

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 April 2017

Public Authority: The University of Warwick
Address: Coventry
CV8 8UW

Decision (including any steps ordered)

1. The complainant has requested from the University of Warwick actual and projected figures spanning various years for its student numbers, on-campus accommodation and students living in Leamington Spa.
2. The University of Warwick has disclosed some of the requested information but withheld most of the projected figures under Section 43(2) of the FOIA.
3. The Commissioner's decision is that University of Warwick has not successfully applied Section 43(2) of the FOIA.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information which comprises of one global number for projected on-campus figures for the combined academic years of 2018/19 and 2019/20 and the twelve separate numbers for the projected student figures for 2016/17, 2017/18, 2018/19 and 2019/20.
5. 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.

Requests and responses

6. The complainant made two requests to the University of Warwick (the University). The first was on 15 and 21 April and 9 May 2016 and the second was on 25 May 2016.

The first request

7. In the first request the complainant asked the University for information in the following terms;

"Please can you tell me for each of the following academic years: 2000, 2005, 2010, 2015, 2020 (projected)

1. *How many full-time students were enrolled at Warwick University?*
 2. *The aggregated capacity of the University's on-campus accommodation (halls of residence etc)?*
 3. *The number of Warwick University students living in Leamington Spa (actual or estimated)? If no figures are available, then the nearest proxy, for example the number in Warwick District Council boundaries.*
8. In relation to question 3 of the request the complainant clarified he would be happy if the University counted anyone who had Leamington Spa in their address.
9. The University responded on 20 May 2016. It disclosed the figures for full time students, on-campus accommodation and students living in Leamington Spa for 2000/01, 2005/06, 2010/11 and 2015/16 but withheld the projected figures for students, on-campus accommodation and Leamington Spar accommodation under Section 43(2) of the FOIA.
10. On 24 and 25 May 2016 the complainant requested an internal review.
11. Following an internal review the University wrote to the complainant on 19 July 2016 and upheld its original decision to withhold the projected figures in relation to student numbers and on-campus accommodation under Section 43(2) of the FOIA. However, in relation to the projected figures for students living in Leamington Spa the University said that it did not hold this information.

The second request

12. The second request was made on 25 May 2016 when the complainant wrote to the University and requested information in the following terms:

"Please provide me with your projections for student numbers and on-campus accommodation for 2016/17, 2017/18, 2018/19, 2019/20 and 2025/26".

13. The University responded and stated that it was withholding all of the projected figures under Section 43(2) of the FOIA.
14. Following an internal review the University wrote to the complainant on 19 July 2016 and upheld its original decision to withhold the projected figures under Section 43(2) of the FOIA.

Scope of the case

15. The complainant contacted the Commissioner on 4 July 2016 to complain about the way his request for information had been handled by the University. In particular, he complained about its decision to withhold some of the requested information under Section 43(2) of the FOIA.
16. Following correspondence with the interested parties during the months of September, October and November 2016 the Commissioner has agreed to restrict the scope of her investigation to the University's application of Section 43(2) of the FOIA to the projected on-campus figures for 2018/19 and 2019/20 and the projected student numbers for 2016/17, 2017/18, 2018/19 and 2019/20.

Chronology

17. The Commissioner contacted the University 24 August 2016 and requested copies of the withheld information together with any further arguments it wished to advance in respect of its reliance on Section 43(2) of the FOIA.
18. The University responded on 23 September 2016 and provided the Commissioner with a copy of the withheld information and its further arguments in support of Section 43(2) of the FOIA.
19. On 27 September, 14 October and 7 November 2016 the Commissioner requested clarification from the University as to what information it actually held falling within the scope of the complainant's requests and also invited it to consider disclosing some of the information it had previously withheld.
20. The University responded on 11 October, 4 November and 8 November 2016. It clarified the information it held and identified the information it was withholding under Section 43(2) of the FOIA. It also disclosed some of the projected on-campus accommodation figures. See the table below for details.

Projected students in Leamington Spa	
Academic Years	2020/21
Rooms	<i>Not held</i>

Projected On-campus accommodation						
Academic Years	2016/17	2017/18	2018/19	2019/20	2020/21	2025/26
Rooms	6,433- Disclosed	Additional 267 rooms Disclosed	Withheld S.43(2)		<i>Not held</i>	<i>Not held</i>

Projected Student Numbers	Per HEFCE return			Per 5YP	
	2016/17	2017/18	2018/19	2019/20	2020/21
Total Student FTE	Withheld S43(2)	Withheld S43(2)	Withheld S43(2)	Withheld S43(2)	<i>Not held</i>
Safety Factor	Withheld S43(2)	Withheld S43(2)	Withheld S43(2)	Withheld S43(2)	<i>Not held</i>
Total Student FTE after deducted Safety Factor	Withheld S43(2)	Withheld S43(2)	Withheld S43(2)	Withheld S43(2)	<i>Not held</i>

21. On 8 November 2016 the Commissioner contacted the University to confirm that the scope of her investigation would be limited to its application of Section 43(2) of the FOIA to the projected on-campus figures for 2018/19 and 2019/20 and the projected student numbers for 2016/17, 2017/18, 2018/19 and 2019/20.

Reasons for decision

Section 43(2) of the FOIA

22. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it. The exemption is subject to the public interest test which means that even if it is engaged account must be taken of the public interest in releasing the information.
23. The exemption can be engaged on the basis that disclosing the information either 'would' prejudice someone's commercial interests, or, the lower threshold, that disclosure is only 'likely' to prejudice those interests. The term 'likely' is taken to mean that there has to be a real and significant risk of the prejudice arising, even if it cannot be said that the occurrence of prejudice is more probable than not.
24. In this case the University has confirmed that it is relying on the lower threshold to engage the exemption. Although relying on the lower threshold makes it easier to engage the exemption it also reduces the value in maintaining the exemption when it comes to consider the public interest test.
25. For section 43(2) to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the University alleges would be likely to occur if the withheld information was disclosed has to relate to the commercial interests;
 - Secondly, the University must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice to those commercial interests; 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. whether there is a real and significant risk of the prejudice occurring.

Commercial interests

26. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner has considered the meaning of the term in her awareness guidance on the application of Section 43. This comments that:

*"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."*¹

¹ See here:

http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freed

27. The University has argued that disclosure of the requested information (comprising of the projected student and on-campus accommodation numbers) would be likely to prejudice its commercial interests since it might influence other Higher Education Institutions as to how many university places they offer. The University has pointed out that it operates in a commercial market as its relationship with potential students is a commercial one and highly competitive. The successful recruitment of students and staff is very much a commercial activity of the University and is critical to maintaining its ability to compete within the Higher Education sector.
28. The University has further argued that it operates in a global market place competing for research funding, students and accreditation with other Higher Education providers. It maintains that universities are entitled to protect their commercial interest and to ensure that they are not unduly prejudiced by the disclosure of commercially sensitive information. The University has stated that the UK Higher Education Sector is highly competitive as universities are seeking to recruit from a limited pool of prospective UK and International students. It believes that the type of information requested could be used by other institutions to affect its competitive position.
29. The Commissioner is satisfied that the actual harm alleged by the University relates to its commercial interests. Accordingly, she is satisfied that the first criterion is met.

Causal link

30. When investigating complaints which involve a consideration of prejudice arguments, the Commissioner considers that the relevant test is not a weak one and a public authority must be able to point to prejudice which is "real, actual or of substance" and to show some *causal* link between the potential disclosure and the prejudice. As long as the prejudice is real and not trivial, its severity is not relevant to engaging the exemption – this will be factored in at the public interest test stage.
31. The University has provided the Commissioner with details of the way in which it believes its commercial activities would be affected by disclosure of the requested information.

Student number projections

32. The University has pointed out that its student projections for 2016/17, 2017/18, 2018/19 and 2019/20 is taken from its annual financial return to the Higher Education Funding Council (HEFC). The 2019/20 figures

were assembled from its own five year plan. It has added that the figures are hypothetical projections for financial purposes and are not suitable for external users to draw meaningful conclusions from.

33. The University has stated that there is no longer a student cap on Higher Education² and it is not bound by its projections. It has pointed out that intakes may be above or below its student number projections which are dependent upon the attractiveness of its various course offerings in the marketplace and its assessment of the competitiveness of its courses on an annual basis through the yearly target setting process.
34. The University has stated that its ability to achieve its recruitment targets relies on a number of factors. These include the number of individuals who apply to it in the first place, the quality of those applications and offers made, the actual qualifications attained by the students vs their offers, the decision of individuals as to whether to finally accept a place (known as conversion), the actual number of people who end up enrolling and arriving at the University as well as any attrition during the course of study.
35. The University has observed that higher education institutions throughout the sector have adopted various strategies for recruiting students. For example, some universities have attempted to boost its student numbers by making unconditional offers which guarantee the applicant a place irrespective of the grades attained. Others have offered free follow on Master's Courses if an undergraduate place is accepted. Some universities have offered students inducements to apply for certain courses, like iPads.
36. The University believes that knowledge of what an institution's student growth plans are, even at the highest levels, will give an insight to what share of the market institutions are aiming at. This means that competitors will adapt their marketing and offer strategies to retain their position or seek to poach market share off others.
37. Over half of the University's income derives from academic fees. Accordingly it follows that fluctuations in student numbers will have a significant impact on its revenue.
38. The University has argued that its ability to succeed in a highly competitive student recruitment market would be compromised if other institutions were able to adapt their own marketing and recruitment

² <https://www.theguardian.com/higher-education-network/blog/2014/sep/18/removing-cap-student-numbers-six-questions-hepi-report>

strategies on the basis of knowledge of its own plans. It believes that even high level of intelligence would be of benefit to competitors.

39. It believes that its ability to sensitively manage relations with stakeholders would be compromised if premature indications of growth trajectories were released into the public domain before it was in a position to manage such messages.
40. The University has pointed out that it devotes significant resources to forward planning and forecasting its student number strategy. Its ability to develop a comprehensive strategy of forecasts and plans for particular courses and departments places it with a possible advantage compared to competitors who undertake this activity less effectively. The University has stated that it would not wish to share any of its commercial objectives with its competitors as this would be anti-competitive and would jeopardise its ability to secure planned student numbers in future academic years. It believes that this would have the cumulative effect of undermining any forecasted plans for further development of the University and its campus as these are dependent upon the planned projected numbers of students being achieved.

On-campus projections

41. The only information held by the University in relation to its on-campus projections are the figures for 2018/19 and 2019/20. The actual figure held is a single one spread across the academic years 2018/19 and 2019/20. The University has stated that this is an aspirational figure and would be subject to planning permission being granted.
42. The University has a capital plan for its student accommodation which covers the same timescales as the financial plan. Its overall campus master plan was last developed in 2007 and approved in 2009. It forms the basis upon which a number of its agreements with local councils rests. E.g. the campus boundary, the amount of car parking allowed on campus and the extent of planned build. Aligning with the review of strategic priorities, the University is also in the process of commencing a strategic review of its campus master plan. The strategic master planning process is anticipated to take about a year with the anticipation that a new campus master plan would be presented to the local authorities sometime in 2017.
43. The University has stated that it is currently in the process of a review of its strategic priorities linked to the refresh of its campus mater plan. This is at a sensitive stage alongside the consultation of Warwick District Council's local plan; elements of which are of considerable strategic interest to the University. The University wishes to be in control of its strategy planning processes and to determine its approach to local discussions and negotiations. The University believes that disclosing its

growth plans into the public domain would prejudice its ability to achieve value for money in its interest. It has stated it has already has experience of artificial price inflation when its interests in a particular acquisition becomes known.

44. The University also believes its ability to negotiate favourable terms with third party accommodation providers would be compromised if its growth plans were made public.
45. The Commissioner is satisfied that the University has provided reasonable arguments to suggest that there is a causal link between the requested information and its commercial interests.

Likelihood of prejudice

46. In *Hogan and Oxford City Council v the Information Commissioner* [EA/2005/0026 and 0030] at paragraph 33 the Tribunal said:

“there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not.”

47. In this case the University has argued that disclosure would be likely to prejudice its own commercial interests and its competitiveness in the Higher Education (HE) sector. The Commissioner's view is that “would be likely to” places an evidential burden on the public authority to show that the risk of prejudice is real and significant.
48. The University has pointed out that it devotes significant resources to forward planning and forecasting its student number strategy. Its ability to develop a comprehensive strategy of forecasts and plans for particular courses and departments places it with a possible advantage compared to competitors who undertake this activity less effectively. The University has stated that it would not wish to share any of its commercial objectives with its competitors as this would be anti-competitive and would jeopardise its ability to secure planned student numbers in future academic years. It believes that this would have the cumulative effect of undermining any forecasted plans for further development of the University and its campus as these are dependent upon the planned projected numbers of students being achieved.
49. The University has argued that disclosure of the requested information would provide its competitors with information it considers is integral to its future commercial activities. It believes that competitors could use this information to guide their own student number strategy. This would enable other universities to compete for the recruitment of students.

The University therefore believes that disclosure of the requested information would commercially disadvantage it in what is a highly competitive market. It has stated that the risk of this happening is likely and probable.

50. The Commissioner has seen the requested information which consists of one global number for projected on-campus figures for the combined academic years of 2018/19 and 2019/20 and twelve separate numbers for the projected student figures for 2016/17, 2017/18, 2018/19 and 2019/20. See the tables above for the details.
51. The Commissioner notes that global number for the projected on-campus figures for the combined academic years of 2018/19 and 2019/20 is an aspirational one and is subject to planning permission. The Commissioner is not persuaded by the University's arguments that disclosure of this figure would result of a real and significant risk of its economic interests being prejudiced.
52. With regard to the future student numbers, the Commissioner notes the University's comments that that these figures are non-binding hypothetical projections for financial purposes and are unsuitable for external users to draw meaningful conclusions from.
53. The Commissioner has also noted that the figures are high level and do not include a breakdown in relation to particular departments or courses. Although the University has argued that its ability to succeed in a highly competitive student recruitment market would be compromised if other institutions were able to adapt their own marketing and recruitment strategies on the basis of knowledge of its own plans, the Commissioner is not persuaded that this would be the case. She might have had more sympathy with the University's arguments if the requested information included details of any particular departments or courses.
54. The Commissioner has further noted that the requested information does not include details of any of the University's marketing or recruitment strategies in relation to its student numbers for the future. The information simply consists of high level projected figures which on the University's own admission are hypothetical and unsuitable to be relied upon by external users.
55. The Commissioner is not persuaded by the arguments advanced so far by the University that disclosure of the requested information in relation to both projected future on-campus accommodation and student numbers would be likely to prejudice its commercial interests.
56. As the Commissioner finds that Section 43(2) of the FOIA is not engaged she has not gone on to consider the public interest test.

Right of appeal

57. 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

58. 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.
59. 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

Jon Manners
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