Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 1 March 2011

Public Authority: University of Wales
Address: University Registry
King Edward VII Avenue
Cardiff
CF10 3NS

Summary

The complainant requested a copy of a report in relation to a review commissioned by the University into its commercial activities. The public authority refused the request by virtue of section 22 of the Act and also relied on the exemption at section 43(2) of the Act. The Commissioner has investigated and has concluded that section 43(2) is engaged and that the public interest in maintaining the exemption outweighs the public interest in disclosure. As a result, he has not considered the University's application of section 22 of the Act. The Commissioner requires no steps to be taken.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. In December 2008, the University privately commissioned a review into some of its commercial activities. A report, which summarised the recommendations, was prepared by the individual tasked with carrying out the review, and was received by the Vice Chancellor of the University in December 2009. A limited number of individuals within the University were provided with a copy of the report which is referred to in the notice as the "Risk Review".

3. One of the University's most profitable commercial activities is referred to as its "collaborative provision". The University is involved in validating degree awards for various partner institutions, known as "collaborative centres". The University is one of the UK's largest degree awarding bodies.

4. In 2010, the University was subject to an institutional review by the Quality Assurance Agency for Higher Education ("QAA"). This is separate from the Risk Review referred to in paragraph 2 above. QAA carries out external quality assurance by visiting universities and colleges to review how well they are fulfilling their responsibilities in respect of the standard of their awards and the quality of their education provision. Following its review of an institution QAA publishes a report containing its assessment of the confidence that can be placed in the institution's own quality assurance systems. The reports also contain features of good practice and recommendations for further action and are published on the QAA website once completed. The University expects QAA to publish the report relevant to the University in March 2011.

5. The University has submitted a number of confidential documents to QAA to form part of this institutional review. The Risk Review forms part of the confidential documentation provided to QAA by the University.

The Request

6. On 11 May 2010 the complainant wrote to the University of Wales ("the University") and requested:

> *"May I also put in an FOI request for the recent review by [named individual]"*

7. The University responded to the request on 7 June 2010 and stated that the Risk Review was exempt from disclosure by virtue of section 21 of the Act, and that the information was intended for future publication. The University explained that the Risk Review had been submitted to QAA as part of its ongoing institutional review, and that the Risk Review itself would be published once the findings of the QAA report (encompassing elements of the Risk Review) had been made public. It stated that the QAA report was due to be published in or around March 2011. The University also stated that the information in question was commercially sensitive and that a case could easily be made for the application of section 43 of the Act.

8. The complainant wrote to the University on 8 June 2010 and requested an internal review of its decision, questioning its application of section 21 of the Act.

9. The University responded to the complainant on 8 June 2010 and explained that it had made a typographical error in its refusal notice of 7 June 2010. The University explained that it was relying on section 22 of the Act in withholding the requested information, rather than section 21. The University asked the complainant for confirmation that he still wanted the University to carry out an internal review of its decision.

10. The complainant requested an internal review of the University's decision to withhold the information by virtue of section 22 of the Act on 8 June 2010. The University provided the outcome of its internal review on 28 July 2010, upholding its decision to withhold the information by virtue of section 22 of the Act.

The Investigation

Scope of the case

11. On 18 August 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the University had correctly withheld the Risk Review that he requested on 11 May 2010.

Chronology

12. On 29 October 2010, the Commissioner informed the University that he had received a complaint regarding its handling of the information request and requested a copy of the disputed information. The Commissioner also asked some specific questions in respect of the University's application of section 22 of the Act in withholding the requested information.

13. On 30 November 2010, the University provided the Commissioner with a copy of the withheld Risk Review.

14. On 8 December 2010, the University wrote to the Commissioner and provided detailed arguments to support its application of section 22 of the Act.

15. The Commissioner noted from the University's refusal notice of 7 June 2010 that it had made reference to the commercial sensitivity of the withheld information, and to the fact that, in its view, the exemption at section 43 of the Act was also engaged. Therefore the Commissioner wrote to the University on 8 December 2010 to request detailed arguments in respect of its application of section 43 of the Act as well.

16. The University responded on 23 December 2010 and provided detailed arguments in support of its application of section 43 of the Act.

Analysis

Exemptions

Section 43(2)

17. Section 43(2) provides an exemption from disclosure for information which would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). Full details of the legislation relevant to this case are reproduced in the attached legal annex.

18. For the Commissioner to agree that section 43(2) of the Act is engaged the University must first demonstrate that prejudice would, or would be likely, to occur to the commercial interests of the University or any other third party. In the Information Tribunal hearing of *Hogan v The Information Commissioner and Oxford City Board (EA/2005/0030)* ('Hogan') the Tribunal stated that:

> *"The application of the 'prejudice test' should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption… Second, the nature of 'prejudice' being claimed must be considered… A third step for the decision-maker concerns the likelihood of occurrence of prejudice."*

19. When considering the nature of the prejudice, the tribunal stated in the hearing of Hogan that:

> *"An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, as Lord Falconer of Thoroton has stated "real, actual or of substance" (Hansard HL (VOL. 162, April 20, 2000, col.827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected."*

20. As stated in paragraph 18 above, the third step of the prejudice test is to consider the likelihood of occurrence of the prejudice claimed. The Commissioner notes that there are two limbs to this test; "would be likely to prejudice" and "would prejudice". The first limb of the test places a lesser evidential burden on the public authority to discharge. "Would be likely to prejudice" was considered in the Information

Tribunal hearing of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005).* The tribunal stated that:

> *"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk".*

21. The second limb of the test "would prejudice" places a much stronger evidential burden on the public authority to discharge. Whilst it would not be possible to prove that prejudice would occur beyond any doubt whatsoever, it is the Commissioner's view that prejudice must be at least more probable than not.

22. If the prejudice test is satisfied and the exemption is engaged, then the University would need to apply the public interest test, weighing up the arguments for, and against, disclosure.

23. Due to the circumstances of this case and the content of the withheld information, the level of detail which the Commissioner can include in this Notice about the University's submissions to support its position in respect of this exemption and the Commissioner's consideration of those arguments is limited in some areas. This is because inclusion of any detailed analysis is likely to reveal the content of the withheld information itself. The Commissioner has therefore produced a confidential annex which sets out in detail his findings in relation to the application of the exemption. This annex will be provided to the Authority but not, for obvious reasons, to the complainant. For any part of the following analysis where more detailed analysis has been included in the confidential annex, the Commissioner has made clear reference to this below.

Applicable interests

24. The University stated that disclosure of the information in question would prejudice its own interests, and would be likely to prejudice the interests of its collaborative centres. In other words it applied the first limb of the prejudice test to the interests of the collaborative centres, and the second limb of the test to its own interests. The University stated that the Risk Review in question was associated with its commercial activities, and not with activities which are funded by the public purse.

25. It is not possible for the Commissioner to include any further detailed analysis in respect of the applicable interests, as this is likely to reveal the content of the withheld information itself. Therefore this analysis is set out in the confidential annex.

Does the information relate to, or could it impact on, a commercial activity?

26. The term 'commercial interests' is not defined in the Act. However the Commissioner has considered his Guidance on the application of section 43. This states 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'.*

27. The University explained that it receives less than 5% of its income from the public purse; its collaborative work provides 65% of its income. The University explained that validating courses for other institutions is a very competitive market, and that other leading organisations may be expected to offer alternative provision should the University of Wales withdraw its own services in this area. The University also explained that the Risk Review was a report on the recommendations following a review of its commercial activities.

28. In this case the Commissioner is satisfied that the withheld information does relate to a commercial activity as it relates to the validation of courses which equates to 65% of the University's income, and is conducted in a competitive market.

Nature of the prejudice

29. The Commissioner's view is that the use of the term 'prejudice' is important to consider in the context of the section 43 exemption. It implies not just that the disclosure of information must have some effect on the application of the interest, but that this effect must be detrimental and/or damaging in some way.

30. In this case, the University believes that disclosure would prejudice its own commercial interests and that it would be likely to prejudice the commercial interests of its collaborative centres.

Prejudice to the commercial interests of the University

31. It is not possible for the Commissioner to include any detailed analysis in respect of the potential prejudice to the commercial interests of the University, as this is likely to reveal the content of the withheld information itself. Therefore this analysis is set out in the confidential annex.

Prejudice to the collaborative centres

32. The University did not provide any evidence of how it had established that prejudice to the third parties' commercial interests would be likely to occur. However, the Commissioner notes that the University, by its very nature, works in close partnership with the collaborative centres. The University is responsible for validating courses run by the collaborative centres. The Commissioner therefore considers that the University is in a position to fully understand the potential prejudice to the collaborative centres, without the need for further evidence.

33. It is not possible for the Commissioner to include any further detailed analysis in respect of the potential prejudice to the commercial interests of the collaborative centres, as this is likely to reveal the content of the withheld information itself. Therefore this analysis is set out in the confidential annex.

Likelihood of prejudice

Prejudice to the commercial interests of the University

34. The Commissioner is satisfied that a disclosure of the information at the time of the request would have prejudiced the commercial interests of the University.

35. It is not possible for the Commissioner to include any further detailed analysis in respect of the likelihood of prejudice to the commercial interests of the University, as this is likely to reveal the content of the withheld information itself. Therefore this analysis is set out in the confidential annex.

Prejudice to the collaborative centres

36. The Commissioner is satisfied that a disclosure of the information at the time of the request would have been likely to prejudice the commercial interests of the collaborative centres.

37. It is not possible for the Commissioner to include any further detailed analysis in respect of the Premium, as this is likely to reveal the content of the withheld information itself. Therefore this analysis is set out in the confidential annex.

38. The conclusion of the Commissioner is, for the reasons given above, that prejudice to the commercial interests of the University would have been more probable than not, and that there would have been a real and significant likelihood of prejudice to the commercial interests of the collaborative centres as a result of disclosure of the Risk Review at the

time of the request. The exemption provided by section 43(2) is, therefore, engaged.

The public interest test

39. Section 43 is a qualified exemption which requires that a public interest test is carried out to ascertain whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

40. In reaching a conclusion on the balance of the public interest here, the Commissioner has taken into account those factors that relate to the specific information in question, including the arguments advanced by the complainant and the public authority. He has also taken into account the public interest in avoiding prejudice to the commercial interests of the public authority, which the Commissioner has found would be likely to occur through disclosure of the information in question, and the general public interest in improving the openness and transparency of the public authority.

Public interest arguments in favour of disclosing the requested information

41. Covering first those factors that favour disclosure, the University recognised the general public interest in its publicly-funded activities, and confirmed its commitment to openness and transparency in its governance and activities. Despite being a small public authority, the University explained that it endeavours to publish as much material as it can on its activities, policies and processes.

42. The complainant provided detailed submissions to the Commissioner in support of his belief that there was an overwhelming public interest in favour of disclosing the requested information.

43. The complainant referred the Commissioner to letters, press releases and news articles about investigations and reviews being undertaken, or being requested to be undertaken, in respect of the University. The complainant argued, generally, that the link between the University and the higher education sector in Wales is explicit and significant. The complainant argued that around £400 million of public money is spent on the higher education sector in Wales each year, and that any impact on a sector receiving this level of investment deserves proper public scrutiny. The media reports and statements provided by the complainant showed Assembly Members calling for investigations into the University by investigative bodies, such as QAA and the Higher Education Funding Council for Wales.

44. The complainant argued that the Risk Review was an important public document which set out priorities in the higher education sector for a twelve month period. The complainant stated that it was in the public interest to have access to the most up to date information.

45. In response to the University's assertion that information contained in the Risk Review was out of date and therefore misleading, the complainant argued the information would be significantly more out of date by the time the University intended to publish the document, in March 2011. The complainant argued that the University's statement that it had already acted on many of the recommendations contained in the report, indicated that the document was, in fact, of current relevance at the time of the request and not out of date as argued by the University.

46. The complainant stated that, as the University was making changes in advance of the QAA review, it was in the public interest to know what the changes were before publication of the QAA review, not after, and that it was for the public to judge whether or not the QAA institutional review would overshadow or supersede the Risk Review.

47. In support of his view that the public interest in disclosure was significant, the complainant pointed out that, in addition to grants from public bodies, the University received a significant amount of income from its member institutions in Wales in 2008-2009, that the University "exists to serve Wales and its people", and that the University awards degrees to 4000 students at Welsh universities each year.

Public interest arguments in favour of maintaining the exemption

48. Turning to those factors that favour maintenance of the exemption, the Commissioner has taken into account the public interest in avoiding prejudice to the commercial interests of the public authority, which the Commissioner has found would occur through disclosure of the information in question.

49. The University provided submissions to explain that disclosure would undermine the QAA institutional review process. By undermining and pre-empting this process, along with the disclosure of recommendations yet to be accepted by the University, the Commissioner considers that reputational damage would be caused to the University and linked institutions, leading in turn to a negative impact on its income and therefore a potential loss to the public purse.

50. The University explained that, since disclosure would have an adverse impact on its income, this would be contrary to the public interest in itself. The University's position was that the aforementioned public interest in openness and transparency would be addressed by the future

publication of the Risk Review along with the QAA report and an explanatory commentary, once the University has had the opportunity to consider its position in respect of the proposals made in the Risk Review.

51. It is not possible for the Commissioner to include any further detailed analysis in respect of the public interest arguments in favour of maintaining the exemption, as this is likely to reveal the content of the withheld information itself. Therefore this analysis is set out in the confidential annex.

Balance of the public interest arguments

52. The Commissioner accepts that there is a strong public interest in the disclosure of the requested information, as evidenced by the national media interest and the requests from Assembly Members in Wales for a full investigation into the University. The Commissioner also accepts the complainant's arguments in respect of whether or not the information contained in the Risk Review is out of date. The Commissioner agrees that the fact that the University intends to take further action on the recommendations included in the review, and the fact that the University does intend to publish the Risk Review at a later date, suggests that the information contained within it remained relevant (rather than out of date) at the time of the request. The Commissioner considers that there is a public interest in the publication of the Risk Review, whether or not the information contained within it was the settled, or current, view of the University.

53. However, along with arguments presented in the confidential annex, the Commissioner considers, as set out in paragraph 48 above, that these factors could lead to reputational damage, and therefore have a direct negative impact on the University's income.

54. It is not possible for the Commissioner to include any further detailed analysis in respect of his balancing of the public interest arguments, as this is likely to reveal the content of the withheld information itself. Therefore this analysis is set out in the confidential annex.

55. Whilst the Commissioner accepts that there is public interest in the disclosure of the Risk Review, he considers that it is outweighed by the public interest in maintaining the exemption. The Commissioner has taken into account the timing of the request. The conclusion of the Commissioner is therefore that the public interest in the maintenance of the exemption outweighs the public interest in disclosure. Whilst he has recognised the significant public interest factor in favour of disclosure of the information in question, he concludes that this is outweighed by the public interest in avoiding prejudice to the commercial interests of the public authority and of its collaborative centres.

Section 22

56. As the Commissioner considers that the exemption at section 43(2) of the Act is engaged, he has not gone on to consider the University's application of section 22 of the Act.

Procedural Requirements

Section 17

57. Section 17(1)(c) provides that a refusal notice must state (if it would not otherwise be apparent) why an exemption applies to any withheld information. The University issued its refusal notice on 7 June 2010, and claimed reliance on section 21 of the Act, whilst stating that the information in question was commercially sensitive, and that "a case could easily be made for the application of section 43 of the Act". Since the University did not explain why the exemption at section 43 of the Act applied to the information in question, the University breached section 17(1)(c).

58. Section 17(3)(b) provides that a public authority must state its reasons for considering that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The University did not provide such reasons in respect of section 43(2) within its refusal notice or in any separate notice, and therefore breached section 17(3)(b).

The Decision

59. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- The public authority correctly applied section 43(2) to withhold the information requested

60. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The public authority breached section 17(1)(c) by failing to explain within its refusal notice why the exemption at section 43(2) applied to the information in question.

- The public authority breached section 17(3)(b) by failing to provide its reasons for claiming that the public interest in maintaining the exemption at section 43(2) outweighed the public interest in disclosing the information.

Steps Required

61. The Commissioner requires no steps to be taken.

Other matters

62. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

63. There is no timescale laid down in the Act for a public authority to complete an internal review. However, as he has made clear in his *'Good Practice Guidance No 5'*, the Commissioner considers that these internal reviews should be completed as promptly as possible. In the absence of exceptional circumstances, a reasonable time for completing an internal review is 20 working days from the date of the request for a review. In exceptional circumstances it may be reasonable to take longer, but the total time taken should not exceed 40 working days, and as a matter of good practice the public authority should explain to the requester why more time is needed.

64. In this case the complainant's internal review request was made on 8 June 2010 and the public authority communicated its decision on 28 July 2010, therefore taking 35 days to complete the review. The Commissioner does not believe that any exceptional circumstances existed in this case to justify any delay, and he therefore wishes to register his view that the public authority fell short of the standards of good practice in failing to complete its internal review within a reasonable timescale.

Right of Appeal

65. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0300 123 4504
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

66. 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.

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

Dated the 1st day of March 2011

Signed ……

Anne Jones
Assistant Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

Refusal of Request

Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,
(b) specifies the exemption in question, and
(c) states (if that would not otherwise be apparent) why the exemption applies."

Section 17(3) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case , the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

Information intended for future publication

Section 22(1) provides that –

"Information is exempt information if-

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),

(b) the information was already held with a view to such publication at the time when the request for information was made, and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a)."

Section 22(2) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which falls within subsection (1)."

Commercial interests.

Section 43(1) provides that –

"Information is exempt information if it constitutes a trade secret."

Section 43(2) provides that –

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

Section 43(3) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2)."