

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 8 December 2020

**Public Authority:** Office for Students  
**Address:** Nicholson House  
Lime Kiln Close  
Stoke Gifford  
Bristol  
BS34 8SR

#### Decision (including any steps ordered)

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1. The complainant requested copies of information demonstrating the action taken in respect of a particular institution. The Office for Students ("the OfS") refused to confirm or deny holding relevant information as it stated that to do so would prejudice its regulatory functions.
2. The Commissioner's decision is that the OfS was entitled to rely on section 31(3) to refuse to confirm or deny holding information within the scope of the request and that the public interest favours maintain the exemption. However, as it failed to issue its refusal notice within 20 working days, the OfS breached section 17 of the FOIA.
3. The Commissioner does not require further steps.

#### Background

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4. During 2019, the complainant appears to have made several allegations to the OfS about a particular university ("the University"). The allegations involved were serious and the complainant stated that he could back up his allegations with evidence. The OfS appears to have acknowledged receipt of the allegations whilst simultaneously informing the complainant that he would be unlikely to learn the eventual outcome.

## Request and response

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5. On 24 February 2020, the complainant wrote to the OfS in the following terms:

*Throughout 2019, I lodged a series of complaints with the Office For Students regarding [the University]...It may seem unusual to make this approach via both the Press Office and the Freedom of Information routes. However, I am doing this in the hope that at least one will furnish me with a worthwhile response (for use in my book).*

*"In short, I never received an answer as to what (if anything) had been done regarding my complaint. Instead, I was told it was all "confidential".*

*"I would argue that it is strongly in the public interest that the Office for Students releases more information regarding this case - if only to demonstrate that some action has been taken and thus the regulator is doing what it should be doing."*

6. The OfS replied on 25 February 2020. It sought to clarify the request in the following terms:

*"Is your FOI question the following: 'What (if any) action has been taken' with regards to the notifications/complaint that you sent to OfS?"*

7. The complainant responded on the same day thus:

*"I appreciate this question may sound vague. (I've submitted hundreds of FoI requests and they are usually more precise).*

*"I have kept it vague because:*

*1) I am no expert on the precise powers and workings of the Office For Students.*

*2) The answers I initially received from the Office For Students was vague. They amounted to little more than "we take such matters seriously but we cannot tell you anything else because it's confidential).*

*3) I didn't want to create any restraints that could prevent me getting a full and frank response.*

*"Hopefully my question is good enough to secure the answers I am looking for (e.g. was an investigation carried out, were [the*

*University's] managers questioned, were any sanctions taken etc)."*  
[sic]

8. The OfS issued its formal response to the request on 29 March 2020. It refused to confirm or deny holding information within the scope of the request. It stated that it was relying on section 31(1)(g) together with 31(2)(c) to refuse to confirm or deny holding information.
9. The complainant sought an internal review on 30 March 2020. Following an internal review the OfS wrote to the complainant on 29 April 2020. It largely upheld its original position although it now noted that it was relying section 31(3) of the FOIA specifically to refuse to confirm or deny holding information.<sup>1</sup>

### Scope of the case

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10. The complainant contacted the Commissioner on 29 May 2020 to complain about the way his request for information had been handled.
11. The Commissioner wrote to the OfS to explain that she considered that the actual request was the line in brackets at the end of the complainant's correspondence of 25 February 2020 (following the "eg."). She noted that the request appear to consist of three individual elements and that, whilst the "investigation" and "questioning" elements, were closely related, the "sanctions" element was not. The Commissioner pointed out that the OfS already published some information about regulatory action it had taken and asked it to explain whether or not there would be an expectation that any information about sanctions would be published. The Commissioner noted that both the prejudice test and the public interest balancing test would be more likely to favour issuing a confirmation or a denial in relation to sanctions than in relation to the other two elements because a formal sanction would indicate fault.

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<sup>1</sup> The OfS, whilst informing the complainant that it was neither confirming nor denying holding information in its initial response, appeared to cite section 31(1)(g) of the FOIA which is an exemption from the duty to communicate information, as its reason for doing so, rather than section 31(3) – which is an exemption from the duty to confirm or deny that information is held. Given that section 31(3) explicitly refers back to the functions set out in section 31(1) and that the OfS has always been clear that it was neither confirming or denying holding information, the Commissioner does not consider that the complainant was put under any significant disadvantage in either seeking an internal review or in pursuing this complaint.

12. During the course of the investigation, the OfS issued a further statement to the complainant in response to the request:

*"The OfS can confirm that it has not exercised any of the following statutory powers in respect of any registered higher education providers to date: (a) suspension of registration; (b) mandatory removal of registration; (c) revocation of degree awarding powers; and (d) the imposition of a financial penalty. However, for the reasons previously given, our position remains that we can neither confirm nor deny whether we are investigating or are considering taking any regulatory action in respect of any registered higher education providers."*

13. The Commissioner considers that the scope of her investigation is to consider whether the OfS was entitled to rely on section 31 of the FOIA to refuse to confirm or deny holding further relevant information.
14. For the avoidance of doubt, the OfS has not informed the Commissioner as to what information it might or might not hold in respect of the request – nor has the Commissioner sought to establish whether relevant information is held. Nothing in this decision notice should be taken as indicating that the OfS does or does not hold any particular piece of information – save for the records that are already in the public domain.

### **Reasons for decision**

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15. Section 31(1) of the FOIA states that:

*Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—*

*(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),*

16. Section 31(2)(c) of the FOIA states that one of the purposes referred to in the above sub-section is:

*the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise*

17. Section 31(3) of the FOIA states 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 any of the matters mentioned in subsection (1)*

18. Therefore a public authority can refuse to confirm or deny holding relevant information if to do so would risk undermining the ability of a regulator to go about its work.
19. In this particular case, the OfS itself is the regulator in question – therefore the Commissioner is satisfied that the relevant limb of the exemption has been cited.
20. The exemption can be engaged on the basis that disclosing the information either “would” prejudice the regulatory function, or the lower threshold that disclosure only “would be likely” to prejudice that function. For the Commissioner to be convinced that prejudice “would” occur, she must be satisfied that there is a greater chance of the prejudice occurring than not occurring. To meet the threshold of “would be likely to” occur, a public authority does not need to demonstrate that the chance of prejudice occurring is greater than 50%, but it must be more than a remote or hypothetical possibility.
21. The Commissioner’s approach to the prejudice test is based on that adopted by the Information Tribunal in *Christopher Martin Hogan and Oxford City Council v the Information Commissioner* EA/2005/0026 and 0030. This involves the following steps:
  - Identifying the “*applicable interests*” within the relevant exemption
  - Identifying the “*nature of the prejudice*”. This means:
    - Showing that the prejudice claimed is “*real, actual or of substance*”;
    - Showing that there is a “*causal link*” between the disclosure and the prejudice claimed.
  - Deciding on the “*likelihood of the occurrence of prejudice*”.

#### *The OfS’s position*

22. The OfS explained that it had been established and designated as a regulator by the Higher Education and Research Act 2017 (HERA). HERA requires the OfS to maintain a register of higher education providers. Any provider meeting the registration criteria must be added to the register, but it must continue to meet the criteria in order to remain on the register. The OfS therefore has a responsibility to:

*“determine and publish the initial and ongoing registration conditions. Accordingly, the OfS monitors providers on an ongoing*

*basis to assess whether they are complying with their registration conditions."*

23. If a provider has breached the conditions of registration (for example by failing to ensure that its awards of degrees were of a sufficiently high quality), the OfS has the power, under HERA, to issue a monetary penalty notice, suspend the provider's registration (and, hence, its ability to charge the highest tuition fees) or, for the most serious breaches, remove a provider from the register altogether.
24. HERA sets out a statutory requirement for the OfS to publish information regarding the suspension or expulsion of providers from the register – although it has discretion over the timing of publication. Where providers are granted the ability to confer degrees or have that ability removed, this must be done by statutory instrument. In respect of monetary penalties, the OfS has discretionary powers to publish this information.
25. The OfS also noted that, unlike a regulator such as the ICO, its founding legislation did not give it a role to deal with individual complaints or disputes with particular providers. Whilst it would receive "notifications" that particular providers may not be meeting their registration criteria, it was not required to report back, to the individual providing the notification, on any progress that had been made in assessing the merit of any concerns.
26. In respect of this particular request, the OfS argued that confirming or denying that it held relevant information would be tantamount to confirming or denying that it had, was, or would be, investigating the University. It argued that revealing the existence of an investigation would be unfair to the University.
27. Alternatively, even if such an investigation did not or had never existed, the OfS argued that it would still be appropriate to apply a "neither confirm nor deny" response consistently so as to avoid undermining use of the exemption in circumstances where information did exist.
28. In its internal review, the OfS set out three lines of argument as to potential prejudice:

*"A disclosure under the FOIA is tantamount to a disclosure to the general public. To disclose whether a provider is being investigated (and, if so, information regarding the progress and/or outcome of that investigation) would be likely to hamper such an investigation if it is ongoing. This is because the information could tip-off individuals at the provider (and any other parties involved) to destroy or amend relevant evidence before it is obtained by the*

*OfS. Such a destruction of relevant evidence would prejudice that investigation, which in turn would be likely to prejudice the OfS's ability to ascertain whether justification for regulatory action exists/may arise in relation to that provider.*

*"Disclosing information regarding internal deliberations about notifications or investigations would give other providers valuable insight regarding this that some could use to avoid compliance with registration conditions (and possibly regulatory scrutiny during monitoring/investigations) in the future. This would be likely to prejudice the OfS's ability to ascertain whether justification for regulatory action exists/may arise in relation to those providers, in addition to reducing the level of compliance amongst providers. It is therefore important that a regulator is able to have full and frank internal discussions about the merits of intelligence received, without this being disclosed to the sector that it regulates.*

*"Much of the OfS's ability to properly monitor and investigate providers is reliant upon co-operation from them, particularly in relation to obtaining relevant information and documents. Although the OfS has statutory powers that enable it to require a provider to submit specified information, this process is more efficient and effective when providers work in cooperation with it. Information of the type requested is sensitive in nature and often confidential. If providers become concerned that the OfS will disclose their sensitive/confidential information to the public, they would be less likely to cooperate, and possibly withhold information/documents that are relevant to monitoring and investigations. As such, this would prejudice the OfS's functions with regard to ascertaining whether justification for regulatory action exists/may arise in relation to a provider. The OfS makes public announcements from time to time with regard to its regulatory activities, but does so only when it considers that it is appropriate and in the public/student interest to do so."*

29. The OfS also introduced, in its formal submission during the investigation phase, two further arguments in relation to prejudice. Firstly it argued that:

*"The duty of fairness is particularly relevant in relation to information that is critical or could otherwise adversely affect the interests of a third party. It is a well established legal principle that a person should not be criticised in a public report without having a fair opportunity to respond to that criticism;<sup>2</sup> and, a regulator should give any person whose activities are being investigated 'a reasonable opportunity to put forward facts and arguments in*

justification of his conduct of these activities before they reach a conclusion which may adversely affect him.'"

30. Secondly it noted that:

*"In addition to its functions relating to registration and enforcement, the OfS has a number of wider regulatory roles. For example, the OfS is the principal regulator for higher education providers that are exempt charities, and the monitoring authority for higher education bodies with respect to the Prevent duty. In addition to utilising its own sector regulatory functions where relevant, the OfS also has an important role in referring matters to other regulatory bodies for them to utilise their powers. For example, the OfS regularly refers matters, and provides advice to, the Charity Commission, the CMA, HMRC and the National Crime Agency in order for those bodies to consider taking regulatory action. As such, the OfS must be mindful whether the disclosure of information relating to its wider duties (including in response to a freedom of information request) is likely to prejudice the exercise of functions of those other regulatory/enforcement bodies."*

31. After some discussion with the Commissioner about the "sanctions" element of the request and the information already published by the OfS on its website, the OfS agreed to provide the statement quoted at paragraph 12. However, it also noted that:

*"There may be circumstances where, in the opinion of the OfS, it is appropriate to impose other forms of regulatory intervention as an alternative to the above listed formal sanctions. This could include, for example, imposing further or more specific monitoring or formally writing to the senior management team at the provider to set out our concerns alongside the remedial action that we expect that provider to take. This could also include the OfS agreeing voluntary commitments from a provider to address regulatory concerns that we have."*

#### *The Commissioner's view*

32. The Commissioner considers that the OfS's submission would have been somewhat stronger if it had been consistent in its assessment of the likelihood of prejudice. At various points throughout its submission, the OfS has referred to consequences arising from confirmation or denial which "would prejudice", which "would be likely to prejudice", which "would or would be likely to prejudice" and which "could prejudice." In the context of the FOIA, these terms have very specific meanings and are not interchangeable.



33. The Commissioner has therefore decided to assess the OfS's arguments against the lower threshold: that confirming or denying that information was held "would be likely to" cause prejudice. Whilst it is easier to meet this threshold of the prejudice test, the prejudice itself will carry less weight in the public interest test.
34. Having considered the OfS's submission and its internal review, the Commissioner is satisfied that issuing a confirmation or a denial that information is held would be likely to prejudice the OfS's function to ascertain whether regulatory action is justified. Whilst she is not convinced that such prejudice would be more likely than not to occur, she still considers that it is more than a remote possibility.
35. The Commissioner does not consider the two new arguments introduced in the OfS's submission to add substantial weight to the arguments laid out in its internal review.
36. In respect of public law fairness, the OfS's argument appears to relate to the disclosure of information not the confirmation or the denial that information is held. The Commissioner accepts that the OfS would not want to publish criticism of an institution without having given the institution the opportunity to address the substance of that criticism – but confirmation that an investigation had been carried out (or was ongoing) does not, in itself, equate to criticism of the institution in question. If the OfS (hypothetically) did hold information within the scope of the request, it does not follow that the information would necessarily be critical of the University.
37. Whilst the Commissioner accepts that an institution may not always know that it is under investigation, she will deal with this point later as she considers that it is an extension of the arguments presented in the OfS's internal review.
38. In relation to the potential effect on other law enforcement bodies, the OfS has also failed to identify exactly how issuing a confirmation or a denial that it holds information within the scope of this request is likely to affect the work of those bodies: the OfS's argument refers to "disclosure" of information causing problems. Once again, the OfS has not identified a clear causal link between confirmation or denial in respect of this particular request and the negative consequences that might arise. The Commissioner can therefore only regard this argument as hypothetical.
39. The OfS also raised the argument that, even when it publishes the fact that a sanction has been applied, it may not always do so immediately depending on the circumstances. The OfS cited, as an example, the possibility that an institution could have come to regulatory attention

because it was experiencing financial difficulties. Alerting the general public to anticipated or completed regulatory action, before the institution had been able to secure its finances, would risk plunging that institution into further financial difficulties by scaring off potential investors. Whilst the Commissioner accepts that this is a reasonable concern for the OfS to have, she also considers it somewhat generic. The original grounds on which the complainant provided his notification did not relate to the University's financial viability. As the OfS has been unable to draw a causal link between issuing a confirmation or denial in respect of this particular request and the potential consequences in respect of timing, the Commissioner is, again, unable to give this argument considerable weight.

40. That being said, the Commissioner considers that the OfS did, in its internal review, present two powerful arguments about the possibility of prejudice arising from a confirmation or a denial that information is held.
41. As a regulator herself, the Commissioner recognises that, for a regulatory body to be effective it must be able to do two things. Firstly it must occasionally be able to have frank and candid discussions with the entities it regulates, outside of the public sphere. Such conversations enable regulators to "nip in the bud" activities which, if left unchecked, might develop into more serious statutory or regulatory breaches. By having these conversations behind closed doors, the entities being regulated are more likely to be candid and flexible than if they perceive that their reputation could be tarnished.
42. Secondly, the Commissioner recognises that there will be occasions where a regulator needs to create a degree of uncertainty, amongst those they regulate, as to where its resources may be focused at any given time. Regulators have finite resources which they must prioritise according to where they perceive the most serious concerns are (or are likely to occur). The more information about the regulator's allocation of resources it has, the better able an unscrupulous entity will be to make an accurate assessment of the likelihood of a particular activity coming to the attention of that regulator and, hence, the risk of carrying out that activity. This is the equivalent of a burglar wishing to know the patrol patterns of police officers so that they can make an assessment of which houses they can burgle with the lowest risk of being caught.
43. In respect of the first argument, the OfS noted that, whilst it does have some formal powers to require particular information from providers, it is much easier for all concerned if there is a free flow of information between providers and the OfS. It also noted that, whilst it did have powers to require information, there was no criminal offence preventing individuals from destroying or altering records which had been, or would likely be, requested by the OfS.

44. The Commissioner accepts that it will often be the case that, when the OfS receives a notification, it will need to undertake preparatory work prior to contacting the provider in question, or may not need to contact the provider at all. She therefore considers that there will be occasions when a particular provider is unaware that it is being investigated by the OfS.
45. The Commissioner considers that, if a provider were to learn, via a freedom of information disclosure, that it was under investigation, there would be three potential consequences. Firstly, the provider is likely to become much more defensive and less co-operative as it seeks to protect its public reputation. This is likely to make it much more difficult for the OfS to establish the facts of the matter and to ascertain whether regulatory action is justified. Secondly, a provider which might otherwise have accepted an informal solution – such as agreeing to take particular remedial steps – may be less willing to do so if it feels that accepting such an informal solution would be tantamount to an acceptance of fault. If the OfS didn't feel that a formal sanction would be appropriate and the provider refused to accept an informal solution, the OfS might be left without tools by which it could achieve its regulatory objectives. Finally, an unscrupulous provider may decide that it wishes to destroy incriminating or embarrassing information to prevent it from falling into the hands of the regulator. This would have a considerable impact on the OfS's ability to ascertain whether regulatory action is necessary.
46. If the existence of a completed investigation is revealed after the fact, the Commissioner considers that providers are less likely to engage productively with future investigations.
47. Admittedly, a provider which had never been investigated might be quite happy to have that fact revealed to the world at large. However, a neither confirm nor deny response must be used consistently. If the OfS only uses a neither confirm nor deny response when it *does* hold information, that fact is likely to become obvious quite quickly and would defeat the purpose of neither confirming or denying.
48. Turning to the OfS's arguments about priorities, whilst the arguments appear better suited to withholding particular information, the Commissioner does consider that they would also apply to a confirmation or a denial that information is held.
49. By confirming or denying that investigations had taken place in respect of particular types of notifications, the OfS risks revealing, via a mosaic effect, which types of notifications are more or less likely to lead to an OfS investigation and sanctions being applied.

50. Providers would therefore be able to use this information to structure their activities in such a way as to make it less likely that they would come to the OfS's attention. This would mean that a provider would be more likely to engage in activities which are not in the best interests of students but which it has assessed as being low risk. Whilst the OfS could reprioritise its resources to deal with the issue, this would only be effective until its new priorities are revealed – when the process would start again.
51. Whilst the Commissioner accepts that there are limits to which a provider can change their activities to minimise regulatory scrutiny (a specialist arts college cannot easily become a specialist agricultural college just because the OfS is perceived to be focused on arts colleges), she still considers that the risk exists and that it is more than hypothetical.
52. The Commissioner notes that the original request sought information about both "investigations" and "sanctions." Whilst the fact that a particular provider has been investigated would not, in the Commissioner's view, imply that the provider had done something wrong, the fact that a provider had received a formal sanction would indicate a finding of fault. She therefore asked the OfS to consider the issue of sanctions separately to the issue of investigations – particularly given the OfS's statutory duty to publish certain information.
53. Having reconsidered the matter, the OfS made the statement quoted at paragraph 12. However the OfS was keen to draw attention to the fact that its regulatory tools extended beyond the formal sanctions set out in the legislation.
54. The Commissioner considers that the statement made by the OfS in paragraph 12 covers its position on formal sanctions. In relation to informal regulatory action, the Commissioner considers that the effectiveness of such actions rests on the fact that an informal resolution is unlikely to be made public.
55. A provider is much more likely to accept an informal resolution precisely because it is aware that, whilst it will be required to take remedial steps, it does not need to defend its position in public. The provider will be incentivised to deliver on any commitments it has made because it will wish to avoid a public admonishment from the OfS. Because such agreements are effective and are quicker to implement than a formal sanction, there is a strong incentive for informal resolution to be used, where it is appropriate to do so – with formal sanctions reserved for only the most serious breaches of registration conditions.

56. By making the existence of any informal resolutions public, particularly where this is contrary to the expectations of the provider, the OfS undermines its ability to reach informal resolution in the future. If a provider knows that any action will be published anyway, they are much less likely to agree to an informal resolution. This undermines the OfS's ability to regulate effectively because it removes an important regulatory tool.
57. The complainant argued that the OfS's assessment of prejudice was exaggerated. He pointed to the example of the police and argued that:

*"if police forces applied this logic, they would never confirm or deny if there had been an investigation into any offence. Obviously, this is not the case."*
58. The Commissioner does not accept such an argument. Indeed, as her published decision notices show, police forces can and do refuse to confirm or deny whether investigations are ongoing or have taken place. Where an individual has been charged or arrested it can be presumed that some form of investigation has taken place, but where that hasn't happened (or hasn't yet happened), the police would be very unlikely to confirm or deny investigating a particular individual (or entity), for very similar reasons as to those put forward by the OfS – it would give the person or entity identified the opportunity to destroy important evidence before it could be seized.
59. Having considered the OfS's arguments, the Commissioner is satisfied that the OfS has identified potential harms which may arise if it were to confirm or deny holding further information within the scope of the request and that these harms relate to the specific limb of the exemption being relied upon. She considers that those harms are real, actual and of substance. The Commissioner also considers that the OfS has demonstrated a clear causal link between issuing a confirmation or a denial that information is held and the potential harms.
60. In principle, any response provided under the FOIA is provided to the world at large. However, the complainant in this case has been explicit, in his correspondence with both the OfS and the Commissioner, that he wishes to use any information provided in a book that he intends to publish. Therefore the Commissioner considers that wider dissemination of any information the OfS provided (or confirmed it held), if it were to issue a different response to the request, is not a hypothetical possibility but a near certainty.
61. The Commissioner is not satisfied that the prejudices she has identified are more likely than not to occur. Academic integrity, a sense of public duty and the fear of future reputational damage if caught, will inhibit

most providers from destroying information. Providers may also not have the flexibility to “play cat and mouse” with the regulator in respect of their activities.

62. Nevertheless, the Commissioner is satisfied that the possibility of such actions occurring is more than remote and cannot be dismissed as hypothetical. She is therefore satisfied that confirmation or denial that the OfS holds information in respect of this request would be likely to prejudice its ability to ascertain whether regulatory action is or may be necessary.
63. As the OfS has demonstrated that a confirmation or a denial would impede one of the functions set out in section 31(1) of the FOIA, it follows that section 31(3) of the FOIA is engaged.

*Public interest test*

64. Section 31 is a qualified exemption, meaning that, even where it is found to be engaged, a public authority must still demonstrate that the balance of public interest lies in maintain the exemption. This means that, even where the Commissioner has found that prejudice would be likely to result (or, even, would result) from issuing a confirmation or a denial, the public authority may still be required to issue such a response if there is a strong public interest argument for doing so.
65. The fact that potential prejudice has been identified does not automatically tip the balance in favour of maintaining the exemption – however the Commissioner considers that, if an exemption is designed to protect against prejudice, there will always be a substantial public interest in preventing that prejudice from occurring. The strength of that public interest will depend on the severity and the likelihood of the prejudice.
66. The complainant argued that there was a considerable public interest in the OfS disclosing any information it held (or, presumably, denying it held relevant information).
67. The complainant explained that he had raised serious concerns about the operation of the University and, as a result, had been victimised. He argued that he had a strong personal interest in understanding how the OfS had handled his concerns and that there was a wider public interest in understanding how effectively the OfS is performing.
68. The Commissioner also recognises that there is always a public interest in understanding how bodies spend public money. She also recognises, given the seriousness of the allegations presented, that the OfS’s view of the merits of those allegations would be of considerable interest to both current and potential students of the University.

69. However, the Commissioner must weigh those interests against the potentially negative effects that might result from confirmation or denial that relevant information is held.
70. The mere act of confirming or denying that information is held would, in itself, reveal very little about the overall effectiveness of the OfS. Equally, if the OfS were (hypothetically) to confirm that it did hold information in respect of an investigation, that would also not, in itself, reveal the OfS's view of the merits of the allegations the complainant originally made. Admittedly, denying that relevant information was held would (if that were in fact the OfS's position) suggest that the OfS did not consider that the allegations had merit (although it could also suggest that the OfS had not been able to investigate the allegations at that point in time) but the OfS must apply the exemption consistently.
71. The Commissioner considers that there are already processes in place to ensure scrutiny of the work of the OfS: through its parent department, the Department for Education and through Parliamentary scrutiny committees. In addition, the OfS already publishes details of the most serious regulatory action it takes – which reduces any public interest in further transparency.
72. Whilst none of the issues that the OfS has identified are ones that it is incapable of overcoming, the Commissioner considers that it would only be able to overcome those challenges through a considerable diversion of resources. There is a strong public interest in the OfS being able to allocate its resources efficiently to achieve its regulatory priorities.
73. In conclusion, the Commissioner is satisfied that there is a strong public interest in allowing the OfS to go about its work unhindered by neither confirming or denying that relevant information is held. That strong public interest outweighs the very little public interest that would be served if the OfS confirmed or denied it held relevant information.
74. The Commissioner is therefore satisfied that the public interest in maintaining the exemption outweighs the public interest in issuing a confirmation or a denial that relevant information is held. The OfS was therefore entitled to rely on section 31(3) of the FOIA in the manner that it has done.

Procedural Matters

75. Section 17(1) of the FOIA states that when a public authority wishes to withhold information or to neither confirm nor deny holding information it 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.*

76. The OfS's refusal notice was not provided within 20 working days of the date on which it received the complainant's clarified request. The OfS therefore breached section 17 of the FOIA in responding to the request.



## Right of appeal

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77. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

78. 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.
79. 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

**Phillip Angell**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**