IN THE FIRST-TIER TRIBUNAL **Case No. EA/2011/0146**

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM:

Information Commissioner's Decision Notice No: FS50346728/9

Dated: 16th June 2011

BETWEEN

CRANFIELD UNIVERSITY

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

Dr HELEN PECK

Second Respondent

Heard at 45 Bedford Square on 17th and 18th January and at Victoria House on 6th February 2012

Representation: **Cranfield University: Mr James Cornwell**

The Commissioner : Ms Laura Johns

Dr Peck represented herself and made written submissions on 6th February.

Date of decision 5TH March 2012

BEFORE:

Fiona Henderson (Judge)

Suzanne Cosgrave

And

Dave Sivers

Subject matter: FOIA – s 43 Commercially sensitive information

-s 40 data protection

Cases:

John Connor Press Associates Limited v Information Commissioner EA/2005/0005

R (on the application of Department of Health) v Information Commissioner [2011] EWHC 1430 Admin

Corporate Office of the House of Commons v IC and Norman Baker MP EA/2006/0015 & 16
Corporate Office of the House of Commons [2008] EWHC 1084

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2011/0146**

GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below and in the confidential annex, the Tribunal upholds the Decision Notice in relation to the material withheld pursuant to s43(2) FOIA and allows the amended grounds of appeal in relation to the material withheld pursuant to s40 FOIA and amends the Decision Notice FS50346728/9 dated 16th June 2011 as follows.

SUBSTITUTED DECISION NOTICE

Dated:	**5th March 2012**
Public authority:	**Cranfield University,**
Address of Public Authority:	**Cranfield, Bedfordshire, MK43 0AL**
Name of Complainant:	**Dr Helen Peck**

The Substituted Decision:

For the reasons set out in the Tribunal's determination and confidential annex the substituted decision is that in relation to items 1-6 as identified in the amended grounds of appeal, s 40(2) FOIA is engaged because disclosure would breach the first data protection principle as condition 6 of Schedule 2 FOIA is not fulfilled as the rights, freedoms and legitimate interests of the data subjects outweigh the legitimate interests of the public.

Action Required:

Cranfield are directed to disclose all the withheld disputed material save items identified in their application to amend the grounds of appeal as items 1-6 within 35 days of the date of this decision.

Signed

Fiona Henderson (Judge)

REASONS FOR DECISION

Background

1. Since 1984, Cranfield University has provided academic training courses on defence related subjects for the MOD. These are delivered using MOD premises at Shrivenham by Cranfield Defence and Security (which is one of the Schools of the University). These courses are tailored to the specific requirements of the MOD and are currently post graduate and generally at practitioner and expert level. They are provided pursuant to a 22 year contract[1] entered into in 2006 following a competitive tender process.

2. The AP contract has break and termination provisions and is subject to annual agreement of the programme for delivery of courses and services for the MOD. At specified times the contract requires Cranfield to compare the quality and price of the services it provides to the MOD with comparable services offered by other organisations (Benchmarking). If the prices collated during a benchmarking exercise, differ by more than a threshold amount, or the MOD does not agree the results, the contract provides that either an adjustment in the contract price is agreed or market testing[2] is to be carried out by Cranfield. The first benchmarking exercise is due in August 2012.

3. In 2009 the MOD notified Cranfield that they had to make substantial savings which would result in a 20% cut in the value of the annual fee. As a result of these changes:
   a) Some courses were discontinued, or restructured,
   b) Some groups were closed or restructured,
   c) As a result of these changes certain posts were put at risk and Cranfield began a formal redundancy consultation process in May 2010.
   d) During the negotiations with the MOD, Cranfield informed them that as provided for in the contract, they would be seeking to reclaim the "exceptional" costs incurred as a result of severance payments attributable to the MOD's change of requirements, in accordance with the AP contract.

[1] The Academic Provider Contract (the AP contract)
[2] Where Cranfield would seek tenders for the services in question to assess the going market rate.

4. Dr Peck is one of the trade union representatives from amongst the academic staff at Cranfield who have been involved in the redundancy consultation process (which is not yet resolved). There has been debate amongst the academic staff as to whether the redundancies were necessary or if a different restructuring or the continuation of courses privately[3] (under licence from the MOD who own the intellectual property rights) would have avoided the need for redundancies. The redundancy situation is not yet resolved because Cranfield's redundancy committee, whilst accepting that a redundancy situation exists, have rejected the proposals due to failures to follow the University's own policy and procedures.

The request for information

5. On 5th June 2010 Dr Peck made 2 requests for information relating to discussions of, plans or proposals for:

    i) the restructuring of courses and departments and

    ii) Redundancies

    at the Shrivenham site.[4]

6. Initially Cranfield withheld all the information under s40[5] FOIA, s 36[6] FOIA and s43[7] FOIA. However, during the Commissioner's investigation a substantial amount of information was disclosed on the grounds that in light of the passage of time s36 FOIA was no longer applicable to much of the material.

7. The Commissioner issued a single decision notice, owing to the factual overlap of the 2 requests, which held that inter alia[8]:

    i) S36 had been correctly applied to the information that remained withheld on this basis.

    ii) S40 had been correctly applied in some but not all instances.

    iii) S43 had been incorrectly applied and consequently there was a breach of s1 FOIA.

[3] Referred to as "Complementary business"
[4] As set out in full at paragraphs 3 and 8 of the Decision Notice
[5] Personal data
[6] Prejudice to the effective conduct of public affairs
[7] Disclosure is likely to prejudice the commercial interests of Cranfield
[8] The Commissioner also found certain procedural breaches which are not the subject of appeal.

8. In the Decision Notice[9] the Commissioner had divided the s43 information into 3 categories:
   i) Information relating to the pricing of the AP contract,
   ii) Information relating to "exceptional costs" i.e. severance costs,
   iii) Information relating to a single communication between two individuals.

   The Commissioner compiled a confidential annex of information where s 40 and s43 had been relied upon unsuccessfully, that Cranfield was ordered to disclose pursuant to the Decision Notice.

The appeal to the Tribunal

9. Cranfield disclosed the category iii) s43 material and the s40 material as listed in the Commissioner's confidential annex. Dr Peck did not appeal the Commissioner's findings in relation to the s40 material that the Commissioner found was properly withheld. In their grounds of appeal dated 13th July 2011, Cranfield appealed the Commissioner's conclusion that s43(2) was not engaged in relation to the first two categories of information.

10. In his reply the Commissioner conceded that, following the detail and arguments provided in the confidential annex to the grounds of appeal, the category ii) disputed information was (contrary to his findings in the Decision Notice) commercial. He maintained however, that the exemption was not engaged in relation to either category because he was not satisfied that disclosure would be likely to prejudice Cranfield's commercial interests.

11. The issues before the Tribunal were:
    a) Whether the Commissioner was wrong to conclude that the disputed information would not be likely to prejudice Cranfield's commercial interests and that consequently s43(2) FOIA was not engaged.
    b) If s43(2) was engaged whether the public interest balance favours maintenance of the exemption in relation to all or any of the disputed information.

[9] At paragraph 96

Preliminary matters

12. During the oral hearing additional material was disclosed from the disputed information on the grounds that:

a) It was no longer commercially sensitive due to the passage of time or

b) The information was in the public domain.

Additionally considerable material from witness statements and submissions which had been served as part of the closed bundle was placed in the open bundle during the hearing on the basis that if the sensitive material was redacted, the surrounding material was disclosable.

13. In light of the disclosure from the disputed information the Tribunal was not asked and did not consider it proportionate in the circumstances of this case to determine whether it had been properly withheld in the first place (as its decision would depend upon the facts of this case and would neither set a precedent for, or bind any future case). Consequently, in light of the aforementioned disclosure the evidence heard relating to that disputed information was curtailed.

14. During the original hearing Cranfield ceased to rely upon s43(2) in relation to the redacted exceptional cost information (save 1 item)[10] arguing that instead the information was personal data and s40 applied. In relation to some of these items they had relied upon s40 FOIA before the Commissioner, but through oversight it had never been claimed in relation to the rest. Whilst the Decision Notice made some general findings in relation to s40 in the body of the decision notice, in his confidential annex , the Commissioner ordered that these items be disclosed because s43 was not engaged but made no explicit finding in relation to s40 where it had been claimed. The oral hearing was adjourned part heard to enable Cranfield to apply to seek leave to amend their grounds of appeal. Neither the Commissioner nor Dr Peck objected to their application and the Tribunal granted leave on 27th January 2012.

15. In relation to paragraph 3 p90 CB the Commissioner contended that the last redaction was information relating to exceptional costs. Cranfield argued that it

[10] Paragraph 3 at p90 CB, p137 ST/1

related to the AP contract as it was pertinent to their pricing mechanism. On reviewing the unredacted material, the Tribunal was satisfied that it fell into both categories in that it showed the way the exceptional costs had been calculated which in turn showed Cranfield's methodology.

Confidential Information

16. S43(2) FOIA provides:

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).

There is no longer any dispute that the information is commercial information. Whilst the MOD were a party to the discussions, Cranfield informed the Tribunal that the MOD had no objection to the information being disclosed and indeed they were not a party to the Appeal and made no representations.

17. There was no dispute between the parties that likely to prejudice[11] should be construed as meaning *"that the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk"*[12]

18. It is not disputed that the information would be of use to a competitor in a re-tendering exercise were one to arise, although the parties did not agree how useful it would be.

How would the information be used ?

19. Cranfield argue that it would provide an insight into how the University operates and prices its services, providing the "price to beat" and would assist competitors in undercutting Cranfield should a tender situation arise in relation to the AP contract. Cranfield argue that they have only been able to bid at such a competitive price because they have devised a unique methodology for pricing.

[11] The limb relied upon by Cranfield
[12] John Connor Press Associates Limited v ICO EA/2005/0005 para 15

They believe that provision of the cost figures would enable competitors to divine Cranfield's methodology, thus enabling them to replicate the cost base and hence to undercut Cranfield. The Tribunal accepts that there would be a particular prejudice in relation to any other competitor also operating at the Shrivenham site. Cranfield also argues that disclosure would place them at a disadvantage against private bodies not subject to the Act (in 2006 all bidders were either public bodies or partnered with public bodies). The Tribunal accepts that there are private companies capable of awarding degrees e.g. BPP and that the ability to award degrees is becoming less important as the MOD is increasingly moving towards Continuing Professional Development (CPD). Additionally the field is likely to become more crowded: in 2006 there were 3 other bidders, but Cranfield's evidence is that had there been a tender situation in 2010 (the relevant date for consideration of the information request) it would have been likely to attract more bidders due to the economic climate.

20. Cranfield argues that the information was "live" in 2010, but the Commissioner argues that the information would be historic[13] at the date of any re-tender which would reduce its commercial utility. Not all of the information was live at the date of the request because whilst some related to courses still provided, much of it related to:

    - courses that were to be discontinued,
    - The Tail Management Programme (TMP) for the running down of the modular masters course which was a unique situation,
    - Transfer of elements from the Weapons & Vehicles Systems MSc course to the Battlespace Technology MSc course was also a one off situation.

21. Whilst Cranfield accept that figures become outdated as costs change, Cranfield's argument is that their method could be derived using modelling if the disputed information were disclosed.

[13] In the context of the date of these request the date of the first benchmarking exercise scheduled for August 2012 means the information was likely to be 3-5 years old were any re-tender situation to have arisen.

The "unique" pricing mechanism.

22. The Tribunal notes that it is Cranfield's case that this is a "one off" contract, indeed Cranfield argue that this pricing mechanism is only of use to them in relation to this contract and not any other contracts they may tender for. The Tribunal heard from Mr Say, Head of Financial Services for Cranfield Defence and Security. His evidence was that the bid which won the AP contract in 2006 took a significant amount of time and resourcing to prepare during which time a unique pricing mechanism was developed from scratch. Although he has not worked in academia before, from his experience at Cranfield and from his colleagues at Cranfield who have worked in other academic institutions he does not believe that this method is used by other academic institutions. We are not satisfied that this is a conclusion we could draw from the evidence before us. Having considered the components as explained in the closed material, the Tribunal considers that these would be common to any such calculation, but we do accept that Cranfield's values are unique.

23. Mr Say's evidence was that if a competitor had the starting point (the course requirements) and the end point (the price) the methodology could be determined using financial modelling and that this process would be assisted by the ability to triangulate the results using cost data from the various courses. A competitor would then be able to apply this to their own figures from which they would be able to make savings and undercut Cranfield.

24. The Commissioner argues that even with the starting and end points Cranfield's assumptions were so varied and unknown that even using modelling it is unlikely that the exact formula would be uncovered. The Tribunal observes that a competitor may not necessarily want to work out how Cranfield has structured its price; once they have the course requirements and the "price to beat" they may prefer to focus their efforts upon applying those to their own structures with the focus being to undercut the price.

25. The Tribunal is satisfied that the use that this information would be put to in a re-tendering exercise is by providing a "price to beat". Even if the information is old or relates to a discontinued course, it would enable a competitor to compare what they would have bid and what Cranfield did in fact bid and to know whether they were charging above or below the Cranfield "rate". If above they could then consider where and to what extent to make savings in their model, and then carry that information forward into a future tender scenario.

26. For the reasons set out above and in the closed annex the Tribunal is not persuaded that the method is unique as such, rather that it includes Cranfield's own assumptions. Additionally the Tribunal notes that there is a lot of pricing information that is generally available from other institutions and consider that pricing information within the industry is not as sensitive as Cranfield would argue because of:

    a) Information already known (e.g. comparable pricing levels, because there is sufficient information publicly available that benchmarking can be conducted, even if not in relation to entire courses.)
    b) Many institutions publish their fees (although we accept that would be the individual student price rather than a bulk purchase price as envisaged by the AP Contract).
    c) In evidence the Tribunal were told that Kings College London and Open University contract with Cranfield to deliver some teaching which Cranfield are then paid for under the AP contract. KCL and OU calculate the course cost using their own pricing mechanisms which they then pass on to Cranfield therefore their starting and end points are available to Cranfield in relation to those modules.

27. Cranfield indicated that they would wish to use their pricing mechanism in any future tender of the AP Contract, however, the Tribunal notes the letter from Jonathan Lyle[14] in which the MOD express some dissatisfaction with the pricing mechanism:

[14] Director Defence Academy Shrivenham (MOD) P322 OB

"..I do however, feel that the mechanism may not reflect the true cost of courses or the elements of education capability which you provide for us, and does little to encourage flexibility or agility in responding to changing customer demand. As we have previously discussed, greater transparency of your pricing and cost models should be something to explore in the very near future."

Additionally reform of the pricing/costing mechanism in relation to the Masters programmes was identified for consideration by the Joint Working Group in October and November 2009.[15] Consequently the Tribunal does not accept that it is inevitable that this pricing mechanism would be used in any future tender.

28. Further any future tender for bulk academic provision to the MOD could be entirely different and might require a new approach. The JWG discussed consideration of a re-focus away from delivering complete Masters programmes towards delivering Masters level modules. However, the Tribunal observes that this is still envisaged within the parameters of the existing AP contract.[16]

Is it likely that a re-tender situation would arise?

29. There must be a causal link between potential disclosure and the prejudice it is alleged would be likely. The Tribunal therefore considers whether there is a real and significant risk that a re-tendering exercise would be likely to take place in relation to all or some of the AP contract. Cranfield argue that this might arise in the following ways:
    i. Market testing.
    ii. Break of the contract.
    iii. Re-tendering part of the contract.
    iv. Unsolicited approach to the MOD by a competitor offering a cheaper alternative.

Market testing:

30. If a market testing process were triggered, providers would have to be prepared to participate in the market testing process where there is no guarantee of a contract

[15] (p305 and p314 OB)
[16] ibid

being awarded because Cranfield have the option of agreeing to perform the contract at or around the tender price. Whilst Mr Say acknowledged that it might be difficult to find tenderers, the Tribunal is satisfied that in the economic climate as it was in 2010 and in light of the evidence that in a recent market testing exercise conducted by Serco at Shrivenham, tenders were submitted , the likelihood is that if market testing were commenced a competitive tender situation would arise.

31. The Tribunal accepts that if the market testing procedure were triggered and disclosure of the disputed information had been made, whilst under the AP contract Cranfield would have the benefit of the benchmarking figures which would not be available to others, their competitors would have the benefit of Cranfield's historic figures and Cranfield would not have theirs.

32. However, market testing under the contract can only arise if a price is not agreed further to the benchmarking exercise. Benchmarking will take place from August 2012 (2 years after the request). It can apply to all the services provided under the contract or some. If Cranfield's price, in comparison to those of other providers ascertained during benchmarking, differs by a specified threshold the MOD can either ask Cranfield to accept the price determined through benchmarking or proceed to market testing. Market testing is a tender exercise (in which Cranfield may itself tender) following which Cranfield can either be asked to accept the price of the successful tender or if this cannot be agreed, the MOD could terminate the contract or part of the contract subject to market testing.

33. The Commissioner relies upon:

a) Cranfield's assertion in correspondence with the MOD that their courses provide value for money and are competitive:

"I do believe that the University is providing the Authority with a product which represents good overall value for money"...

The letter goes on to state:

"In respect of the Academic Provider Contract, the University delivers around 80,000 student days of tuition in return for a Contract Price (excluding income from Military Knowledge courses) of approximately [...], at a delivery cost of approximately [.....] per student day, this compares favourably with other educational institutions".[17]

b) Their argument is that their pricing mechanism enables them to provide a high quality service at the best cost in a way that their existing competitors cannot.

in support of his contention that there is no real prospect that Cranfield will fail the benchmarking exercise and thus trigger a market testing/re-tendering scenario.

34. The Tribunal accepts these arguments and takes into consideration that benchmarking compares the existing rate being already charged by other institutions for comparable services through the use of commercially supported figures. This would not be affected by the disclosure of the disputed information. If it is accepted that a comparable service can be provided at that rate, the Tribunal questions why Cranfield would refuse to accept that this is a fair price and insist on a competitive tender which incentivizes bidders to reduce the price further because of the benefits of being on the Shrivenham campus "behind the wire".

35. For these reasons and those set out in the confidential annex, the Tribunal is not satisfied that even if Cranfield failed the benchmark test (which on their own account around the time of the request seemed unlikely), they would fail to reach agreement under the benchmarking provisions. Consequently the Tribunal is not satisfied that there is a real and significant risk that Market testing would arise.

Termination of the AP Contract:

36. It is accepted that the consequences of losing the AP contract would be devastating for Cranfield; they would have to vacate Shrivenham campus and whilst

[17] Letter from Professor Wallace to the Director Defence Academy Shrivenham (MOD) 15th January 2010 p341 OB

approximately 10% of the work would be relocated, it would not be viable for the university to continue to provide complementary business in this field (private students outside the contract).

37. Cranfield argue that in current economic climate the MOD might seek to terminate and re-tender for all or some services. They rely upon the 20 % cut in the overall value of the service that had taken place in 2009 before the information was requested and Mr Say's evidence that there had been informal conversations "over coffee" in which concerns relating to the major cuts in defence spending were discussed.

38. The Commissioner argues that the punitive elements of the contract make this unattractive especially as the possibility exists for reducing the size of the contract by a threshold amount each year without incurring exceptional or severance costs along with the benchmarking provisions to ensure that the MOD were not paying above the market rate.

39. The Tribunal accepts these arguments and in concluding that there is no real and significant risk that the MOD would terminate the contract it repeats its reliance upon Cranfield's own assessment of its competitiveness as set out in paragraph 33 above and takes into consideration the nature of the relationship between MOD and Cranfield as evidenced in the correspondence which points to the MOD preferring to obtain changes to the content through agreement rather than by breaking the contract. The Tribunal notes that the relationship dates back over 25 years and the terms of the "Draft Joint Statement CY5"[18] which details the *"commitment and flexibility of the negotiating teams on both sides"* and finishes with an assertion that "*we will now be working together to determine in detail how we will work together to take our partnership forward*".

40. Cranfield gives as an example of the possibility that the MOD may want to break the contract the fact that Cranfield no longer runs undergraduate courses for the MOD, which has chosen to send cohorts to other undergraduate universities.

[18] OB p436

However, the Tribunal notes that this did not result in the breach of an existing contract but arose when the contract was redesigned. There is substantial flexibility within the contract, with the MOD being able to add new courses and types of courses and remove others. If the circumstances changed so substantially that the MOD wished to break the whole contract it is most likely to be in a circumstance when they were no longer intending to provide bulk training of this type in which case there would not be an equivalent contract to re-tender.

Re-tendering part of the contract

41. Cranfield argued that re-tendering of the contract could occur either pursuant to market testing or by removing items from the contract with a view to putting them out to re-tender. The Tribunal repeats its findings in relation to market testing.

42. Cranfield argued that there was nothing to prevent the MOD from indicating that they no longer required them to provide a course under the AP contract, and then put it out to re-tender at a later stage. They did not rely upon any particular contract term in support of this contention. Tribunal has not seen a complete copy of the contract and makes no finding as to whether this would be a breach of the terms of the tender but notes that the ethos of the contract relies upon "best business practice" and there could be a reputational consequence to the MOD in following this course. The Tribunal is satisfied that there is no real and significant risk that this would happen as there is no real benefit to the MOD in re-tendering for part of the contract outside the benchmarking provisions because:

i) The fact that this service is being re-tendered implies that it is one which the MOD need, yet there would be considerable disruption in ceasing to provide the courses as part of removing them from the core contract with a view to restarting them at a later date.

ii) There is the prospect that Cranfield would remain the provider, as it is likely that the MOD would have to re-tender (rather than appoint a successor) and Cranfield would be able to bid for the contract,

iii) If they want a cheaper price they can seek to renegotiate the price under benchmarking or by agreement under the contract with Cranfield.

iv) Depending on the size of the contract exceptional costs might be payable.

v) It is unlikely to be a comparable contract because this scenario does not envisage the interlinked /comprehensive AP contract in its entirety but a discrete provision or series of services.

vi) If the contract were to be performed on the Shrivenham site, the complication of multiple providers may arise as there is no guarantee that the successful bidder would already be on site.

vii) Cranfield speculate that this might be for a course that is sufficiently different from the discontinued course and that there would be no prospect of contract breach or interruption of provision but this still points to a small contract size with a disproportionate administrative burden.

Unsolicited approach to the MOD by a competitor offering a cheaper alternative

43. The Tribunal is not satisfied that this was a viable scenario in particular at or around the date of the request in 2010, because:

i) If the MOD were approached by a competitor offering to undercut Cranfield, the breach provisions are such that any such bid would have to be significantly undercutting to make it financially viable.

ii) There is no evidence this has ever happened before,

iii) It is likely to require a tender so there is no guarantee that the competitor would in fact gain the contract.

iv) It is more probable that the MOD could achieve the price through benchmarking, because there is no advantage to following up one unsolicited approach rather than comparing that to other options e.g. through benchmarking which was due in August 2012.

44. For the reasons set out above and in the confidential annex, the Tribunal is not satisfied that the exemption is engaged and therefore does not go on to consider the Public interest balance.

Personal Data s40FOIA

45. Under s40(3) FOIA disclosure to the public otherwise than under this Act must not contravene any of the data protection principles. Pursuant to the first data protection principle:

Personal data shall be processed fairly and lawfully...

46. Guidance is given as to what is meant by "fairly" in paragraph 1(1) of Part II of Schedule I DPA and *"regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed."*

47. It was accepted by the Commissioner that all the figures that it was sought to redact constituted personal data. The figures relate either to the estimated costs of severance / redundancy of an individual or a small group of individuals. Whilst Cranfield argued that no individual had at that time been identified for redundancy because the University's selection process had not yet commenced, and consequently the figures were estimates to provide a ball park figure for the MOD; from the surrounding context of the disclosed documents the Tribunal was satisfied that each figure would provide some information relating to an identifiable individual.

48. Dr Peck argues that the information withheld pursuant to s40 cannot all constitute personal data because it is accepted that at least one of the data subjects made a subject access request to Cranfield and did not receive this information. The Tribunal notes that some of the figures are aggregated and would therefore include personal data belonging to others. Additionally it is understood that Cranfield relied upon exemptions to disclosure under the DPA. The Tribunal has no remit in relation to whether any subject access request has been dealt with correctly but has made its finding having considered the unredacted evidence.

49. Dr Peck seeks to distinguish between information known by the general public and University employees, however the Tribunal is satisfied that this is not a relevant

distinction as the Data Protection principles protect the disclosure of information to those who are not themselves the data subject.

50. Cranfield argued that disclosure of this information would be unfair as none of the data subjects would have expected their employer to release details to the world at large including their colleagues of what it was estimated they would be eligible for were they to be made redundant which in turn would tend to indicate inter alia their salary and pension entitlement.

51. From the evidence of Ms Truesdale Programme Manager of the AP Contract it was apparent that there is already considerable information in the public domain.

i) The pay structure is in the public domain and an employee of the University would be in a good position to make an estimate as to the payband within a level that an individual was at as these are generally based upon length of service. However, there were also other unknowns such as whether a staff member had progressed up the band more swiftly than normal due to exceptional performance, or was due a bonus or was paid for an additional responsibility beyond their primary role.

ii) Members of the University would have access to the terms of the 2 pension schemes relevant to most staff members and would be able to see what if any lump sum provisions might be triggered in relation to a specified individual based on age.

iii) The University's standard redundancy terms were disclosed pursuant to this appeal, as was the aggregated figure of estimated exceptional costs attributable to potential redundancies for CY5.

The Tribunal is satisfied that a "ball park" figure estimate could be derived from this publicly available information as to the likely sum involved in relation to an identified individual.

52. The Commissioner concedes and the Tribunal accepts that disclosure of the University's estimated figure, where it relates to a single individual and is not combined with anyone else's figure, would be unfair as it would provide certainty

and indicate whether other factors were in play such as additional responsibility or a bonus, whereas someone making their own calculation may be wrong and would not have access to the individual factors that made up the actual figure. We are therefore satisfied that these have been properly withheld pursuant to s40.

53. The Commissioner argues that there is no unfairness when the figure cannot be disaggregated.[19] In relation to the figure on p59 CB it is not known how many people this relates to. Additionally whilst it may be that it is apparent that a senior colleague with length of service and/or approaching pensionable age would receive a greater payment than a newly arrived junior member of staff, the exact division must remain uncertain. Disclosure of the information would not add to the information already in the public domain, consequently disclosure would not be unfair.

54. The Tribunal accepts the Commissioner's arguments and notes that whilst section 40 FOIA is an absolute exemption and there is no public interest test under the Act, the assessment of fairness and the application of the data protection principles does involve striking a balance between the reasonable expectation of the data subject with general principles of accountability and transparency.[20] The Tribunal considers whether schedule 2 condition 6(1) is met in relation to these figures:

" The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject".

Necessary implies the existence of a "pressing social need" rather than something useful or desirable.[21]

[19] The Commissioner did not consider self identification by another individual in the same group who in a joint figure for eg 2 individuals would thereby know the extent of the payment to the other person, to be the same as identification to the world at large. Therefore following R (on the application of Department of Health) v Information Commissioner [2011] EWHC 1430 Admin it was anonymous and disclosure would not be unfair.

[20] *The Corporate Office of the House of Commons v IC and Norman Baker MP EA/2006/0015 and 16*
[21] Corporate Officer of the House of Commons [2008] EWHC 1084

55. The Tribunal has identified the following factors in favour of disclosure:

i) There is an inherent public interest in openness and accountability and increasing transparency in decisions.

ii) The impact on the public purse – whether Cranfield's statements relating to the exceptional costs are consistent or legitimate,

iii) The closure and restructuring of courses has impacted on staff and students, there is a public interest in ensuring that these decisions are made in a fair manner. Cranfield argues that the interests of staff and students are private interests, however, the Tribunal is satisfied that there is a public interest in Cranfield treating their staff and students fairly.

iv) The Tribunal notes the tension between the apparent identification of individuals to provide estimated costs to the MOD when the redundancy process had not yet been concluded. It was implicit in Dr Peck's arguments that scrutiny was warranted to ensure that posts identified were genuinely redundant and not selected on the basis of the amount of exceptional costs claimed, and the figures would be necessary to this process.

v) Dr Peck argues that the staff could have been redeployed and additional private courses run. Cranfield argues that the structure of the contract (by which we understand them to mean the ability to reclaim exceptional costs) makes it less economical to start new courses[22].

56. However, the Tribunal is not satisfied that the disclosure of these aggregated figures is "necessary" because there has been considerable disclosure already:

- correspondence with the MOD detailing the negotiation process,
- detail of many of the posts identified as at risk to the MOD,
- disclosure of the way the exceptional costs would be calculated (i.e. the University's standard terms of redundancy)
- the global figure for estimated exceptional costs for CY5.

All of which allow these arguments to be mounted and the process scrutinized. Additionally no actual claim has yet been made to the MOD and the Tribunal would expect there to be scrutiny of the amounts both at the estimation stage and

[22] Projected demand for a course based on past figures for complementary business was also cited as a major factor

when the actual claim is made to ensure that it is consistent with University policy, and that the costs have been mitigated where possible.

57. Dr Peck argues that attempts on behalf of some employees to access this information under the DPA or via the redundancy process have been unsuccessful and that whilst disclosure to the world at large might not be ideal, there is no realistic alternative for the individuals. However, the Tribunal is satisfied that these aggregated figures would not take the matter further because:
    a) They are not a complete set of data,
    b) All disclosure would do would be to enable someone who had made their own estimate to see whether they had significantly over-estimated the payout. An underestimate would not be obvious in relation to a particular individual because the figures cannot be disaggregated.

    The Tribunal is satisfied that transparency is substantially met by the disclosure of the CY5 aggregated figure and disclosure of the small group aggregated figures would not add to the debate.

58. Additionally the Tribunal is satisfied that disclosure encourages speculation which is unwarranted in light of the minimal impact disclosure would have upon transparency and the other factors identified above. The Tribunal accepts the distinction between a small number of interested individuals going to the effort to make their own calculation based upon publicly available information rather than providing an aggregated figure which is open to misinterpretation.

59. For the reasons set out above the Tribunal is satisfied that disclosure of the small group aggregated figures would breach the first data protection principle and is properly withheld pursuant to s40 FOIA.

Conclusion

60. For the reasons set out above, the Tribunal refuses the appeal in relation to the material withheld pursuant to s43 and allows the amended grounds of appeal in relation to the material withheld pursuant to s40 FOIA. Cranfield are directed to disclose all the withheld disputed material save items identified in their application to amend the grounds of appeal as items 1-6 within 35 days of the date of this decision.

Dated this 5th day of March 2012

Fiona Henderson

Judge