than the alternative limb of the exemption which says that disclosure 'would' have a prejudicial effect. Nevertheless, 'would be likely' means that there must be a significant risk of the prejudice occurring and more than simply a hypothetical possibility. In other words, there must be a real possibility that the circumstances giving risk to prejudice would occur and the opportunity for prejudice to arise is not so limited that the chance of prejudice is no more than remote.
38. From the evidence provided in support of its position, the Commissioner has determined that the threshold 'would be likely' has not been shown to be met. Specifically, while he has accepted that it is possible to imagine a link between the withheld information and the prejudice identified, the Commissioner considers there are insufficient grounds upon which to determine that there is a real risk of the prejudice occurring.
39. The Commissioner has reminded himself that the exemption will only be engaged if BIS demonstrates not only that disclosure would be likely to result in harm but also that this harm is to its commercial interests. In this case BIS has claimed that disclosing the names of the colleges could deter other colleges from applying to BIS in the future. However, the Commissioner understands that the designation of courses for higher education student support is dependent on this application process. Consequently, there would seem to be no question of a college withholding its application, or otherwise conducting its business elsewhere, in protest at a supposed breach of confidentiality if student support is required.
40. From the explanations provided, the Commissioner does not reject out of hand that some harm could arise through disclosure. Rather, he has found that there is insufficient evidence to find that there is a real risk of prejudice occurring to *BIS' commercial interests*. On this basis, the Commissioner has decided that the third stage of the prejudice-test is not met, which has the effect that section 43(2) of FOIS is not engaged.

Right of appeal

41. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

42. 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.
43. 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

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