

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 June 2017

Public Authority: University of Sussex
Address: Sussex House
Brighton
BN1 9RH

Decision (including any steps ordered)

1. The complainant has requested information relating to the trial of 'Kanopy'.
2. The Commissioner's decision is that the University of Sussex (the University) has correctly applied section 43(2) (commercial interests) to the majority of the withheld information. However, she also considers that part of the withheld information should be disclosed to the requestor.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The University should disclose the list of video titles as outlined in paragraph 32 of this notice.
4. 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

5. On 16 December 2016, the complainant wrote to the university and requested information in the following terms:

"I'm interested in your trial of Kanopy as described here:

<http://www.sussex.ac.uk/internal/bulletin/staff/2015-2016/19022016/nib-19022016>

In particular, I'm interested in:

- a) When the trial started*
 - b) When the trial ends/ed*
 - c) What the trial's conclusions were*
 - d) How much the trial cost (broken down by film if possible)*
 - e) How many films were watched during the trial*
 - f) Which films were watched during the trial*
 - g) Which films were available over the Kanopy platform"*
6. The University responded on 20 January 2017. It provided some information within the scope of the request but refused to provide the remainder. It cited section 43 of the FOIA as its basis for doing so.
7. The University provided an internal review on 20 January 2017 in which it upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 23 January 2017 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of this case to be to determine if the university has correctly applied section 43(2) to parts d-g of the request.

Background

10. Kanopy is a streaming video service for public bodies such as educational institutions and allows students to access a large collection of films and documentaries. The education institute pays a fee for the service, which means that students are able to watch films and documentaries for free.

Reasons for decision

Section 43 – commercial interests

11. Section 43(2) of FOIA provides an exemption from disclosure of information which would, or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore subject to the public interest.

Engagement of section 43

12. The Commissioner initially considered whether the relevant criteria for the engagement of section 43(2) were satisfied.

(i) Applicable interest within the exemption

13. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered her awareness guidance on the application of section 43¹. 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."

14. The Commissioner considered whether the prejudice claimed by the University is relevant to section 43(2). The University has argued that disclosure of the information withheld under section 43(2) would be likely to prejudice the commercial interests of Kanopy and the University itself.
15. The University considered that releasing information relating to the cost of the product, the specific details of films available and how many and which films were watched during the trial, into the public domain would give away the competitive advantage of the University and that of Kanopy and, therefore, directly compromise the commercial interests of both.
16. Competitors of Kanopy would be able to use the information, including the specification and catalogue of films, to shape their offer and

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https://ico.org.uk/media/fororganisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf

potentially gain a higher market share to the detriment of Kanopy. The University considered that disclosure of the information was likely to be detrimental to Kanopy's ability to participate competitively in relation to the supply of film streaming services within the Higher Education environment.

17. The Commissioner accepts that the disclosure of the withheld information would be likely to be detrimental to Kanopy.

(ii) The nature of the prejudice

18. The Commissioner next went on to consider whether the prejudice being claimed was "real, actual or of substance" ie not trivial and whether there was a causal link between disclosure and the prejudice claimed. With regard to the first element, the Commissioner is satisfied that the prejudice being claimed is not trivial or insignificant.
19. With regard to the second element, the public authority needs to be able to establish that the disclosure of the information would be likely to lead to the harmful consequences claimed.
20. There is a high level of competition amongst providers of goods and services to higher education institutions and the University considered that disclosure could potentially undermine that level of competition. This could have a detrimental effect on the University's negotiating position and its ability to ensure best value for money in commercial contracts of this nature.
21. The University has stated that it also wishes to ensure it provides the best learning environment and facilities for its students, and disclosure of commercial information of this nature could give an advantage to its competitors within the higher education environment, namely other Universities.
22. The Commissioner accepts that the prejudice is "real, actual or of substance" and therefore the exemption is engaged. She is satisfied that disclosure could have a detrimental effect on the University's negotiating position.

(iii) The likelihood of prejudice

23. Although the first limb of the prejudice – 'would be likely' – places a weaker evidential burden on a public authority, the risk of prejudice must nevertheless be real and significant and more than a hypothetical possibility. Section 43(2) is also qualified by the public interest test. This means that if the exemption is found to be engaged on the basis that

the prejudice test is satisfied, the public authority must go on to assess the balance of the public interest in disclosure.

24. The University considered that disclosure of the information would also lead to a risk of prejudice to the University's interests in both its ability to negotiate with other potential providers (particularly as this was initially a trial) and its ability to compete with other higher education providers.
25. It went on to explain that within the higher education environment, there is a level of competition amongst providers of specific projects, licences, software etc as well as competition amongst Universities in providing the best learning environment for students. That level of competition is relevant to whether release of the requested information could be prejudicial to commercial interests.
26. The Commissioner is less persuaded by the argument that disclosure would be likely to impact on the University's ability to compete with other Universities, as there are many important criteria students consider before deciding on which University to attend.
27. However, the Commissioner does consider that disclosure of all the requested information would be likely to impact on the University's negotiations with other service providers.
28. For the reasons explained above the Commissioner is therefore satisfied that section 43 (2) is engaged and has gone on to consider the public interest test.

Public interest test

29. Wherever possible, the University publishes information about its financial arrangements and commercial transactions, including proactive publication through its annual accounts published on its website. This is because it acknowledges the importance of transparency and the public interest in ensuring financial accountability of public bodies such as Universities. However, this has to be balanced, and there are occasions where disclosure is not appropriate.
30. In this particular case, the University considered that the public interest – namely in the University's ability to provide the best education for its students, including excellent facilities and learning environment - was better served in maintaining its competitive advantage and strong negotiating position. On this basis, the exemption was applied.
31. The complainant argued that the list of films available from the particular streaming service is available to every single student and staff

member of the University, so how could it be considered commercially sensitive.

32. The Commissioner asked the University to provide her with the withheld information in relation to this case. In its response to the Commissioner, the University stated that it was unable to provide a list of the films which were available over the Kanopy platform at the time of the trial, as the selection changes frequently and it did not have the information for that specific period. It therefore seems reasonable that the information requested at part g) of the request is not held.
33. However the University did provide the Commissioner with a list of information including video titles, although it is unclear what period this is from. The Commissioner has therefore assumed that this is the current list of videos/films available on the Kanopy platform. This list has not been provided to the complainant.

Conclusion

34. The Commissioner recognises that there is a general public interest in accountability and transparency in relation to the activities of public authorities.
35. The Commissioner also acknowledges that there is a public interest in transparency in a general sense. However she has seen nothing to suggest that there is a compelling need for more transparency in this particular case.
36. In addition, the Commissioner accepts that disclosure would be likely to prejudice the commercial interests of Kanopy. There is clearly a significant public interest in not disclosing information which may have an adverse effect on the commercial interests of any organisation.
37. The Commissioner considers that there is an inherent public interest in ensuring fairness of competition; in that respect she agrees with the University that it is against the public interest for the commercial interests of a third party to be undermined simply because they have entered into a contract.
38. The Commissioner recognises that there is a public interest in preserving a situation in which private sector suppliers can contract with public authorities without prejudice to their commercial interests. Whilst the Commissioner is not convinced that prejudice to the commercial interests of the University was more probable than not in this case, she does recognise that a number of disclosures that result in prejudice to the commercial interests of private sector contractors could lead to a

less favourable environment for public authorities seeking to contract with private sector contractors. Avoiding that outcome is in the public interest.

39. After weighing the public interest arguments, the Commissioner has determined that the public interest factors in not prejudicing the commercial interests of both parties, outweigh the public interest factors in favour of disclosure. In particular the Commissioner has afforded more weight to the potential effect on the commercial interests of Kanopy rather than the University.
40. The Commissioner's decision is that the University has correctly applied section 43(2) to the majority of the withheld information. However, the University should disclose the list of video titles to the complainant as outlined in paragraph 32 as she does not consider this information in itself engages section 43 (2).

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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF