

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 November 2017

Public Authority: University of Exeter

Address: Northcote House
The Queens Drive
Exeter
Devon
EX4 4QJ

Decision (including any steps ordered)

1. The complainant has requested a copy of a contract between the universities of Exeter and Plymouth in respect of the provision of a particular training course. Ultimately the University of Exeter disclosed a redacted version of the report. The redacted information was withheld under section 43 on the basis that its disclosure would prejudice commercial interests.
2. The Commissioner has had to address one of the arguments presented by the university in a confidential annexe. The Commissioner's decision is that the exemption provided by section 43 does not apply.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - To disclose the withheld information.
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 21 March 2017 the complainant made the following request for information under the FOIA:

“A full true copy of the contract between the University of Exeter and the University of Plymouth for the provision of educational services in respect of the education/training of Trainee Clinical Psychologists employed by Taunton and Somerset NHS Foundation Trust.”

6. On 20 April 2017 the university responded by refusing to provide the requested information. It cited the exemption under section 43(2) of the FOIA (commercial interests) as its basis for doing so.
7. The complainant requested an internal review on 21 April 2017. The university sent him the outcome of its internal review on 22 May 2017 in which it upheld its original position.
8. Following the Commissioner’s intervention the university provided the complainant with a redacted version of the contract on 23 October 2017. However the complainant advised the Commissioner that he was not satisfied with this response and still wanted a copy of the entire contract.

Scope of the case

9. The complainant contacted the Commissioner on 3 August 2017 to complain about the way his request for information had been handled. He put forward ten points in support of his argument that the information should be disclosed. In broad terms these were that there was no commercial competition for the provision of the training courses to which the contract related and that in any event there was a public interest in having access to the contract.
10. The Commissioner considers that the matter to be decided is whether the information the university is still withholding under section 43(2) engages that exemption and, if so, whether the public interest favours maintaining the exemption.

Reasons for decision

Section 43(3) – prejudice to commercial interests

11. Section 43(2) of FOIA states that information is exempt if its disclosure would prejudice the commercial interests of any person, including those of the public authority holding it.
12. In the request the information sought was referred to as a "contract". The university refers to the requested information as a memorandum of understanding (MOU) between the universities of Exeter and Plymouth. It is understood that the two universities made a joint bid to the Special Health Authority, now Health Education England (HEE), to provide educational courses in clinical psychology. It appears that the actual contract is between the University of Exeter and HEE. The MOU sets out certain aspects of the relationship between the two universities for the joint delivery of courses under that contract. In effect it binds the University of Plymouth to the terms of that contract as if it was a party to the contract. The university has argued that disclosing the information it is continuing to withhold would, or would be likely to, prejudice both its own commercial interests and those of the University of Plymouth.
13. Where a public authority is arguing that disclosing information has the potential to prejudice not just its own commercial interests, but those of a third party, it is required to satisfy the Commissioner that the arguments it is presenting reflect the genuine concerns of that third party. To this end the University of Exeter has advised the Commissioner that it consulted with the University of Plymouth over this matter. The Commissioner accepts that the arguments presented reflect the concerns of the University of Plymouth.
14. The exemption can be engaged on the basis that disclosing the withheld information either 'would' or 'would be likely to' prejudice commercial interests. This establishes two thresholds for engaging the exemption. The lower one, 'would be likely to' prejudice has been interpreted by the Tribunal as meaning that the chance of prejudice being suffered should be more than a hypothetical possibility; there must be a real and significant risk. It follows there must be a greater risk of the prejudice occurring for the exemption to be engaged on the basis that the prejudice 'would' occur.
15. The Commissioner notes that in its refusal notice and at the internal review stage the university claimed the lower threshold, i.e. that disclosure 'would be likely to' prejudice both its own and the University of Plymouth's interests. However in its submission to the Commissioner the university has simply argued that disclosing the information 'would' prejudice commercial interests. It is therefore not clear how likely the university considers the risk of prejudice to be. The Commissioner has therefore considered the application of the exemption on the basis of the lower threshold, i.e. that the prejudice is only 'likely' to occur. Clearly, where the Commissioner finds an exemption is not engaged on the

lower threshold, she would not find it be engaged under the higher test that the prejudice 'would' occur.

16. The university has identified two sets of information and applied different arguments as to how the disclosure of each set of information would be likely to prejudice the commercial interests of both itself and the University of Plymouth. The argument in respect of the first set of information cannot be discussed in the open version of this notice as to do so would itself reveal information which the university considers prejudicial. The Commissioner has therefore produced a confidential annexe to this notice which will be made available solely to the university. For the purposes of the open version of the notice, the Commissioner is only prepared to say that she does not accept this argument. The exemption is not engaged in respect of the first set of information.
17. The second set of information has been withheld on the basis that its disclosure would be likely to undermine the position of both universities should the HEE retender the contract for the delivery of the courses. It is also concerned that disclosing the information could impact on the student's perception of the delivery of the courses.
18. Having viewed the withheld information the Commissioner finds it very difficult to understand how the actual information in question would have either of these two effects. The vast majority of the clauses withheld under these arguments appears to be unremarkable, simply setting out the sort of arrangements that one would expect in any MOU of this type. It could be argued that one clause revealed something about how the value of the contract would be shared between the two universities. However the Commissioner considers the effect of this clause would become apparent upon implementation of the MOU and she is not persuaded that the disclosure of this clause would have any real impact on student's perception of the courses.
19. Nor is it clear how the disclosure of any of these clauses could undermine the position of either university if the contract with the HEE was retendered. It does not reveal anything about the quality of the courses offered, or suggest any innovative teaching methods, or even anything meaningful about the way the universities' approach to tendering for the contract. It simply sets out the mechanism by which the University of Exeter's responsibilities under its contract with HEE are shared by the University of Plymouth. As such it relates to the nature of the relationship between these two parties and is therefore unique to them. The university has failed to explain how disclosing such information to a rival bidder would enable that rival to undermine the position of either university if the contract with HEE was retendered. Furthermore, the university has not explained when it is likely that the contract for delivering the courses would be retendered. When initially

writing to the university the Commissioner set out the complainant's arguments as to why he did not accept there was commercial competition for such a contract and the university did not take the opportunity to counter those arguments.

20. In light of the above the Commissioner is not persuaded that disclosing the second set of information would be likely to prejudice the commercial interests of either university. The exemption is not engaged and therefore the university is required to disclose these clauses. As the Commissioner has already found that the exemption does not apply to the first set of information withheld under the arguments discussed in the confidential annexe, this means that the university is required to provide the complainant with a full un-redacted copy of the MOU it holds.

Right of appeal

21. 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

22. 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.
23. 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

Rob Mehan
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF