

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 December 2024

Public Authority: The Governing Body of Ulster University
Address: Cromore Road
Coleraine
BT55 7EL

Decision (including any steps ordered)

1. The complainant has requested information relating to the income and expenditure incurred by each campus. Ulster University (the university) has refused to disclose some of the information on the basis of section 43(2) (commercial interest) of FOIA. The university's response to the remainder of the request is that it does not hold the information in the manner requested by the complainant.
2. The Commissioner's decision is that the university was correct to withhold the requested information under section 43(2) and the public interest favours maintaining the exemption. The Commissioner has also decided that on the balance of probabilities the university does not hold any further information falling within the scope of the complainant's request.
3. He does not require any further steps to be taken.

Request and response

4. On 25 March 2024, the complainant wrote to the university and requested information in the following terms:

"Can Ulster University outline the expenditure on each of its campuses and the income generated from each of its campuses over the past five years?"

Please break that down into separate campuses. If possible, break it down to the amount spent on teaching, accommodation etc? Then how much is generated i.e. from international students or research?"

5. The university responded on 25 April 2024 and explained that the information which has been requested was not held because of the manner in which it records its financial information. It provided the complainant with a link by which they can access its financial information detailing income and expenditure over the last 23 years.
6. Following an internal review the university wrote to the complainant on 31 May 2024. It dealt with the complainant's request under the following four headings:
 - Outline of expenditure on each of its campuses and the income generated from each of its campuses over the past five years, broken down by campus.
 - Amount spent on teaching, accommodation by campus etc
 - How much is generated from international students by campus
 - How much is generated from research by campus

Amount spent on teaching, accommodation by campus

7. The university stated that it is a single integrated institution. For this reason, much of its high value expenditure supports the provision of its university-wide services and not those specific to a particular campus. It explained that its professional service departments operate across all campuses with budgets held and monitored at institutional level. It added that this is also the same for its faculties which have schools spread across all campuses with budgets held and monitored at faculty level rather than campus level. On this basis it decided that it did not hold all the requisite available data to form the framework in order create or generate the analysis required to respond to this part of the complainant's request.

How much generated from research by campus

8. The university maintained that it did not hold this information because research grants are linked to the research being undertaken by the Principal Investigator. It said that it employs staff in its capacity as a unitary institution, and they move routinely between campuses. It said that research can also be undertaken by multiple staff working in teams across different campuses. The funding from government sources is allocated to the institution and not per campus basis. For this reason,

the university maintained that it did not hold the amount generated by research at a campus level and will be unable to generate such information.

How much generated from international students by campus

9. In relation to this aspect of the complainant's request the university stated that it has the building blocks to generate the information and confirmed that the information is held. However, it has relied on section 43(2) of FOIA to withhold the information as it considers that the disclosure of it could prejudice its own commercial interests.

Scope of the case

10. The complainant contacted the Commissioner on 31 May 2024 to complain about the way their request for information had been handled.
11. The Commissioner considers that the scope of his investigation is to determine whether the university is right when it says it does not hold information. He will also consider whether it was correct to rely on section 43(2) of FOIA to withhold information.

Reasons for decision

Section 43- commercial interests

12. 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.
13. The Commissioner has defined the meaning of the term "commercial interests" in his guidance on the application of section 43 as follows:

"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."¹
14. Most commercial activity relates to the purchase and sale of goods, but it also extends to other fields such as services. The Commissioner's guidance says that there are many circumstances in which a public

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

authority might hold information with the potential to prejudice commercial interests.

15. The public authority needs to demonstrate a clear link between disclosure and the commercial interests of either itself, a third party or both. There must also be a significant risk of the prejudice to commercial interests occurring and the prejudice must be real and of significance for section 43(2) to be successfully engaged.
16. The actual harm that the public authority alleges would or would be likely to occur if the withheld information was disclosed, has to relate to the commercial interests.

Does the information relate to commercial interests?

17. In this case, the withheld information relates to the income and expenditure generated by campus from international students over a five-year period.
18. The university explained that the Higher Education market is a very competitive one as it competes with other educational institutions regionally, nationally and globally to recruit high calibre students. It explained that the Northern Ireland (NI) higher education market differs significantly from universities in the rest of the UK, in that the number of NI student places attending NI universities is capped by the local devolved government. It added that the number of international students a NI university recruits is not capped, and this provides a much-needed source of additional income to support the university's sustainability. It said that the competition to attract international students is particularly intensive and this is reflected by the fact that institutions make use of recruitment agents to assist with the process. It argued that these considerations intensify the competition felt by the university regionally, nationally and globally with the ability to recruit international students commercially vital to the university.
19. The Commissioner is satisfied that the information being requested relates to a commercial activity carried out by the university.

Causal relationship

20. The university argued that the withheld information in conjunction with information disclosed in response to an earlier FOIA request would enable the university's competitors to work out the amount paid to its agents in each of the five financial years in question.
21. It said that in response to a previous FOIA request FOI/23/004 it disclosed the number of international students that study at each campus and whether those students are engaged in undergraduate or

postgraduate studies. It reported that the information was disclosed for the same five-year period to which the current request relates.

22. The university argued that the fees for international undergraduate and post graduate study are published on its website. The information disclosed under FOI/23/004 together with the published level of fees could be used to generate a gross figure for the total revenue generated from overseas students for each campus in respect of each year. It explained that the withheld information gives a net figure for this same item of revenue. Therefore, by comparing the gross figure calculated from FOI/23/004, and the net figure set out in the withheld information, its competitors could determine the amount paid to its agents for each year per campus.
23. During the Commissioner's investigations he requested additional explanation from the university about how the disclosure of the amount paid to its agents would prejudice its commercial interests.
24. The university explained that agents receive commission based on the total tuition fee payable by the student upon payment of full fees. This is a standard commission-based model adopted by most Higher Education Institutions (HEI). It argued that its competitors will be aware and will use the commission-based approach to remunerate agents for student recruitment. The university said that HEI's have an in depth understanding of how tuition fees and agent commissions are charged and therefore it will be relatively simple exercise to work back through the public information to calculate the commission rates. The university argued that the information would provide competitors with valuable market intelligence on how it recruits students via agents, the profitability or otherwise of its agents' portfolio and its own profits by level and campus after commission.
25. The university maintained that this information would provide a commercial advantage to its competitors, in seeking to sell its products to recruit high calibre students, which would be prejudicial to its commercial interests. Within its submissions to the Commissioner, it referred to the case of University of Central Lancashire EA/2009/024 in which the Tribunal noted that universities operated "in competition with other institutions of higher education in seeking to sell its products, namely undergraduate courses, to potential students" in support of its position.
26. The university stated that competitors within the UK and worldwide would gain an advantage from disclosure of the information as it would enable them to learn new information about its approach to commission. It will also allow them to change their own approaches in the market based on whether students are full-time or part-time, and offer more incentivised commission. It added that it would be likely to suffer a

commercial disadvantage by revealing its commission rates. The information would greatly assist its competitors and put them in a stronger position, as they can use the total agent fees to work out rates of percentage commission that it pays to agents.

27. The university provided the Commissioner with scenarios of how the withheld information, if released into the public domain, would impact its commercial position in the competitive market. It considered the impact on its position in a scenario where it uses the same agent as its main competitor, Queens University Belfast (QUB). It also considered the scenario, where both universities use different agents and how QUB would be in an advantageous position if it were to discover the commission it pays to its agents.
28. The University stated that QUB can use the information to increase its own commission rates and proactively encourage its agents to work for them while incentivising this with higher commission. It said that this would negatively impact its international student recruitment and recruitment opportunities in the countries that those agents operate.
29. The Commissioner considers that the university's conclusions in the above scenarios are similar to the arguments presented above and therefore he does not consider it productive to reproduce it in this notice.
30. In its submissions, the university referred to the Commissioner's decision in IC-94401-V8H0² where he accepted 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". It said the Commissioner recognised "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." The Commissioner added that "Disclosing the information ... 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."
31. The university stated that it is attempting to compete with its significantly larger and more established local competitor QUB, which is a Russell Group university with significant stronghold in the international student recruitment market. The university on the other hand is relatively new to the international market. It argued that the use of

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/4018859/ic-94401-v8h0.pdf>

agent commission is commercially sensitive and an effective incentive to try and increase the income stream and establish its position in the market. It said that the disclosure of the information would provide an insight into its recruitment strategy and weaken its position in the competitive environment.

Likelihood of the prejudice occurring

32. In order to apply section 43(2), a public authority must be able to show that the disclosure of the information would, or would be likely to, prejudice commercial interests
33. "Would prejudice" means that if the information is disclosed, it is more probable than not that the harm identified would occur (i.e. there is a more than 50% chance of disclosure causing the prejudice, although it is not absolutely certain that it would do so). "Would be likely to prejudice" is a lower threshold. It means that if the information is disclosed, the probability of the harm occurring is less than 50%. However, the risk of prejudice occurring must be real and significant, and it must be more than hypothetical or remote.
34. The university argued that disclosure of the information would be likely to have a prejudicial effect if released into the public domain. While the recruitment of international students is not capped, it is in direct competition with QUB to attract students both in-country and internationally. This also provides a much-needed source of additional income to support its sustainability. For this reason, the competition between NI universities is even more intensive than it is with most UK universities generally.
35. The university argued that disclosure of the information would be likely to prejudice its commercial interests, creating an imbalance in which its competitors both locally and nationally would be able to exploit to its detriment. It said that competitors will be able to explore the incentives it uses with agents by combining the information with previously released data and fees which is already publicly available. It said that a competitor would use the information to increase the fees paid to their own agents with a view to obtaining an advantage over it in recruiting overseas students.
36. The Commissioner accepts that the risk of prejudice occurring is real and significant. He therefore finds that the university was entitled to apply section 43(2) of FOIA to the withheld information.

Public interest test

The complainant's argument

37. In their supplementary information to support arguments in favour of disclosure, the complainant took the view that money generated by international students is held by the university and should be released. They believe that the university wants to make itself an exception to the rules of transparency as it has previously relied on the same exemption to refuse to disclose information about student accommodation units, when other institutions had disclosed the information.

Public interest in disclosing the information

38. The university accepted that there is a general public interest in openness and transparency in relation to its financial affairs and ensuring that as a public authority, it can be held accountable for its decisions and that it is providing value for money.

Public interest in maintaining the exemption

39. The university's international recruitment is an important part of its strategy which is intensified by the NI Higher Education market which differs significantly from universities in the rest of the UK due to the cap by the devolved government on NI student places. The university considered that disclosing the information into the public domain would undermine its position in the Higher Education sector.
40. It explained that the market is a highly competitive one with each institution seeking opportunities to expand and gain a competitive advantage over other institutions. It said the competition is not only locally but also online, within the wider UK and also in the International Higher Education market. It maintained that disclosure would be likely to create an imbalance and provide a commercial advantage to competitors.
41. The university considered that public interest is better served in maintaining its competitive advantage. It argued that there is a public interest in the university remaining in a competitive market. Therefore, disclosure of this information would place it at a disadvantage to its competitors regionally, nationally and globally. It therefore concluded that the balance of the public interest lies with maintaining the exemption.

The balance of the public interest

42. The Commissioner has considered the arguments before him and accepts that there is a public interest in creating greater transparency

and ensuring that public authorities are accountable for the decisions they make surrounding their finances.

43. While the university has demonstrated how agent fees can be calculated if the withheld information is disclosed, the Commissioner considers it unlikely that the actual amount paid to individual agents could be deduced from those calculations. He has therefore considered whether the total agent fees per campus would reveal enough information that could prejudice the university's commercial position in international student market.
44. The Commissioner believes that for the individual cost for an agent to be worked out, the university's competitors will require additional information, for example, how many agents the university uses, which agents it employs and from which countries (the Commissioner considers that the cost of an agent will vary between countries) as well as the courses that are being offered during the recruitment of international students etc.
45. Given that HEI's have an in-depth understanding of the international student market the Commissioner accepts that the total agent cost per campus would still be useful to the university's competitors and that HEI's would be able to use the withheld information together with information already in the public domain to improve its competitive position in the market. The Commissioner considers that it will also provide HEIs a good understanding of the university's commercial position in relation to agent fees.
46. 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.
47. The Commissioner also recognises that the university is a relatively small institution in comparison to its direct competitor QUB, and therefore, the impact of any prejudice on its position in the competitive market will be a significant one.
48. The Commissioner's decision is that the public interest in maintaining the exemption outweighs that in favour of disclosure and the university was entitled to rely on regulation 43(2) of FOIA to refuse to provide the requested information.

Section 1- general right of access to information held by public authorities

49. Under section 1(1) of FOIA anyone who requests information from a public authority is entitled (a) to be told if the authority holds the information and (b) to have the information communicated to them if it is held and is not exempt information.
50. In its submission to the Commissioner, the university explained that its systems and processes of how it records information has not changed since the Commissioner's decision notices IC-209144-X5N7 and IC-209145-B8L0.
51. It noted that the complainant has previously been made aware that it does not hold information at campus level. It said that the complainant believes and holds the view that the university should gather and produce this information, however as a unitary multi-campus organisation, it is not practical to do so.
52. The university informed the Commissioner that in responding to the complainant's previous requests, it carefully considered of the Commissioner's published guidance³ on determining whether it holds the information.
53. It argued that the university systems do not hold expenditure or income at campus level, and as such is not held on record. The university submitted that in line with the guidance above, the FOI Act does not obligate a public authority to create information that it does not hold in order to satisfy a request.
54. The university's view is that as a multi-campus institution that operates a single unitary and autonomous institution, its mode of operation has been that there is little merit in establishing separate approaches or budgets for each campus.
55. The university noted that at the time of the request, it liaised with its finance department for detailed information on its systems to confirm if the information could be extracted. It explained that the university allocates and monitors budgets by faculty or department and hence does not capture or monitor based on campus. It said that faculties operate across multiple campuses and even where a particular department may have a more extensive base on one campus, the expenditure it manages is on behalf of the university as a whole. This

³ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/determining-whether-we-hold-information/>

also applies to costs by type, such as salaries and marketing, but monitoring is by cost type for financial statements which is not captured at campus level.

56. The university concluded that extracting the information relevant to this request would require a high level of skill and judgement as referenced in the guidance. A very senior member of staff would have to work through each individual item of expenditure or invoice, as well as salary costs and expenses, and try to allocate these to what would be, in their opinion, the most relevant of the campuses, where this was possible.
57. Having considered the feasibility of this process, the university took the view that this would amount to "creating new information not already held". On this basis, the university informed the complainant, that the information requested is not held.

The Commissioner's view

58. When considering this aspect of the complainant's request, the Commissioner has given particular attention to the complainant's supplementary information provided along with their complaint form.
59. In this document the complainant urges the Commissioner to properly "scrutinize" the university's responses and drew his attention to the case *Garrett Hargan vs Information Commissioner and Ulster University EA/2023/0199*. They stated that:

"...I do not accept that because it is a single institution it does not know what is spent on each campus. It is surely sound governance and accounting to know what is spent on each campus, therefore it would know for Eg [sic] what buildings cost in each area. These are separate campuses. They have to know what is being spent on each campus because if there comes a time when money has to be saved or financial decisions made, they know the value of their own estate. UU would have to know what is spent on teaching at each campus as surely that is based on a simple calculation of staff numbers, how many at each grading level and then a bit of adding up. I believe I got staff numbers before so they should know grading levels at each campus - Derry, Coleraine and Belfast - these are all distinct campuses which are in completely different locations across Northern Ireland."

60. The complainant also disputed the university's response in relation to research roles and referred to a separate request FOIA/23/211 on the specific matter of research roles. They have asked the Commissioner to scrutinize the reasoning and question whether the information is held and whether the university is refusing to disclose it.

61. It is not the Commissioner's role to determine whether a public authority should hold information an applicant has requested. His role is to consider whether or not, on the balance of probabilities, the authority holds the information an applicant has requested.
62. The Commissioner recognises that the university does not apportion costs or income by campus. That being the case, in order to respond to the request, the university would need to go through each item of expenditure and each item of income to determine which campus each one should be apportioned to.
63. In some cases, that is likely to be a straightforward task. In other cases, it will require a judgement to be made as to which campus a particular cost or item of income should be apportioned to. How that judgement is made will depend on the person making it. Different people are likely to apportion costs or income in a different way.
64. As there would be no objective way of apportioning costs or income, the Commissioner accepts that responding to these elements of the request would require the creation of new information. Responding would require staff to exercise their judgement about how to convert the items into the categories of information requested.
65. In this case, the Commissioner is satisfied that the university does not hold information falling within this part of the complainant's request. For the reasons given above, his decision is that the university complied with section 1(1)(a) of FOIA.

Right of appeal

66. 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

67. 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.
68. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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