

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 16 January 2020

**Public Authority:** Staffordshire University  
**Address:** College Road  
University Quarter  
Stoke-on-Trent  
Staffordshire  
ST4 2DE

#### **Decision (including any steps ordered)**

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1. The complainant has requested information in relation to various sub-contracting institutions providing educational services on behalf of the University of Staffordshire ("the University"). The request was refused on the basis of section 43(2) of the FOIA.
2. The Commissioner's decision is that the section 43(2) exemption is not engaged in relation to the copies of contracts and number of full-time equivalent students (parts 1 and 2 of the request). However, she finds that the exemption is engaged in relation to the gross fee income and invoices (parts 3 and 4 of the request) and that the public interest favours maintaining the exemption and withholding the information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information requested at parts (1) and (2) of the request.
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

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5. On 7 January 2019 the complainant made a request to the University about the profitability and governance of the UK franchises of the University based on the table of sub-contractual arrangements published by the Office for Students. The request was in the following terms:

*"Please provide me with the following information relating to each of the 20-or-so active sub-Contracting institutions providing educational services for the Financial Year 2017:*

*(1) A copy of the up-to-date contract(s) between the Staffordshire University and the Sub-contracting institution.*

*(2) The number of full-time equivalent students being provided for on behalf of Staffordshire University*

*(3) The gross student fees income received by Staffordshire University on behalf of these students.*

*(4) The invoices paid to the sub-contracting institution for the educational services."*

6. The University responded on 7 February 2019 and stated that it would be prejudicial to the commercial interests of the University to release the information. The University therefore stated the information was exempt under section 43(2) of the FOIA.
7. The complainant requested an internal review on 22 February 2019 and the University conducted an internal review and provided the outcome on 18 March 2019. The University maintained its position and stated that information relating to partnership contracts is commercially sensitive as they are negotiated separately and therefore have different fee structures. The University also stated that information on the full costing on partnership courses was not held so it would not be able to determine profit or loss on agreements.

## Scope of the case

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8. The complainant contacted the Commissioner following the internal review on 25 March 2019 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of her investigation to be to determine if the University has correctly withheld the requested information on the basis of section 43(2) of the FOIA.

## Reasons for decision

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### Section 43(2) – prejudice to commercial interests

10. 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.
11. The request is in several parts and the University has considered each part separately but ultimately has concluded that the section 43(2) exemption is engaged for each part of the request as to disclose the information would be likely to prejudice its own commercial interests.
12. 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.
13. The Commissioner notes that the University claimed the lower threshold, i.e. that disclosure 'would be likely to' prejudice its own interests. 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.

### *Copies of current contracts*

14. For the first part of the request the complainant asked for copies of current contracts between the University and sub-contracting institutions.
15. The University has explained that, as is common with many Universities, it engages in sub-contracted educational provision i.e. contracts with third party providers to deliver tuition on its behalf. It states partnership working is central to its connected strategy and as part of this strategy it works with a wide range of educational providers across a number of levels and many subject areas. This supports widening access to higher education and the promotion of social mobility by ensuring students have opportunities to study locally at partner institutions rather than attending the University directly.
16. The University argues that disclosing the contract it has with its educational partners would be likely to prejudice its commercial

interests. It argued it has invested considerable time and money in the creation of the documents which it uses to govern these contractual relationships. It paid its external solicitors to draft a comprehensive and effective model agreement to be used as a template; using knowledge and experience acquired over many years of sub-contracting to adapt aspects of this template to suit specific internal needs and respond to specific challenges that had arisen in previous arrangements and to reflect novel developments with partner institutions.

17. The University considers the templates are valuable commercial assets that belong to them and govern its arrangements with sub-contractors and differentiate it from other Higher Education Institutions. It argues it would be unfair to the University and prejudicial to its legitimate commercial interests if these documents were released into the public domain and were accessible by other competitor institutions.
18. In addition to the value of the standard clauses and structure of the templates, the University also points to the fact the contracts contain sensitive information relating to unit prices, pricing mechanisms and other operational matters which would be of commercial value to competing universities as the models could be used to undercut the University in future negotiations with sub-contractors. The University argues it would also prejudice its ability to negotiate new contracts and to manage existing ones if the details of its existing arrangements and detailed pricing models were available for all current and prospective partners to see; thus its ability to maintain a competitive edge and negotiate best value for students would be undermined.
19. Having viewed the samples of contracts provided by the University the Commissioner finds it very difficult to understand how the actual information in question would have the prejudicial effect argued by the public authority. The vast majority of the contract appears to be unremarkable, simply setting out the arrangements that would be expected in a partnership agreement of this nature.
20. It could be argued that the pricing models within the contracts would reveal something about the contract shared between the partner institutions. However, the Commissioner considers it is not clear how this information would undermine the position of the University either during the current contract lifespan or in any period of renegotiation of the contract as it is likely that unit prices and other prices would change over time.
21. It would seem these contracts are multi-year contracts and do not reveal any innovative clauses or anything about the delivery of the courses in any specific detail. The contracts set out the nature of the relationship between the University and its partner institution and is

therefore unique to those parties. The University has failed to explain how disclosing such information to a rival institute would undermine the position of the University in future retendering, particularly as each contract is likely to be bespoke and the information requested was for the financial year 2017 and the request was made in 2019.

22. In light of the above the Commissioner is not persuaded that disclosing the contracts would be likely to prejudice the commercial interests of the University. The exemption is not engaged and therefore the University is required to disclose these contracts.

*The number of full-time equivalent students*

23. The University argues that disclosing the number of full-time equivalent students on Staffordshire University awards at each of the partner institutions would prejudice the commercial interests of the University because it would highlight for competitors the institutions, courses or geographical locations to target in order to undermine the University's activities or for competitors to develop their own.
24. Furthermore, it is argued that the commercial risk associated with disclosing this information is enhanced due to the varied levels of subcontracting activity within the partner institutions.
25. The Commissioner is not clear as to how disclosing the number of full-time equivalent students being provided study by one of the partnership institutions on behalf of Staffordshire University would be prejudicial to the University's commercial interests. Whilst disclosing this information would show the number of students at each of the partnership institutions this would not necessarily be of any commercial advantage to competitors. Even if the partnership organisation was only providing one course on behalf of the University and the information revealed the number of students on this course it is difficult to see how this information could be used to put the University at a competitive disadvantage, particularly as there may be a wide variety of reasons a student is studying in a particular way at a particular institution.
26. The Commissioner is not convinced that the disclosure of this information, on its own, can be used by competitors in any meaningful way to place the University at a disadvantage and for this reason the Commissioner finds the section 43(2) exemption is not engaged and the information should be disclosed.

*Gross fee income and invoices paid to the sub-contracting institution*

27. The University also considers this information is exempt as it would be likely to prejudice the University's commercial interests. It argues that it operates a confidential business model in which the fees for full-time

students are collected by the University and the fees for part-time students are collected by the partner institutions.

28. In addition to this, the University uses a complex model around collection of Office for Students and Student Loan Company funding where the status of each student determines which party collects the associated funding. These models help the cash-flow of the parties and also means the risk of bad debt can be shared. Accounting reconciliation is undertaken at various points throughout a year and invoices are raised by the University or the partner institution as appropriate.
29. Different pricing mechanisms and income shares apply to different providers depending on individual commercial negotiations and the specific details of each collaboration. The University considers disclosing the income sharing arrangements that apply in respect of each sub-contract would provide valuable intelligence to the University's competitors which could be adopted or modified by them, this in turn would prejudice the University in future negotiations with its sub-contractors. Disclosing income-related information together with full-time equivalent numbers would increase that risk.
30. In relation to invoices paid to the sub-contracting institutions; the University considers the likely prejudice to be the same as for the gross fee income information. The provision of gross fee income and the details of invoices paid to the institutions would produce, it is argued, a misleading impression of the financial situation unless the details of the University's confidential business model (fee invoicing and periodic reconciliation) were also revealed at the same time to explain the figures.
31. In terms of the gross student fee incomes and invoices paid to each of the sub-contracting institutions; the Commissioner can accept there is a stronger argument that disclosing this may be likely to prejudice the University's commercial interests. This information is more specific to each partner institution and in more granular and less generic detail than the contracts themselves. It is reasonable to speculate that should a competitor have access to details of the gross income received by a partner institute, alongside the knowledge of the numbers of full-time equivalent students at each institution, this information could be of value in calculating how much a contract is worth and using this to develop rival bids for future sub-contracts with the University.
32. However, the prejudice argued is prejudice to the University's commercial interests and not those of its partners. The University considers that this potential prejudice to its partners would be likely, in turn, to prejudice the University in future negotiations with its sub-contractors. The Commissioner accepts that if fee incomes and invoices

are disclosed this provides information in the public domain that can be of some use. It is possible that other educational institutions may use this information, along with the knowledge of the number of students at each partner institution, to make a determination as to whether it is financially viable for them to try to enter the same market as the University and provide courses at a cheaper rate to students for the same or similar courses in the same areas.

33. Whilst the Commissioner cannot speculate as to how likely this outcome is she has to acknowledge there is a possibility that this could be a consequence of disclosure and therefore that it would be likely to prejudice the University's commercial interests. For this reason she accepts the exemption is engaged in relation to the gross fee income and invoices paid to the sub-contracting institutions.

*Public interest arguments in favour of disclosure*

34. The University acknowledges there is a public interest in ensuring that sub-contracted provision is an appropriate use of student fees and that it is appropriately governed to maintain academic standards.
35. It accepts there is a public interest in assurances being provided that the arrangements it has are appropriate and represent a prudent use of public funds. However, the University considers that this public interest is safeguarded by the Office for Students (the statutory regulator) by means of its registration process in which the University is required to fulfil the on-going conditions of registration.
36. The complainant argues that although some sub-contractors publish annual accounts that give some indication of the cost and size of their contracts, there is no publicly available information on the income and profit derived by Staffordshire University from these licences. The complainant argues there is public interest in this as it would allow students to gain an indication of the level of investment they are actually receiving, particularly as there is no independent quality assurance process that does not involve parties with direct commercial interests in the provision of the courses.
37. The complainant is concerned that there is no way for students to analyse if they are making good choices in undertaking courses with sub-contractors and if information on gross fee incomes and profits generated by the University versus contracts paid to sub-contractors was available it would allow students to understand the underlying business interests that could be responsible for driving down, or increasing, the quality of what is on offer.



38. Whilst the profit rates on these franchise deals will be known to all the parties involved, students should also be made aware of the quantitative difference between purchasing their education directly from the University or via a sub-contractor so they can make informed decisions.

*Public interest arguments in favour of withholding the information*

39. The University argues that there is a strong public interest in preserving a competitive market for sub-contracted provision, free from distortions resulting from the exploitation of sensitive commercial information unilaterally being put in the public domain. The University considers it needs to have a pool of specialised, well-resourced contractors who can provide tuition in areas where it is either not commercially viable for the University itself to engage in direct provision, and it affords access to students who, for socio-economic reasons, could not otherwise attend University, or where it serves the University's broad objectives and allows it to share its expertise and values more widely in the provision of education.
40. The University argues that negotiating optimal sub-contracting arrangements is indispensable to fulfilling the Government's agenda of making Higher Education more accessible to disadvantaged groups and to ensuring positive outcomes for students. The University argues this would be much more difficult to achieve if it was not free to negotiate in confidence different arrangements with a variety of sub-contractors.

*Balance of the public interest arguments*

41. The Commissioner accepts that there would be some public interest in the disclosure of information that would allow students to scrutinise how the money they are paying for a course is being used and the profit margins involved. That being said, in a large number of cases the reasons students are studying at sub-contracted institutions rather than the University itself directly is due to geography or socio-economic reasons. It is not clear whether understanding the profit margins and value of the contracts would influence the decisions of these students to still take up courses of study at the sub-contracted institutions.
42. Conversely, whilst the Commissioner does not consider the arguments in favour of maintaining the exemption to be particularly strong, she does acknowledge that the University, in using partner institutions to provide courses of study is attempting to make higher education more accessible to students from different backgrounds. There will of course be some profit involved for the University in these contracts and whilst it might be useful for students to understand the profit margins involved it is not unreasonable for the University to be able to generate profit provided it is still providing quality learning to students who may not have had this



accessible to them otherwise. The Commissioner is not clear how disclosing the gross fee income and invoices would be in the public interest.

43. Although the Commissioner has already expressed reservations as to whether the impact of disclosure of gross fee incomes and invoices would be negative as it may lead to greater competition and the University being able to negotiate better value contracts, there is a possibility that it may lead to a reduction in the quality of the services provided in order to undercut competitors or place the University at a commercial disadvantage by alerting other higher education providers to opportunities and areas of demand that they may have been otherwise unaware of that they may attempt to capitalise on leading to the University losing students and thus income. This would be in the public interest as it may lead to increased choices for students but it may have a detrimental affect on the University's finances as they do gain significant funds from the provision of courses via sub-contractors and loss of income may impact on all areas of the University's service provision which would not be in the public interest.
44. The Commissioner does consider these to be finely balanced arguments but the potential for this to impact on the University's overall finances does weigh the arguments in favour of maintaining the exemption and withholding the gross fee income information and invoices. The Commissioner therefore upholds the use of the section 43(2) exemption in relation to this information.

## Right of appeal

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45. 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)

46. 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.
47. 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 .....**

**Jill Hulley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**