

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 December 2014

Public Authority: The Governing Body of City University London

Address: City University London
Northampton Square
London
EC1V 0HB

Decision (including any steps ordered)

1. The complainant requested from City University London ("the University") information about its Bar Professional Training Course ("BPTC"). In relation to examinations for two subjects, he requested details of how many people were due to sit each examination, how many people sat each examination, how many people passed each examination and how many people failed each examination for the period 2009-2013. The University withheld this information under sections 21, 22, 36, 41 and 43(2).
2. The Commissioner's decision is that the University has correctly applied section 36 to the withheld information for the period 2010-2013. He has however decided that it breached section 1 by not informing the complainant that it did not hold any information falling within the scope of the request for the period 2009-10. The Commissioner does not require the University to take any further steps to ensure compliance with the legislation.

Request and response

3. On 14 November 2013 the complainant made the following request for information under FOIA:

"Please could you tell me, for the BPTC Civil and Criminal [Multiple Choice Questions]/[Short Answer Questions] exams in the following academic years, 2009/2010 2010/2011 2011/2012

2012/13. How many people were due to sit each exam, how many people sat each exam, how many people passed each exam and how many people failed each exam. Please could you provide me with this information for both the first sit attempt and the re-sit attempt for each of the years listed. Some of those assessments are now marked by BSB and I am only interested in the students from City University not from other providers.

For clarity I am not asking for any personal details such as name, candidate number etc. of people who sat these exams just the figures for sitting, passing, failing."

4. The University responded on 13 December 2013 and refused to provide the requested information citing the exemptions in sections 21 and 22.
5. The complainant requested an internal review on 1 January 2014. The University provided the result of its internal review on 20 March 2014 in which it maintained its original position that sections 21 and 22 were applicable. In addition, it applied sections 36(2)(c) and 41 to the withheld information.

Scope of the case

6. The complainant contacted the Commissioner on 9 June 2014 to complain about the way his request for information had been handled. He specifically complained about the University's refusal to disclose the information that he had requested.
7. During the course of the Commissioner's investigation, the University sought to rely on the exemption in section 43(2), in addition to those that it had previously cited.
8. The Commissioner considered whether the University was entitled to rely on the exemptions that it had cited as a basis for refusing to provide the requested information.

Reasons for decision

Section 1 – Information held

9. During the course of the Commissioner's investigation, the University informed him that it did not hold any information falling within the scope of the complainant's request for the academic year 2009/10 as the BPTC did not commence until 2010/11.

10. The complainant argued that period 2009/10 may have been covered by the Bar Vocational Course ("BVC"), the predecessor to the BPTC. He contended that they were essentially the same course, with criminal and civil assessments contained within each and with the subjects being unaffected by what was essentially just a change in the name of the course.
11. The University confirmed that it did teach the BVC in 2009/10. However, it informed the Commissioner that the BVC was different from the BPTC. In particular, with the BPTC the course specification became much more prescriptive, the syllabus for each of the knowledge assessments was subject to detailed change, there were a large number of technical differences which had a significant overall effect when taken together and there was a change to the nature of the examinations for the Civil and Criminal parts of the course.
12. The Commissioner notes that the complainant's request was very specific as to the course in relation to which he was asking for information. He accepts the University's argument that the BVC was not the same course as the BPTC and that, consequently, information held by the University about the BVC for 2009/10 did not fall within the scope of the complainant's request. However, the Commissioner believes that the University should have informed the complainant of this when it responded to him. This would have allowed him to make a timely new request for any relevant information that he might have wished to obtain in respect of the BVC.
13. Section 1 of FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds the information and, if so, to have that information communicated to him, subject to the application of any relevant exemption. By not informing the complainant that it held no information falling within the scope of his request in respect of the academic year 2009/10, the Commissioner has determined that the University has breached section 1(1)(a) of the Act.
14. The Commissioner went on to consider whether the information held by the University falling within the scope of the complainant's request for the academic years 2010/2011, 2011/2012 and 2012/13 was exempt from disclosure.

Section 36 – Prejudice to the effective conduct of public affairs

15. The University argued that the withheld information was exempt from disclosure under section 36(2)(c).
16. Section 36(2)(c) provides that:

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act -

...(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

17. In order to determine whether section 36(2)(c) has been correctly applied the Commissioner has:
- (i) ascertained who the qualified person was for the public authority;
 - (ii) established that an opinion was given;
 - (iii) ascertained when the opinion was given; and
 - (iv) considered whether the opinion given was reasonable.

The engagement of section 36

18. The University confirmed that the opinion in relation to the application of section 36 was given by its Vice Chancellor. The Commissioner is satisfied that he was the appropriate qualified person for these purposes.
19. In support of the application of section 36, the University has provided the Commissioner with details of the submission to the qualified person, which identifies the information to which it is suggested that section 36(2)(c) should be applied. The Commissioner notes that the qualified person's opinion was provided on 19 March 2014 on the basis that he believed that disclosure of the withheld information would have the effects set out in section 36(2)(c). He accepted that section 36(2)(c) was engaged for the following reasons:
- Disclosure would jeopardise the "safe space" to liaise with the Bar Standards Board ("BSB") under the terms of the information sharing agreement in place.
 - Disclosure would undermine the duty of confidentiality and the ability of the BSB to decide the timing and detail of the information it publishes in consultation with course providers.
 - Disclosure would damage the working relationship between the BSB and the University with an adverse impact on the University's staff and students and the credibility and reputation of the University within the higher education sector.

20. The Commissioner notes that his guidance on section 36 makes clear that:

*"The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that **no** reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the **most** reasonable opinion that could be held; it only has to be a reasonable opinion."* (para. 21)

21. Provided that the Commissioner is satisfied that the opinion is in accordance with reason and not irrational or absurd, in short, that it is an opinion that a reasonable person could hold, then he will regard it as a reasonable opinion for the purposes of section 36.
22. After reviewing the withheld information, the Commissioner has concluded that it was reasonable for the qualified person to conclude that section 36(2)(c) applied to it.
23. As section 36 is a qualified exemption, it is subject to a public interest test. The Commissioner therefore went on to consider whether the public interest in maintaining the exemption outweighed the public interest in disclosure of the information.

Public interest test

24. The Commissioner notes that the qualified person's opinion was that disclosure of the withheld information "would" have the effects set out in section 36(2)(c), as opposed to that it "would be likely" to have those effects. In his view this means that means that prejudice is 'more probable than not'. In other words, there is a more than 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so.
25. In *Guardian Newspapers & Brooke v Information Commissioner & BBC* (EA/2006/0011 & EA/2006/0013), the Tribunal noted the distinction between consideration of the public interest under section 36 and under the other qualified exemptions contained within the Act:

"The application of the public interest test to the s 36(2) exemption involves a particular conundrum. Since under s 36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person, it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s 36(2)(b), or indeed of prejudice under s 36(2)(a) or (c). But when it comes to weighing the balance of

public interest under s 2(2)(b), it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice."

26. The Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and so

"...does not necessarily imply any particular view as to the severity or extent of such inhibition (or prejudice) or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant."

27. Therefore, in the Commissioner's opinion, this means that while due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of the likely prejudice to the effective conduct of public affairs.

Public interest arguments in favour of maintaining the exemption

28. In its submission to the Commissioner, the University acknowledged the public interest in disclosure to demonstrate openness and transparency in its decision making process and to help to ensure that it was held accountable for its decisions. However, it believed that this was outweighed by the public interest in protecting its working relationship with the BSB and allowing the BSB to publish comprehensive and detailed exam data in accordance with its plans.

29. The University informed the Commissioner that confidentiality in respect of the requested information was imposed on it under its Accreditation Agreement with the BSB. This agreement provides at Clause 20.1 that:

"...each party shall treat as strictly confidential and shall not disclose to any person any information received or obtained as a result of entering into or performing this Agreement and which relates to the provisions of this Agreement, the negotiations relating to this Agreement, or the subject matter of this Agreement."

30. The University stated that the BSB had been clear that it would treat the disclosure of the information that had been requested as an unauthorised disclosure contrary to the Accreditation Agreement. If it had disclosed this information contrary to the views of the BSB, the University believed that this would have undermined its working relationship with the BSB, could have resulted in litigation from the BSB for breach of confidence and, even, have resulted in the University losing its status as a BPTC provider.

31. The University provided the Commissioner with a copy of its correspondence with the BSB concerning the information that had been requested. In this correspondence, the BSB stated that it believed that the University was under a duty of confidence in respect of that information as a result of its contract with the BSB. The BSB indicated that it believed that the selective release or publication of information on assessment performance by providers would have a direct and detrimental effect by undermining public confidence in the integrity of the assessment through misrepresentation, intended or otherwise, before BSB was in a position to put information in the public domain against which it could be validated.
32. In its correspondence with the University, the BSB went on to explain that it intended to publish examination data, including the information that had been requested, in early 2015, once it had three years' worth of data. The reason that it was waiting until then was to ensure that it had enough cycles of assessment to be able to provide a reliable analysis. In the BSB's view, this would allow it to publish the information in a responsible manner, identifying the other factors that have a bearing on the interpretation of a provider's raw examination results and drawing comparisons between providers in a meaningful way.
33. The complainant argued that clause of the Accreditation Agreement identified by the University was not specific to the disclosure of assessment data. The Commissioner notes that the clause, as will often be the case, is drafted widely in order to presumably cover a range of different types of information. Whilst he acknowledges that the clause is not specific to the type of data requested by the complainant, it would appear to cover such data.
34. The complainant also argued that by relying on this clause the situation that had been created between the University and the BSB was that the BSB have become the controllers of the University's freedom of information policy which was not the role of the BSB, but was the role of the ICO. The complainant believed that if the University's submission was upheld then this could create a dangerous precedent, whereby regulators of various professions became responsible for what information was disclosed under FOIA by the bodies they regulated. This would erode the powers of the ICO and undermine the purpose of why the Act was created.
35. The Commissioner notes the complainant's concerns but would emphasise that it is for the University to determine whether information that has been requested is exempt from disclosure under FOIA. It is entitled to consult with third parties, such as the BSB, where it may be relevant to seek their views but ultimately it is the University which has to make the decision. If a requester believes that a public authority,

such as the University, has been too heavily influenced by a third party in making a decision under FOIA then a complaint, as in this case, can be made to the Commissioner. The Commissioner will then make a decision as to whether the Act has been correctly applied.

36. During the course of the Commissioner's investigation, the complainant challenged whether the information that he had requested should be regarded as confidential. He informed the Commissioner that there used to be a pass list published in *The Times* newspaper of all the people who passed the BPTC course and the grade they received. This was the case for the information up to the year 2011/2012. The complainant went on to explain that, for the year 2012/2013, the pass list for the main assessments and resits was available on the University's website and so, in his view, was in the public domain. However, he indicated that the pass list was taken down a few hours after publication.
37. The University confirmed that a list of students that passed the BPTC examinations was published by the City Law School at the University in *The Times* newspaper until 2012/13. The list contained the students' surname and initial, the Inn of Court of which they were a member and the overall grade for the course (outstanding, very competent or competent). It did not include individual results for parts of the course, such as Civil and Criminal Litigation.
38. The University informed the Commissioner that the BPTC students' results were published most recently in *The Times* in July 2013. It pointed out that students had always been able to request that their names and results should not be included in the published list and that, consequently, the list was not complete.
39. In relation to making information available on its website, the University informed the Commissioner that a pass list was made available on a noticeboard outside City Law School's office and also on the website up until approximately 2010/11 or on City Law School's virtual learning environment from approximately 2011/12. This was done to as a way to deliver results quickly to students at a time when results were otherwise released by post. The University confirmed that the results were generally removed from all locations after about two weeks. As regards the City Law School's virtual learning environment, access to the information was restricted so that only those students and staff involved with the BPTC could see it.
40. The University explained that these published lists contained details of the student's full name, the Inn of Court which they attended and the aggregate mark and grade for the whole programme (not for individual parts of the programme) for students who successfully completed the programme. As with the list published in *The Times*, the lists did not

contain any information about the results students achieved in individual subjects and students could request that their names and results were not published in the lists.

41. The Commissioner notes that, whilst some information about some of those passing the BPTC at the University was made public, it would not be possible to determine what proportion of those that passed the course were included in the published list, given the option for students to request that their details were not published. In addition, the list clearly did not give any indication as to those that failed the course or any details of the results in relation to individual subject areas, such as Civil and Criminal Litigation. In light of this, the Commissioner is satisfied that none of the specific information requested by the complainant has entered the public domain.
42. In relation to the complainant's request for details of how many people were due to sit each examination and how many people actually sat each examination, the University explained that, if this information was disclosed, it believed that over time it would be possible to calculate to a high level of accuracy the pass and fail rates from these figures. This was because implicit in the numbers sitting and due to sit the assessments were the pass rates of previous assessments.
43. The University provided the following hypothetical example to illustrate its point. A programme had 100 students registered in the current academic year. It had 110 students due to sit the main assessment and 25 students due to sit the resit assessment. The fact that 25 students were due to take the resit had implicit within it that 25 students did not pass the main assessment. The fact that 110 students were due to sit the main assessment when there were 100 students registered on the programme that year had implicit within it that 10 students had outstanding resits from the previous academic year. Those actually taking the assessment tended to be almost all those due to sit, so this also included information about pass rates.
44. In the University's view, the release of this information would, as with the other information that had been requested, be likely to undermine its working relationship with the BSB for the reasons it had explained.
45. The complainant contended that the hypothetical example provided by the University was a very weak argument. He indicated that, even if, as the University stated, the release of this information would allow over time a person to work out the pass and fail rates, this should not matter if the BSB were intending on releasing the data soon.
46. The Commissioner is of the view that the University's arguments for the withholding of details of the numbers of students that were due to sit,

and those that sat, the relevant examinations do not appear to be as strong as those for withholding the actual numbers for those who passed and failed the examinations. He has taken this into account in assessing where the balance of the public interest lies in relation to the withholding of this information.

Public interest arguments in favour of disclosing the requested information

47. The Commissioner believes that there is a strong public interest in openness, transparency and accountability with regard to the operation of public authorities. As a result, in relation to universities, there is likely to be a significant public interest in the disclosure of information which may help to shed light on the quality of educational provision. This is closely linked to the public interest in ensuring that the large amounts of public money which is being invested in universities is being spent in appropriate ways.
48. The complainant noted that the BSB, in its correspondence with the University, had stated that disclosure of the information would “undermine public confidence in the integrity of the exams”. He explained that the reason that he wished to obtain this information was because he wanted to call into question the integrity of those examinations. He argued that the whole point of FOIA was to make sure that public bodies did not behave in a way that was unethical or undermined public confidence by ensuring that any irregular activity was brought to light. The complainant believed that if the BSB felt that the withheld information would “undermine public confidence” that effectively they were saying that the reason for non-disclosure was that they were doing something wrong. This would be a very strong reason for allowing the public interest argument to prevail and allow disclosure of the information.
49. The Commissioner notes that the concerns raised by the BSB with the University about the disclosure of the requested information was that such disclosure would undermine public confidence in the integrity of the assessment through misrepresentation, intended or otherwise, before it was able to make public information against which it could be validated. It does not appear to the Commissioner that the BSB was suggesting that disclosure of the requested information would demonstrate that it was doing something wrong. What it was arguing was that the disclosure of the very limited amount of information that the complainant requested would lead to misapprehensions if this was not viewed in its full context. This full context could only be seen once the BSB had published all of the relevant information that intended to make public.

50. The complainant also argued that although the University and the BSB had stated they intend to release the information in early 2015 they had not set an exact date or approximate time-scale. In his view, there was therefore the possibility that the BSB might change the release date or decide not to release it all together. In addition, he contended that the examination results were released around June each year and the re-sits took place in August. Therefore no more data would be collected before 2015 and so there was no reason why the information could not be provided to him now.
51. Finally, the complainant explained that he was intending to undertake an appeal process in relation to the University and that he needed the information as part of his appeal. From his perspective, non-disclosure of the requested information would cause a detriment to him as he was unable to wait until 2015 for it.
52. The Commissioner notes the complainant's interest in obtaining the requested information in order to pursue his appeal. However, when considering the public interest test he has to consider how the disclosure of information that has been requested would be of benefit to the public as a whole rather than to an individual requester. Consequently, the requester's private interests are not in themselves the same as the public interest and what may serve those private interests does not necessarily serve a wider public interest.

Balance of the public interest arguments

53. It appears clear to the Commissioner, particularly from the copies of the correspondence between the University and the BSB that he has seen, that the BSB has considerable concerns over the possibility of the University disclosing the requested information. These concerns are centred around the BSB's belief that disclosure would pre-empt its plans to place the BPTC examination result data in the public domain, in what it believes to be a responsible manner, so as to allow the public to be able to make reasonable comparisons between different providers.
54. If the University were to have disclosed the requested information, it appears to the Commissioner this would potentially have been a breach of a confidentiality provision in the Accreditation Agreement with the BSB. It would almost certainly have adversely affected the relationship between the University and the BSB. The Commissioner believes that there is clearly a public interest in the maintenance of a good working relationship between these two organisations in order to promote effective access for the public to the BPTC and, subsequently, to the legal profession.

55. With regard to the public interest in disclosure, the Commissioner has already identified the benefit in the disclosure of information held by universities which may help to shed light on the quality of educational provision, which is closely linked to the public interest in ensuring the effective spending of public money which has been invested. In addition, the complainant argued that the disclosure of the requested information may be of assistance to him in relation to an appeal he intends to pursue with regard to the University. However, with regard to the latter point, the Commissioner has already noted that he has to consider how the disclosure of information may be of benefit to the public generally rather than how it might benefit a particular individual pursuing a private matter.
56. The Commissioner notes that the information that was requested was in relation to the Civil and Criminal Litigation examinations for the BPTC. He understands that these subjects constitute two out of ten of the core subjects which are assessed for the course as a whole and that, in addition, students sit assessments for two option subjects. Consequently, the disclosure of information in relation to these two core subjects would provide very limited data with which to attempt to make any assessment of the overall performance of students on the BPTC at the University during the period covered by the request. The Commissioner does not therefore believe that the disclosure of this limited information would allow any meaningful conclusions to be drawn about the quality of educational provision at the University in relation to the BPTC and, therefore, would not view the public interest in its disclosure as being very significant.
57. In addition, whilst it is not a factor which has had any real influence on his decision, the Commissioner notes that quite a number of the providers for the BPTC are private educational institutions which do not come within the remit of FOIA. There would therefore be no obligation on those institutions to respond to similar requests for information to the one made by the complainant. This would clearly pose a difficulty in obtaining information which would allow a meaningful assessment of the quality of provision for the course offered by the University as compared with all of the other BPTC providers.
58. After considering the public interest arguments, the Commissioner has determined that the public interest in maintaining the exemption outweighs the very limited public interest in disclosure and that, consequently, section 36(2)(c) applies to the withheld information. He therefore does not require the University to take any further steps to ensure compliance with FOIA.

59. Having determined that the withheld information was exempt from disclosure under sections 36, the Commissioner did not proceed to consider the application of the other exemptions cited by the University.

Right of appeal

60. 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@hmcts.gsi.gov.uk

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

61. 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.
62. 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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