

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 July 2017

Public Authority: Bolton College
Address: Deane Road Campus
Deane Road
Bolton
BL3 5BG

Decision (including any steps ordered)

1. The complainant submitted a request to the public authority for a copy of two due diligence reports produced pursuant to the proposed merger of the public authority, Bury College, and the University of Bolton. The public authority withheld the reports in reliance on the exemptions contained at sections 41(1), 42(1) and 43(2) FOIA.
2. The Commissioner has concluded that the public authority was entitled to withhold the reports on the basis of the exemption contained at section 43(2) FOIA.
3. No steps are required.

Request and response

4. The complainant submitted a request for information to the public authority on 7 August 2016 in the following terms:

“Dear Chair of Governors Bolton College,

I would be grateful if you supplied me with a description of ‘due diligence’ process, followed by Bolton College, in respect of the Vice Chancellor of University of Bolton, in relation to the current proposed merger with The University of Bolton. I would also like a copy of the report that resulted from the process of ‘due diligence’”.

5. The public authority provided its response on 31 August 2016. With regard to the first part of the request for a description of the due diligence process, the authority explained that it had appointed and instructed external specialist legal advisors, Mills & Reeve LLP, and external specialist financial advisors, BDO UK LLP, to undertake an appropriate due diligence exercise on the proposed arrangement and institution. Each independent external advisor reported directly on its findings to the public authority’s governing body prior to it making its determination on the merger proposal.
6. In terms of the second part of the request for a copy of the report that was produced pursuant to the due diligence undertaken, the public authority confirmed that it “holds the information”. The information was however withheld by the authority in reliance on the exemptions contained at sections 43(2)¹, 41(1)² and 42(1)³ FOIA.
7. On 31 August 2016 the complainant requested an internal review of the public authority’s decision to withhold the information held pursuant to his request for a copy of the due diligence report.
8. The public authority wrote to the complainant with details of the outcome of the internal review on 28 September 2016. It upheld the original decision.

¹ Prejudice to any person’s commercial interests.

² Information provided in confidence.

³ Legal professional privilege.

Scope of the case

9. The complainant contacted the Commissioner on 28 September 2016 in order to complain about the public authority's handling of his request. He specifically disagreed with the decision to withhold the information held by the authority pursuant to his request for a copy of the due diligence report.
10. During the course of the investigation, the public authority clarified that it holds two due diligence reports produced by Mills & Reeve LLP and BDO UK LLP within the scope of the request. The proposed merger is between Bolton College (the public authority in this case), Bury College and the University of Bolton. The due diligence review which was commissioned by the public authority was conducted in relation to the University of Bolton only.
11. Therefore, the scope of the Commissioner's investigation was to determine whether the public authority was entitled to withhold the due diligence reports referred to above in reliance on the exemptions contained at 43(2), 41(1) and 42(1).

Reasons for decision

Section 43(2)

12. The public authority has withheld both reports in reliance on this exemption.
13. Section 43 FOIA states:
 - 1) "Information is exempt information if it constitutes a trade secret.
 - 2) 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).
 - 3) 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)."

Complainant's position

14. The complainant submitted that there was, in his view, a lack of transparency around the proposed merger between the public authority, Bury College and the University of Bolton.
15. He expressed very strong reservations regarding the suitability of the Vice-Chancellor of the University of Bolton to "take charge" of the proposed merger based on a number of allegations in relation to the Vice-Chancellor's conduct.

Public authority's position

16. The public authority's position is that disclosing the reports would prejudice its and the University's commercial interests.
17. The public authority argued that disclosure would jeopardise existing contractual arrangements it has with the University of Bolton. Specifically, it would prejudice the public authority's negotiations in relation to collaborative education provision as well as the ongoing merger discussions and plans between the authority and the University that have yet to be fully agreed and finalised. In support, it provided the Commissioner with published minutes of its meetings from September 2015 in relation to the merger. It drew attention to the fact that the merger was initially agreed by the authority on 14 July 2016 with a target vesting date of 1 January 2018. However, this was pushed back to 31 March 2018 following a meeting in September 2016 at which concerns were expressed about the merger structure model.
18. It explained that the public authority is a collaborative partner institution of the University with the University validating a number of the authority's courses and the authority offering franchised University higher education courses. These collaborative arrangements provided the public authority with an income of circa £486,000 for the year ending 31 July 2016 with similar projections for the year ending 31 July 2017. It argued that this commercial relationship would be jeopardised should it disclose the withheld reports in breach of the non-disclosure agreement between the public authority, Bury College and the University. If the University was to choose an alternative Further Education provider, this would have a significant financial impact on the public authority.
19. In terms of prejudice to the University's commercial interests, the public authority made the following submissions in support of its position based on discussions it has had with the University.
20. As a small higher education institution, the University's most profitable commercial activity is that of its educational collaborative provision. It is

involved in validating degree awards and/or franchising its degree programmes with circa 18 UK and 17 international collaborative partner institutions. Franchising and validating programmes with partner institutions is a very competitive market. In the year ending 31 July 2016 the University received approximately 10% of its income from public funding with its student tuition fees and collaborative partner contracts providing 82% of its income.

21. The University's current and future plans, strategies and forecasts would be jeopardised as it would likely reveal market sensitive information, key savings and efficiencies (current and anticipated). Competitors could use this information to give them an advantage that would be damaging to the University and undermine its ability to compete effectively in an extremely competitive market.
22. Furthermore, disclosure would enable competitors to revise their own strategies or develop ideas further in order to gain a more competitive edge. This could be detrimental to the University as the contents would benefit competitors and impact on the University's ability to compete with existing University competitors and the increasing number of private for-profit education providers entering into the higher education sector.
23. In addition, disclosure would provide the University's competitors with an insight into its future plans, targeted markets and forecasts thereby providing competitors with an advantage in maximising, exploiting or targeting areas of activity or collaboration that they had not previously considered.
24. Finally, disclosure could threaten the confidence that suppliers and/or collaborators have in both the University and the public authority to respect the confidentiality of active, sensitive commercial information. This would undermine the ability of both institutions to achieve their objectives.
25. In terms of the balance of the public interest, the public authority submitted that the public interest in maintaining the exemption outweighs the public interest in disclosure because of the damage disclosure would do to the commercial interests of both institutions. It noted that there is little if any public interest in compromising both institutions' current and future relationships with third parties and also weakening their negotiation positions.

Is the exemption engaged?

26. The Commissioner first considered whether the public authority was entitled to engage the exemption at section 43(2).
27. In order for a prejudice based exemption such as that contained within section 43(2) to be engaged, the Commissioner considers that three criteria must be met.
 - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure ‘would be likely’ to result in prejudice or disclosure ‘would’ result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner’s view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
28. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the public authority clearly relates to the interests which the exemption contained at section 43(2) is designed to protect.
29. The Commissioner is satisfied that the prejudice alleged by the public authority is real and of substance, and there is a causal relationship between the disclosure of the requested information and the prejudice which the exemption is designed to protect. She must however establish whether disclosure would, or would be likely to result in the prejudice alleged (ie the third criterion).
30. The Commissioner accepts that the reports provide significant insights into the University’s operations, financial relationships and commitments, strategies, plans and forecasts that would be beneficial to competitors in the higher education market in ways that could prejudice the University’s commercial interests.

31. In view of the existence of a non-disclosure agreement between the University, the public authority and Bury College, she is further persuaded that disclosure in the circumstances of this case would undermine confidence in the ability of both institutions to maintain confidences in respect of commercially sensitive information. This would clearly have a negative effect on relationships with current and prospective partners, and consequently on their ability to achieve their commercial objectives.
32. She also accepts that there is a real chance the University would be less willing to engage in commercial collaborative undertakings with the public authority if there is a risk that in doing so it could be placing its own commercial interests at significant risk. This would undoubtedly prejudice the public authority's commercial interests.
33. The fact that negotiations or at least discussions, had not fully concluded at the time of the request also increased the chance that disclosure could have made the University a reluctant participant in those discussions, certainly with less candour anyway, for fear that market sensitive information about their institution could be revealed to competitors. Ultimately, this would leave all the parties dissatisfied with the level of scrutiny afforded to the process.
34. Therefore, the Commissioner has concluded that disclosure would present a real and significant risk of prejudice to the commercial interests of the University and the public authority. Consequently, she finds that the exemption was correctly engaged.
35. The Commissioner does not consider that the public authority has successfully discharged the evidential burden of proof necessary to support the view that the higher threshold of prejudice (ie "would prejudice") applies. However, she has not ruled that the higher threshold definitely does not apply. In her opinion, the public authority's submissions are not clear and persuasive enough in support of the higher threshold of prejudice for her to make that finding in the circumstances of this case.

Public interest test

36. The exemption is however subject to the public interest test set out in section 2(2)(b) FOIA. The Commissioner must therefore also consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosing the due diligence reports.

37. The complainant has argued that there is a lack of transparency around the proposed merger. He also considers the Vice-Chancellor unsuitable to lead the merger.
38. In rebuttal, the public authority pointed to the published minutes of its meetings from September 2015 in relation to the merger. It explained that the origin of the merger was the implementation of the Area Review of Greater Manchester in September 2015. The full minutes of the meetings in relation to the merger are published on its website once agreed at the next meeting. The authority's Governors have also been kept fully updated throughout the process. It submitted that the minutes provide a clear and transparent audit trail of merger discussions.
39. The public authority further explained that because the merger proposal included the dissolution of its Further Education Corporation, it is subject to the Further Education Corporations (Publication of Proposals) (England) Regulations 2012. In order to comply with the regulations, the timescale of actions was agreed by the public authority on 11 May 2016 and recorded in the minutes. A public consultation was also launched on 11 May 2016 and closed on 30 June 2016 with the analysis of the outcome presented to the public authority on 14 July 2016. The due diligence reports were also considered at the meeting on 14 July 2016.
40. Having established that disclosure would present a real and significant risk of prejudice to the commercial interests of the University and the public authority, the Commissioner considers that there is a very strong public interest in preventing such an outcome. In the circumstances therefore, she considers that the steps the University has taken so far to make the process transparent satisfies the public interest in that regard. Clearly, more could always be done. Inevitably however, in striking the balance that must be struck between being transparent and protecting the commercial interests of the relevant parties, some significant information will be withheld.
41. Furthermore, she has not seen any substantiated evidence to support the view that the Vice-Chancellor is unsuitable to lead the merger or the merged institutions. In any event, she has not identified any information in the reports to support disclosure for that reason alone.
42. Therefore, on balance, she has concluded that the public interest in maintaining the exemption outweighs that in disclosing the reports.
43. In light of her decision, the Commissioner has not considered the applicability of the remaining exemptions relied on by the public authority. However, on the basis of her review of the reports, she would note that it appears likely that elements of the reports will also engage the exemption at section 42(1).

Right of appeal

- 44. 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

- 45. 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.
- 46. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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