



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2014/0054

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50513117
Dated: 17 February 2014**

Appellant: King's College London

First Respondent: The Information Commissioner

Date of hearing: 21 and 22 July 2014 at Field House

Date of decision: 30 September 2014

Date of promulgation: 2 October 2014

Before

**Ms Anisa Dhanji
Judge**

and

**Ms Rosalind Tatam
Professor Darryl Stephenson
Panel Members**

Representation

For the Appellant: Ms Anneliese Blackwood, Counsel
For the Respondent: Mr Timothy Pitt-Payne Q.C., Counsel

Subject matter

FOIA section 40(2) - whether disclosure of personal data would breach the first data protection principle
FOIA section 43(2) - whether disclosure would be likely to prejudice the commercial interests of the public authority

Case Law

Common Services Agency v Scottish Information Commissioner [2008] 1 WLR 1550

Corporate Officer of the House of Commons v IC and Norman Baker MP

Corporate Officer of the House of Commons v IC & Others

Farrand v Information Commissioner and the London Fire and Emergency Planning Authority [2014] UKUT 0310 (AAC)

Guardian Newspapers Ltd and Heather Brook v Information Commissioner and BBC (EA/2006/0011 and EA/2006/0013)

Hogan v Oxford City Council and Information Commissioner (EA/2005/0026 and EA/2005/0030)

Johnson v Medical Defence Union [2007] EWCA Civ 262

Jonathan Browning v Information Commissioner and Department for Business, Innovation and Skills [2014] EWCA Civ.105C

Rechnungshof and Others v Osterreichischer Rundfunk and Others [2003] 3 CMLR 10

Robert Evans v Information Commissioner and Ministry of Defence (EA/2006/0064)

South Lanarkshire Council v Scottish Information Commissioner [2013] UKSC 55

Surrey Heath Borough council v The Information Commissioner and John Morley [2014] UKUT 0339 (AAC)

Other Authorities

Article 29 Data Protection Working Party, Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of the Directive 95/46/EC

DECISION

The Tribunal dismisses the appeal and upholds the Decision Notice dated 17 February 2014 in relation to the requested information as it concerns the Public Authority's non-academic staff who are on the Principal's Central Team.

The Tribunal allows the appeal in relation to the requested information about the Public Authority's academic staff (whether or not on the Principal's Central Team) and its non-academic staff who are not on the Principal's Central Team, and substitutes the Decision Notice that follows.

Signed

**Anisa Dhanji
Judge**

SUBSTITUTED DECISION NOTICE

Dated: 30 September 2014

Public Authority: King's College London

Address of Public Authority: Room G37, James Clerk Maxwell Building, 57
Waterloo Rd, London SE1 8WA

Name of complainant: Mr Adalbert Lubicz

The following Decision Notice is substituted in place of the Commissioner's Decision Notice dated 17 February 2014.

The exemption in section 43(2) of the Freedom of Information Act 2000 is engaged in relation to the requested information as it concerns the Public Authority's academic staff. The Public Authority is not required, therefore, to disclose this information.

The exemption in section 40(2) of the Freedom of Information Act 2000 is engaged in relation to the requested information as it concerns the Public Authority's non - academic staff who are not on the Principal's Central Team. The Public Authority is not required, therefore, to disclose this information.

Except as set out above, the Commissioner's Decision Notice shall remain in effect.

Signed

**Anisa Dhanji
Judge**

REASONS FOR DECISION

Introduction

1. This is an appeal by King's College London (the "College"), against a Decision Notice issued by the Information Commissioner (the "Commissioner"), on 17 February 2014.
2. On 15 June 2013, Mr Adalbert Lubicz (the "Requester"), made a request, under the Freedom of Information Act 2000 ("FOIA"), for information as to the job titles of those employees of the College earning over £100,000. The College refused the request relying on the exemptions in FOIA. The Requester complained to the Commissioner who issued a Decision Notice requiring the College to disclose the information.
3. The College has now appealed to the First-tier Tribunal challenging the Commissioner's decision.
4. During the course of the appeal, the Commissioner conceded that the requested information as it relates to the College's academic staff, comes within the exemptions in FOIA and does not have to be disclosed. Therefore, this determination only concerns the requested information as it relates to the College's non-academic staff earning more than £100,000 per annum as at the date of the request (the "Disputed Information").

The Request for Information and the Refusal

5. The request as initially made was for information about the job titles of all those employees of the College who are paid over £100,000. Initially, the Requester asked for the information in relation to salary bands of £5,000, but later confirmed that he was content for the information to be provided in salary bands of £10,000.
6. The College provided this information in relation to generic job titles (eg "Professor"), but refused to provide the specific job titles on the basis of the exemption in section 43(2) of FOIA (prejudice to commercial interest).
7. The Requester asked for an internal review. On 28 August 2013, the College informed him that having conducted an internal review, it was maintaining its decision.
8. The Requester complained to the Commissioner under section 50 of FOIA. The Commissioner conducted inquiries, during the course of which the College said that in addition to section 43(2), it was also relying on the exemption in section 40(2) (personal data).

9. The College has also clarified that in relation to section 43(2), its position is not that disclosure “would” prejudice its commercial interests, but that it “would be likely to” prejudice such interests.

The Commissioner’s Findings

10. The Commissioner considered that neither of the exemptions relied upon was engaged, and required the College to disclose the requested information.
11. As regards the exemption in section 40(2), the Commissioner accepted that the information was the personal data of the employees concerned. However, he considered that disclosure would be fair and would not breach the first data protection principle as set out in Schedule 1 to the Data Protection Act 1998 (“DPA”). Having reached this decision, he considered that it was not necessary for him to go to assess whether any of the conditions in Schedule 2 would be met. The Commissioner has now acknowledged that in fact, he should have gone on to consider the Schedule 2 conditions, and has said that he considers that condition 6 of Schedule 2 would be met.
12. As regards the exemption in section 43(2), the Commissioner accepted that the College had commercial interests that it was entitled to protect and that there was a causal connection between the potential disclosure of the information and the prejudice to its commercial interest. However, he concluded that the College had not provided sufficient evidence to establish that the likelihood of prejudice was more than just a hypothetical possibility. Having decided that the exemption was not engaged, the Commissioner did not go on to consider the application of the public interest test in relation to this exemption.

The Appeal to the Tribunal

13. The Appellant has appealed to the Tribunal against the Decision Notice. The scope of the Tribunal’s jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the Decision Notice is not in accordance with the law, or to the extent that it involved an exercise of discretion by the Commissioner, he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other Notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.
14. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the Notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, as in this case, the Tribunal will often receive evidence that was not before the Commissioner
15. An oral hearing took place over two days. Some parts of the hearing took place in closed sessions, although these were very short and strictly limited to the details of the Disputed Information. Since the Commissioner had already had sight of the Disputed Information, and since there were no

members of the public present, the closed sessions did not give rise to the kinds of issues recently addressed by the Court of Appeal in **Browning**, in that nobody present was excluded. We will not refer, in this determination to the evidence in those closed sessions, nor do we consider it necessary, in order to properly explain our reasons, to refer to the Disputed Information or evidence about it in any detail in this determination.

16. The parties lodged two agreed bundles comprising some 462 pages, in addition to Skeleton Arguments. Supplementary material was lodged at the hearing. We have also been provided with the Disputed Information. We have considered all the material before us, and will refer to it as needed, but will not attempt to refer to all of it, nor to every turn of argument.

Issues

17. The appeal has become narrower in scope than had first been envisaged. The request had been for information relating to both academic and non-academic staff. As at the date of the request, of the 125 staff earning more than £100,000 per annum, only 15 were non-academic staff. Adopting the language used by the parties at the hearing we will refer to them as the Professional Services staff (“PSS”).
18. The Commissioner’s Decision Notice applied to all 125 staff without distinguishing between the academic staff and PSS. However, as already noted, prior to the hearing, the Commissioner accepted that the College had now provided sufficient evidence that there would be a real and significant risk of prejudice to its commercial interests if the information relating to its academic staff were to be disclosed. The Commissioner also accepted, in relation to the academic staff, that the public interest in maintaining the exemption, outweighed the public interest in disclosure of the information. In effect, the Commissioner accepted that the exemption in section 43(2) was engaged in relation to the academic staff (albeit that he has stressed that his position reflects the facts of this case and does not mean that he considers salary details of senior academic staff are always exempt from disclosure).
19. For the purpose of this appeal, what is now in issue, therefore, is only the information in relation to the 15 PSS earning over £100,000. Both parties have made it clear that they do not seek to draw any distinction between the 15 PSS concerned, except to the extent that there may be a case for reaching a different decision in relation to the PSS who form part of the senior management team, from those who do not. Later in the hearing, because of the evidence referred to at paragraph 62 below, the College said that it was now not relying on the exemption in section 40(2) in respect of two members of the PSS.
20. The issues to be decided in this appeal are as follows:
 - a. Is the Disputed Information exempt under section 40(2)? It is accepted that individuals can be identified from their job titles and therefore, that the Disputed Information is personal data. The only issue is whether disclosure would breach any of the data protection principles.

If the Disputed Information is exempt under section 40(2), then that determines the appeal. If it is not, or to the extent it is not, then we must go on to consider (b) below.

- b. Is the Disputed Information exempt under section 43(2) on the basis that disclosure would be likely to prejudice the commercial interests of the College? If so, does the public interest in disclosure outweigh the public interest in maintaining the exemption?

Witness Evidence

21. The College had intended to call 6 witnesses to give evidence at the hearing and each had lodged a detailed witness statement. Much of their evidence concerned the potential disclosure of the information relating to the College's academic staff. Once the Commissioner accepted that this information was exempt, they said that two of the witnesses (Professors Karen Steel and Adrian Hayday), would no longer be called to give evidence.
22. We heard evidence from the remaining four witnesses, namely:

Sir Robert Lechler
Mr Brent Dempster
Ms Nicola Dandridge
Mr Stephen Large
23. Since much of their evidence as set out in their witness statements was also no longer relevant, we gave leave for those aspects that were now relevant, to be addressed in more detail.
24. We also heard evidence from Mr Peter Garrod who it was not anticipated would give evidence and therefore, had not prepared a witness statement.
25. We have summarised below the evidence given by the witnesses in their statements and at the hearing. We are grateful for the assistance they have provided to the Tribunal.

Sir Robert Lechler

26. Sir Robert Lechler is the Vice Principal (Health) at the College, a position he has held since 2005. He has overall responsibility for the 5 health schools at the College. Each school has a Dean who reports to him. He also has a corporate role within the College and is on the senior management team.
27. He has only had limited involvement with the recruitment of PSS. He had some involvement with the recruitment of the Chief Operating Officer a few months ago. For that role, the College used a combination of a search process and advertisements. In order to cast the net reasonably wide, they did not specify the salary. The salary for the person appointed was determined on the basis of his past remuneration. The salary was not disclosed internally or externally. The candidate had a background in the

private and charitable sectors. He does not recall if the search extended outside the UK, but the focus would have been the UK.

Mr Brent Dempster

28. Mr Brent Dempster is the College's Director of Human Resources. He has made two witness statements, the first dated 30 June 2014, and the second dated, 17 July 2014. The second deals more specifically with the position of the PSS.
29. He says that the PSS have a significant impact on the student experience, which in turn affects the ability of the College to attract high-quality and high-calibre students. They are responsible for the whole infrastructure of the College. Leading institutions require not just leading academics, but also leading administrators. The only difference in real terms between the position of academics and PSS is that the latter do not have an apparent or obvious link to the recruitment of students and to obtaining research grants. However, PSS are essential, and without these individual "cogs", the operative wheel would not necessarily stop turning, but would significantly slow in pace and this would have a real impact on the College's performance and efficiency. The impact depends on the individual concerned. Fund raising and philanthropy are particularly important functions performed by PSS. Loss of a PSS in these areas would be significantly detrimental to the College
30. At the hearing, Mr Dempster said that impact of PSS on the student experience is equivalent though different to that of the academic staff. He accepted, however, that the identity of the person undertaking a PSS role is usually not important, provided they have the necessary skills and qualifications, in contrast to academic staff who may be well known names and capable of attracting students and research funds because of their reputation. It was put to him that if a senior member of the academic staff were to leave, it may be harder to keep certain research going, for example, but that the impact was likely to be quite different if, for example, a senior member of the IT team were to leave. He said that would depend on how quickly such a person could be replaced. He says that it can often take 6 - 12 months to recruit staff, but accepted that that depended not just on identifying and recruiting the candidate, but also on their notice period. He acknowledged, however, that in contrast to recent recruitment exercises for senior member of the academic staff which cost the College £75,000 to £100,000, that is not the level of investment the College has ever made in recruiting a member of the PSS. However, he says that this does not mean they the College would not be prepared to do so.
31. He says that the recruitment of high-calibre, experienced PSS is a complex process which generally requires facilitation by head hunters. This highly competitive recruitment market is not limited to higher education institutions in the UK. A top performing PSS could equally apply his skills in a commercial/corporate setting. As such, the College competes with private sector entities which are able to lure potential employees with the prospect of world class resources. Head hunters have to work extremely hard to convince suitable candidates that joining the College is a worthwhile

opportunity. He says that the market for high performing PSS is truly international. For example, in a recent recruitment exercise involving a high level PSS, the College was unable to locate suitable candidates in the UK and needed to consider candidates from an international pool. The difficulty in recruiting high quality PSS means that the loss of such a staff member has an enormous impact on the College. Were information about salaries of these key members of PSS to be disclosed to the world at large, it would make it significantly easier for other entities, across a range of sectors, to try to poach them.

32. He confirmed that since he has been in his post, of the 50 or so members of the PSS who have been recruited, only one has been recruited from overseas. He also acknowledged that most people are realistic and understand that the College is unlikely to offer the same salary as the private sector. However, he says that the timing of salary discussions is important. It is important to build the relationship first and to convince a candidate of the attractions of the role, before the salary is discussed. If salaries were published, this opportunity would be lost.
33. As to whether, in recruiting PSS, the College has tended to poach from other universities, he says that they have tended to hire from the private sector at a senior level because the expertise that they are seeking is more likely to be found there. As to whether other universities have poached from the College, he says that they tend to lose people to institutions outside the higher education sector, rather than to other universities.
34. Salaries of senior staff, whether academic or PSS, have not previously been published, except that the College's annual accounts provide a breakdown of the salaries of the number of staff who receive over £100,000. However, it is not possible, from this data, to identify the individuals concerned or the specific positions which command these salaries. This method of publishing anonymised data on senior staff salaries is the norm amongst all the Russell Group Universities, which represents 24 leading UK universities.
35. He says that disclosure of the Disputed Information would have a significant impact on the College's ability to recruit and retain PSS. Employees could use the salary information to speculate as to whether they are overpaid or underpaid in relation to those they consider have a similar level of expertise, within the College and in other universities. Also, the market in which the College operates is international. Private institutions in the USA from which the College has recruited staff in the past, do not disclose salary information, and disclosure would serve as a barrier in attracting staff who would not wish their salaries to be disclosed. In order for a market to operate fairly, all the players must be subject to the same rules. He says that to his knowledge, there is no precedent for any institution to be required to disclose this kind of information.
36. He expects that disclosure of salaries will also create an upward pressure on salaries, as has happened with Vice Chancellors, whose salaries are published. The publication of their salaries allows universities to determine exactly how much they need to offer someone in order to poach them when

a vacancy arises. He envisages a similar situation occurring if salaries of other staff are disclosed.

37. As to how salaries are set if the College does not know what equivalent positions are paid in other universities, he says that they are set by reference to the candidates' current salary. He says that he has no idea at all what his own counterparts are paid in other universities. He confirmed that to his knowledge, the College has not lost any members of staff specifically because of salary issues.
38. He also says that the PSS would not expect their salaries to be disclosed. He quotes, at paragraph 41 of his first witness statement, from a comment made by an individual whose salary would fall to be disclosed if the Commissioner's decision is upheld. That individual says that his salary was not stated in the candidate brief for his role, and that in negotiations, correspondence relating to his salary was headed "private and confidential". Also his salary slip comes in a sealed envelope. He therefore believes that his salary is confidential information and is to be treated that way. Disclosure of his salary would affect his ability to undertake his role in a satisfactory manner. His role requires him to work across many different sectors to form collaborations and to develop strong working relationships with colleagues, across the College and contacts across the cultural sector. If his salary is disclosed, it could damage the relationships he has built up. His role is very unique, and people who do not understand the importance to the College of the duties he undertakes, including colleagues within the College, might question the value the College places on it. Disclosure of his salary could damage relationships between himself and his staff, and it would also cause him to reduce his public profile, and to limit, for instance, his use of social media due to concerns about harassment and risks caused by disclosure. He says this would be very negative as profile is a key part of his role. He would also be concerned if his salary were to be disclosed to his friends. Furthermore, disclosure would likely have an impact on his future prospects as organisations may decide not to approach him on the grounds that financially, he is "out of their league". Disclosure would lead him to consider moving into the private sector, provided, however, the role was equally interesting and had an equivalent salary.
39. Mr Dempster sets out, in his second witness statement, comments made by 4 further PSS in response to a number of questions they were asked in relation to the impact that disclosure of their salaries would have on them. The first is quoted as saying that he had understood that information on his salary would be kept confidential. He would strongly object to the disclosure. He has no wish for people outside the College to know his salary. He would regard this as a breach of trust by the College. His sector is highly competitive and it would spur him on to look for employment elsewhere. He would not have taken up the position if, during the recruitment process, he had been told that information about his salary would be made public. He could easily work in the commercial or another sector where this information is confidential.
40. The second is quoted as saying that he did not know, when he came to the College, that what he earns might become public knowledge; otherwise he

would not have taken the role. He has never previously been required to disclose what he earns. He finds the prospect intimidating and unwelcome. He would go and work in another sector where such intrusion is not routine.

41. The third says that his expectation when he joined the College was, and remains, that his salary would be confidential. Were it to become public knowledge, it would impair his ability to do his job because his salary would be known and that of his staff would remain confidential. He says this would make his role significantly more difficult. As somebody who took a significant salary reduction to accept his current role, if his salary were to become public, he would reconsider whether he wished to remain with the College. He would regard disclosure to be a breach of personal trust by the College. It would make it harder for those who leave the private sector for public sector roles to regain their previous salary levels as private sector organisations consider “cheap employees” as being insufficiently skilled or capable. He had already declined to apply for roles at another body, on account of its policy on salary disclosure. He would expect, in the event of salary disclosure, to be the subject of unfair commentary in the press and his children may be taunted by other children whose parents earn more or less than he earns.
42. The fourth is quoted as saying that he always assumed that his salary would be confidential and that disclosure would make for some tricky conversations with colleagues and supporters. When negotiating his salary, he was told that information about what others were paid, including his predecessor, was confidential as was any subsequent deal that he made. He works with donors, some of which have strong views about limiting the salaries of public sector employees, and disclosure may reduce their support.
43. Mr Dempster was asked about the Commissioner’s guidance headed “Definition Document for Universities and Other Higher Education Institutions” (the “Definition Document”) which deals, amongst other things, with the disclosure of salaries of senior staff which is defined as meaning staff earning over £100,000 per annum and on the senior management team or equivalent level. The Definition Document says that such salaries should be published in bands of £10,000. Mr Dempster says he is not familiar with this document. As to whether that document should have informed the expectations of the senior staff at the College, he says that to his knowledge it has never been given to anyone and also, because salaries are not published in the higher education sector, there is no such expectation. He is unable to say whether the PSS whose views on possible disclosure of their salaries as set out in his witness statements, are aware of this guidance.
44. As to whether press articles such as that appearing in the Guardian on Monday, 3rd March 2014 (at page 299 of the bundle), shows that there is a clear public interest in University salaries, he says he cannot comment. He points out that that article deals with Vice Chancellor salaries only. As to why such a debate is not healthy and why it should not be extended beyond the salaries of Vice Chancellors, he says that the expectations are different. A Vice Chancellor knows that his salary will be disclosed. As to whether the position of the College is akin to that of the BBC which is also funded in part

from the public purse, but where senior salaries are disclosed, he says again that he cannot comment.

45. He also briefly explained that the composition of the Principal's Central Team ("PCT") comprises 12 officers who support the Principal of the College in discharging his role. Some of these officers are academic staff and some are PSS. The PSS who sat on the PCT at the time of the request, comprised the Vice Principal (Strategy and Development), Head of Administration and College Secretary, the Director of Estates, the Director of External Relations, the Director of Finance and the Director of Human Resources (i.e. himself). At the time of the request, 6 of the 15 members of the PSS who are the subject of this appeal, were on the PCT. The remaining 9 (including the 2 who do not object to their salary information being disclosed – see paragraph 62), are not members of the PCT.
46. In a closed session, Mr Dempster was asked about the roles of the individual members of the PSS, and in particular, whether their roles were public facing or inward facing. He was able to answer the question in respect of some, but not all members of the PSS in issue in this appeal.

Ms Dandridge

47. Ms Dandridge is the Chief Executive of Universities UK ("UUK"). This is a membership organisation representing higher education institutions throughout the United Kingdom and currently comprises 134 member organisations.
48. She says the UK higher education sector is unique and multi-faceted. It is not truly public sector, nor is it private. It is not just about education, but also about research, business and industry engagement, economic regeneration, community engagement, social mobility and much else. The higher education sector plays an important role in the UK economy. Overall, the higher education sector contributed £39.91 billion to the UK GDP in 2011-12 (equivalent to 2.8% of the overall GDP).
49. Universities are autonomous institutions with their own governing bodies. Their funding comes from many sources. Overall, the portion of public funding for universities has reduced substantially in recent years, meaning that far more of their income has to be made up from private sources. In 2000 - 2001, 40% of income to institutions in the UK came from funding body grants. That fell to 30% in 2011-12, and 24% in 2012-13.
50. For many institutions, the pursuit of research is a core activity. This may be government funded or privately funded. Universities are also globally-facing institutions and many benchmark their performance against international competitors, not domestic institutions. UK institutions have great sensitivity to international ranking, and there is an extremely competitive environment at play.
51. The roles of PSS can encompass a wide range of areas, such as those who oversee the operation of the infrastructure, and important support functions like managing the estate, administration, admissions, student support,

knowledge exchange and so on. The term “senior management” means different things in different institutions, but broadly refers to those senior staff who have responsibility for the direction of the whole institution. Staff who sit on a university’s executive board include those whose background is academic, as well as senior PSS.

52. The recruitment of senior PSS (for example Registrars and those responsible for philanthropic advancements) is highly competitive and such posts can be very difficult to fill. Candidates are not infrequently recruited from industry and the institutions need to work hard to ensure that they are not enticed back into industry. The ability to offer a competitive package is essential. She says that such individuals will often have a profile in their own right and the risk of them being poached by other institutions or by the private sector would be increased if their salaries were disclosed. Disclosure would also impact on the institutions’ ability to recruit people to these essential roles. Whilst the recruitment market for PSS is traditionally UK based, there are some areas, in particular, fund raising and philanthropy where there is a shortage of exceptional candidates and the candidates may be recruited internationally. She accepts, however, that she has not herself been involved with the recruitment of any PSS.
53. As to whether the recruitment of PSS is not, in fact, as difficult or as complicated as the recruitment of academic staff, she says that it depends on the role. Some positions may be more competitive than others. However, unlike the academic arena where a single member of academic staff may be uniquely qualified for a role, based on expertise and reputation in his or her field, that would be less likely to be the case with the PSS. Nevertheless, while they will not be superstars, there are a few known individuals who can name their package.
54. As to the risk of poaching if salaries are published, she was asked if the effect would not be both ways? She says that the main problem is poaching by international institutions and also, by the private sector. As to whether if salaries of the PSS are disclosed, the College would be in a similar situation to say, the BBC, she says that it feels different. Universities operate in a very competitive environment.
55. She was asked whether, given that it is well known that academic institutions in some countries pay more than in others, publication of individual salaries would in fact make any real difference to recruitment or retention issues. She accepted that its effect would be largely to exacerbate the existing competitive environment. As to whether the publication of salaries would have the positive effect of ensuring equal pay between the genders, she accepted that was a fair observation and that inequality of pay is an issue in the sector. It was also put to her that some of the concerns she had expressed, may not be dissimilar to concerns expressed by those in local government when senior salaries in that sector were to be disclosed. She was asked whether what is really in issue is the fear of the unknown. She says that the education sector is more volatile and more varied than the local government sector.

56. She is familiar with the Definition Document. The UUK was consulted and had an opportunity to comment on the document in its draft form. She was asked whether, because of the Definition Document, senior staff earning over £100,000 would expect their salaries to be published. She says that people seem to think, rightly or wrongly, that it is only anonymised salary bands that will be disclosed. The Definition Document can be read that way. She does not know if any university has asked the Commissioner to clarify the point. The UUK has not. She is not aware of any university in this country disclosing individual salaries of senior staff, apart from those of Vice Chancellors.

Mr Peter Garrod

57. Mr Garrod is the Director of Governance and Legal Affairs Management at the College, a position which he has held since 2009.
58. He is familiar with the Commissioner's Definition Document. He also confirmed that there is a link to the document on the College's website. As to why, given what is said in the Definition Document, the College does not publish senior salaries, he says that the document is only guidance and also, it is capable of being interpreted in more than one way. Furthermore, the Commissioner does not require public authorities to publish information which is exempt. As to why, if there was any ambiguity, was the issue was not clarified with the Commissioner, he says that the College took a conscious decision not to publish the salaries. He had discussed the issue with his immediate supervisor and that is the decision they made. However, the staff know that the College is subject to FOIA and they are aware, therefore, of the possibility of salaries having to be published. He says there would be a general awareness of that risk.
59. Mr Garrod says that the PCT is regarded as the College's executive board and makes all major decisions on behalf of the College. The term "PCT" is used as shorthand for senior management. They are effectively non-executive directors. He says that although the Principal decides who is on the PCT, in his time, the membership has remained constant. Some decisions have to be made by the College Council. The College Council is the equivalent of a governing body for a school. Most members of the College Council do not work full-time in the College.
60. He was asked about how responses from certain PSS as set out in Mr Dempster's statements, had been elicited. He said that once the focus of the appeal was to be only the PSS, e mails were sent out by him to those members of the PSS who could respond the same day. Of the 15 PSS that would potentially be affected by disclosure, emails were sent to 8. Of the others, 2 no longer work at the College, 1 had provided a response that went into Mr Dempster's original statement, 2 were at the hearing as witnesses, and 2 are very senior staff who it was thought would not respond in time. The questions sent by e mail were formulated by the College's lawyers.
61. At the panel's request, the email was produced and was worded as follows:

As you may have seen from the Times Higher, the College is currently appealing an FOI decision by the Information Commissioner relating to the release of salary data on individual staff paid over £100k (in £10K bands). A hearing of the First Tier Tribunal (Information Rights) is scheduled for Monday.

In advance of that hearing we are attempting to gather additional evidence relating to professional services staff who would be affected by the disclosure. This is in response to an indication from the ICO that the ICO is prepared to accept the College's arguments in relation to academic staff (who comprise the bulk of those affected) - i.e. the focus has shifted to professional services staff.

We intend to submit a supplementary statement from Brent focussing specifically on professional services staff. As part of that statement we would like to include some statements from professional services staff who would be affected by the disclosure on their expectations about the confidentiality of their salary data and how the disclosure might affect them personally. We need this by COB today if possible. You will not be identified in the information submitted to the Tribunal - your contribution will be anonymised in Brent's statement.

The lawyers have prepared the following questions, if possible, I would be grateful if you could consider these and get back to me and Brent by 5 p.m. today - apologies for the short notice.

Best, Peter

Key questions:

- In broad terms what expectations do you have regarding the confidentiality of information about your salary?*
- Would you object to details of your salary being disclosed publicly - if so, why?*
- How would you react to the disputed information being made public?*

Wider questions:

- Have you been told anything by the College (during the recruitment process or since) that would lead you to have certain expectations about the confidentiality of this information - if so, what?*
- If during the recruitment process you had been told that information about your salary would or may be made public knowledge, how would this have affected your decision to take up a position at the College?*
- What would the impact on you be of this information being made public? Do you have any concerns in this regard?*
- If information of this kind was routinely made public by universities in the UK, would you consider instead working in a country where this was not the case?*
- Generally, and to the extent not already covered, what is your view on the potential disclosure of the disputed information?*

62. Mr Garrod said, in response to the panel's questions, that 2 of the individuals who responded said that they had no issue with their salaries being disclosed. As to why these responses were not set out in Mr Dempster's statements or elsewhere in the College's evidence, Mr Garrod said that in one case the response was by telephone, and the other was a brief email.

Mr Stephen Large

63. He is the Director of Finance. He has overall responsibility for planning the College's finances, providing financial leadership, and managing the finance function.
64. At any time, the College has more than 25,000 registered students, of which more than 10,000 are post-graduate students from nearly 140 countries. The College has more than 6,500 employees.
65. The College is a member of the Russell Group, and is ranked as one of the top 20 universities in the world. It has an annual income in excess of £600,000,000. It competes successfully with other higher education institutions, both in the UK and overseas. This ultimately comes down to the quality of the people employed.
66. Universities are not public sector organisations in a financial or autonomous sense, even though they receive a large amount of public funding. Unlike public sector organisations, universities decide their own strategies.
67. He confirmed that the PCT is the College's senior management team. Its composition is reasonably stable. Its formal role is to advise the President, but internally, it functions as a Cabinet. It meets for 3 hours every week.
68. The College has approximately 3,000 PSS. For most positions, recruitment is straightforward, but in some areas, such as finance and IT, it can be difficult, even at the lower levels. At the senior level, there is very little difference in the difficulties in recruiting PSS and star academics. It was put to him that this is not what he had said in his witness statement. He says that in that case, he had not worded his statement correctly, because the challenges can be equivalent. He accepted, however, that for many positions, including for example, the Director of Human Resources, given that London is a huge financial centre, there would be a very large pool of potential candidates that cannot be equivalent to the pool for recruiting a well-known academic for the College's law faculty, for example. He agreed that for many PSS positions, there is a larger pool, but says that for some positions involving philanthropy in particular, there are very few qualified candidates.
69. He gave the example of the position of the Director of Real Estate which he says is a position the College recently created. The candidate for that particular position was appointed through a personal recommendation and head hunters were not briefed. It was put to him that nothing in his evidence suggested that it was actually difficult to recruit for that post.

70. He says that if salaries are published, the College will need to have difficult conversations with a number of PSS. That is his primary concern. Salary differences would have to be explained and managed and in some cases, it may mean giving certain staff a pay rise. It may also affect team dynamics. The real issues may arise not with the individuals whose salaries are disclosed, but those one level down. He does not want people to be distracted by differences in pay.
71. Mr Large explained that Vice Chancellor salaries have been published since 1993/1994. He believes it came about as the sector's response to the Cadbury Report. As to why there has been a recent inflation in Vice Chancellors' salaries given that their salaries have been published for some time, he says that in the last decade, the sector has changed dramatically. It is much more competitive and the sector has responded in different ways. More Vice Chancellors are being appointed from overseas. He accepted that the salary inflation was not as a result of the salaries being published.
72. In a closed session, Mr Large gave brief evidence about the roles of the individual PSS whose salaries are in issue in this appeal, in addition to those individuals already dealt with by Mr Dempster in his oral evidence.

Findings and Reasons

Statutory Framework

73. Under section 1 of FOIA, any person who makes a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with that information.
74. The duty on a public authority to provide the information requested does not arise if the information sought is exempt under Part II of FOIA. The exemptions under Part II are either qualified exemptions or absolute exemptions. Information that is subject to a qualified exemption is only exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Where, however, the information requested is subject to an absolute exemption, then, as the term suggests, it is exempt regardless of the public interest considerations.
75. In the present case, the public authority says that the Disputed Information is exempt under sections 40(2) and 43(2) of FOIA. We will consider each in turn.

Is the disputed information exempt under section 40(2) of FOIA?

76. Under section 40(2), personal data of third parties is exempt if disclosure would breach any of the data protection principles set out in Part 1 of Schedule 1 of the Data Protection Act 1998 ("DPA"). The exemption is absolute.

77. It is common ground between the parties that the Disputed Information constitutes the personal data of the PSS. The question is whether disclosure would breach any of the data protection principles.
78. As the case has been put, only the first data protection principle is relevant. This provides that personal data shall be processed fairly and lawfully, and in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met. The parties agree that the only relevant conditions in Schedule 2 are condition (1) and 6(1).
79. Condition (1) applies if the data subject consents to the processing of his or her data. Condition 6(1) provides as follows:
- 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.*
80. As set out at paragraph 62 above, two of the PSS have indicated they do not object to disclosure and for this reason, the College does not now seek to rely on the exemption in section 40(2) in respect of them. As regards the other PSS the key issues that arise from the first data protection principle, and condition 6(1) are whether disclosure would be fair (there being no suggestion that it would be unlawful), whether disclosure is necessary for the purposes of a legitimate interest that is being pursued, and whether disclosure is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects. We will consider each in turn, although we would note here that the first and last of these considerations are closely related.

Would disclosure be fair?

The College's arguments

81. The College's main argument for why disclosure would not be fair, rests on the assertion that it would not have been in the reasonable expectation of the individuals concerned, that their salary information would be disclosed.
82. The College also says that disclosure of the Disputed Information would cause distress to the affected individuals, leaving them with a sense of grievance that their employer had put their personal information into the public domain when they did not expect this to happen, and would expose the staff to the type of negative comments that have been made in relation to the Vice-Chancellors' pay, and that it would have particular adverse effects on individuals working in controversial areas of research. Disclosure would also interfere with the data subjects' right to respect for private life under Article 8(1) of the European Convention on Human Rights.
83. The College relies on the specific responses it has received from five PSS, as regards the prospect of disclosure, as set out in Mr Dempster's witness statements. As already noted, the College now accepts, in view of the

responses it received from 2 further PSS to the effect that they do not object to disclosure, that disclosure in those two cases, would not be unfair. What is in issue, therefore, is the disclosure in respect of 13 members of the PSS.

84. The College also says that the expectation that this information would not be disclosed is reasonable, having regard to the fact that such information is not generally disclosed in the higher education sector, and has not been disclosed by the College in the past. It says that the Definition Document does not mean that those concerned should have expected the information to be disclosed. The document is only guidance and could quite reasonably be interpreted as meaning that the information did not have to be disclosed if it was regarded as being exempt information. There is also no evidence that those affected were actually aware of the Definition Document.

The Commissioner's arguments

85. The Commissioner says that disclosure would be fair. He says that anyone who is paid from the public purse, should expect some information about their salaries to be made public. He refers to his guidance on "Requests for Personal Data about Public Authority Employees" to this effect. He accepts that the College is in a different position from other public bodies, in that it is reliant on both public and private funding. However, as it is partially reliant upon public funding, the Commissioner says that there should be an expectation by its staff that some information relating to salaries, particularly for senior staff earning in excess of £100,000, will be made public.
86. He also refers to his Guidance on Requests for Personal Data about Public Authority Employees, and reiterates the point made there, that anyone paid from the public purse should expect some information about their salaries to be public. The Disputed Information relates to the PSS' professional roles, these are people holding senior positions, they are often in public facing roles and many of them represent the College to the outside world. He says that increased seniority as represented by these high salary levels is commensurate with increased responsibility, especially when the individuals concerned are on the PCT and thereby involved making influential policy and expenditure decisions.
87. The Commissioner also refers to the Definition Document which he says makes it clear that salaries for "staff earning over £100,000 per annum and on the Senior Management Team or equivalent level", should be published. He says that such staff should expect that details relating to their salaries will be published. In light of the Definition Document, if they thought that their salaries would not be disclosed, that was not a reasonable expectation.

Findings

88. When assessing fairness, the interests of the data subject as well as the data user, and where relevant, the interests of the wider public, must be taken into account in a balancing exercise. This wide approach to fairness is endorsed by the observations of Arden LJ in **Johnson v Medical Defence Union** at paragraph 141:

“Recital (28) [of Directive 95/46] states that “any processing of personal data must be lawful and fair to the individuals concerned”. I do not consider that this excludes from consideration the interests of the data user. Indeed the very word “fairness” suggests a balancing of interests. In this case the interests to be taken into account would be those of the data subject and the data user, and perhaps, in an appropriate case, any other data subject affected by the operation in question.”

Although that case concerned the provisions of the Freedom of Information (Scotland) Act 2002, the principles apply equally in relation to FOIA.

89. The following passage in **Corporate Officer of the House of Commons v IC and Norman Baker MP** at paragraph 28, also offers helpful guidance about the balancing exercise to be undertaken:

“If A makes a request under FOIA for personal data about B, and the disclosure of that personal data would breach any of the data protection principles, then the information is exempt from disclosure under the Act: this follows from section 40(2) read in conjunction with section 40(3)(a)(i), or (when applicable) section 40(3)(b) which does not apply in these appeals. This is an absolute exemption - section 2(3)(f)(ii) FOIA. Hence the Tribunal is not required to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure under section 2(2). However... the application of the data protection principles does involve striking a balance between competing interests, similar to (though not identical with) the balancing exercise that must be carried out in applying the public interest test where a qualified exemption is being considered.”

90. This does not mean, however, that one starts with the scales evenly balanced. The continued primacy of the DPA, notwithstanding freedom of information legislation, and the high degree of protection it affords data subjects has been strongly emphasised by Lord Hope in **Common Services Agency v Scottish Information Commissioner** where he states (at paragraph 7):

“In my opinion there is no presumption in favour of the release of personal data under the general obligation that [FOIA] lays down. The references which that Act makes to provisions of DPA 1998 must be understood in the light of the legislative purpose of that Act The guiding principle is the protection of the fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data.”

91. As to the position where public officials are concerned and where the purpose for which the data is processed arises through the performance of a public function, the following passage in **Corporate Officer of the House of Commons** offers helpful guidance:

“...when assessing the fair processing requirements under the DPA ... the consideration given to the interests of data subjects, who are public officials where data are processed for a public function, is no

longer first or paramount. Their interests are still important, but where data subjects carry out public functions, hold elective office or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would the case in respect of their private lives. This principle still applies even where a few aspects of their private lives are intertwined with their public lives but where the vast majority of processing of personal data relates to the data subject's private life.” (paragraph 77):

92. As already noted, the College's arguments in relation to fairness centre on the question of the reasonable expectations of the data subjects. We have evidence from 5 PSS to say that they did not expect this information to be disclosed, and evidence from 2 PSS who say they do not object to disclosure. We do not know the position of the others, but we are asked to infer that the example of the 5 who do object to disclosure is representative of the rest on the basis, *inter alia*, that they, too, would not have expected their salaries to be disclosed because it has not been the practice of the College, nor indeed the higher education sector, to do so.
93. First, we would express our concern that the e mail setting out the questions sent by e mail to the PSS, the responses to which the College relies on, was not put before the Tribunal until requested by the panel, and also that the panel was not informed, until we specifically asked, that two of the PSS had replied to say that they did not object to disclosure. Although we do not say that the College had any intention to mislead, such matters require greater care to ensure that they do not in fact mislead.
94. We also have some difficulty with the evidence of the 5 PSS who object to disclosure. To the extent that they say that when they joined the College, they were not told that this information would be disclosed, or indeed, were told that it would not be disclosed, there is no suggestion that there was or is any confidentiality provision in their contracts of employment. There is also no evidence before us as to when all the individuals concerned were employed, nor whether some may have joined at a more junior level, progressing over time, without there having been any further discussion about the confidentiality that would attach to their salaries. There has also been no opportunity for their evidence to be tested so that they could be asked, for example, what they knew about the Definition Document, how they understood it to apply to them, and how their expectations might have been informed by the on-going public debate about salaries of those entities which are funded, or partly funded, by the public purse. These questions are clearly relevant to their expectations, but are not matters which the e mail questionnaire explored at all. It is also our view that a number of the questions were decidedly leading. It may also fairly be said that the e mail suggests that the sender was seeking comments supportive of the College's position. It was made clear in the text of the e mail preceding the questions, that the responses were being sought to support the College's case, and in those circumstances, there must be a real possibility, that the responses were given in terms intended to assist the College, and also that the responses may have been coloured by the desire of those responding to be helpful to the College's objectives in relation to this appeal.

95. For these reasons, we do not attach as the weight to these responses that the College would like us to, nor indeed, given the responses of the 2 individuals who we are told have said that they do not object to disclosure, do we think it sensible to draw inferences about the position of those who did not respond to the questions, or indeed who were not asked at all.
96. As an alternative argument, Mr Pitt-Payne acknowledged that if there was a case for saying that those PSS earning more than £100,000 should expect their salaries to be disclosed, that should apply only to those PSS who are on the PCT, as distinct from those who are not. We agree that if there is to be a dividing line (and we think there is), then that must be the line. The evidence is that the PCT is, effectively, the executive body of the College. It makes the major policy and expenditure decisions of the College. Individuals are on the PCT because of the particular posts that they hold. It is clear to us, from the evidence, that being on the PCT is a significant role. The PCT meets for 3 hours every week and no doubt, also, these meetings involve preparation and follow-up, and the discharge of such responsibilities as may be assigned, meaning that a substantial portion of the time of those on the PCT is committed to matters of operational or strategic importance to the College as a whole, beyond their specific functional roles. These are all senior individuals as reflected, not just by their salary level, but also by the influence that being on the PCT affords.
97. We agree with the Commissioner that it is reasonable to expect that those working at a senior level in an organisation receiving substantial public funds, would be aware that information about their salaries may be subject to greater public accountability and may have to be disclosed under FOIA. Indeed, as Mr Garrod fairly acknowledged, it is likely that there would be that general awareness. We also keep in mind that the Definition Document which sets out the information which the Commissioner has publicly said he expects will be published in respect of those on the Senior Management Team "or equivalent", is on the College's website. We accept of course that that document represents guidance and not the law, but it clearly puts down a marker as to what may have to be disclosed under FOIA. For these reasons, we consider that an assertion by PSS on the PCT who say that they had no expectation of their salary being disclosed, cannot sensibly be taken to support a finding that disclosure would not be fair.
98. Although this is not directly relevant to the issue of fairness, we would say that we do not accept the interpretations variously proposed, that the Definition Document can reasonably be read as meaning that the salary information only needs to be published in the anonymised way that it is currently published by the College, nor that it can be taken to mean that that information should only be published if to do so does not breach section 40(2). That is an entirely circular argument. The more credible interpretation of the evidence we heard was that the College considered the Definition Document, and decided not to follow it until and unless it was required to.
99. As regards the claim that disclosure of the Disputed Information would cause the PSS affected to feel betrayed that their employer had put their personal information into the public domain when they did not expect this to happen, it is of course the case that the College will not have done so

voluntarily, and indeed has vigorously contested the Commissioner's Decision Notice requiring it to do so. The College also says that disclosure would be unfair because it would expose the PSS to the type of negative comments that have been made in relation to the Vice-Chancellors' pay. We consider that it is a logical consequence of such information being placed in the public domain that there will be public scrutiny of the information and potentially also, public comment. The fact that members of the public may express opinions about how public funds are spent does not make disclosure unfair. We consider it unlikely, in any event, that individual PSS salaries will attract the same attention as those of Vice Chancellors, who, given the higher profile of their positions, are likely to attract much greater scrutiny.

100. The College also says that disclosure would be unfair because it would have particular adverse effects on individuals working in controversial areas of research. This assertion has not been properly explained, and we do not find it likely, in any event, that the PSS would be closely involved with research.
101. In relation to the concerns about the consequences of their salaries being known to their staff and others, again, the assertions are largely just that and have not been properly supported or tested. We accept that the prospect of disclosure may cause apprehension and that disclosure itself may cause discomfort, and that there may be a period of adjustment. Change is often uncomfortable, and in this regard, the situation for the College may be no different from that of other publicly funded entities when salary information is disclosed. In our view, this does not make disclosure unfair.
102. However, in our view, the fairness of disclosure is largely dependent on the position occupied by the PSS concerned, and we are not satisfied that disclosure would be fair in respect of those who are not on the PCT. They fall outside the scope of the Definition Document and this is relevant to an assessment of their reasonable expectation, as is the fact that they are not part of the College's executive body. We do not say that disclosure would always be unfair in respect of those not on the PCT. However, except in relation to the distinction between those on the PCT and those not on the PCT, we were not urged to draw a distinction, nor indeed was evidence put forward to allow a meaningful distinction to be drawn, between the individual PSS who are not on the PCT, based on their specific roles. Although there was some evidence of the outward facing or inward facing aspects of the roles of those individuals, it is not at all evident to us that those distinctions are clear or meaningful, nor that an inward facing role in an organisation like the College with its substantial body of students and staff, is less significant in relation to the considerations under discussion, than a role that might be described as being outward facing, but which, in reality, may be more limited in scope and influence.
103. For all these reasons, we find that disclosure of the Disputed Information would be fair in respect of the PSS who are on the PCT, but not in respect of those who are not.

Whether disclosure is necessary for a legitimate interest?

The Commissioner's arguments

104. The Commissioner says that there is a clear and strong public interest in understanding which specific publicly funded jobs attract very high salaries, and in particular salaries in excess of £100,000 per annum. He also says that increasing access to information on senior staff salaries has an important function in advancing transparency in how public funds are used.
105. The Commissioner further says that in the context of on going public debate about tuition fees and university funding more generally, there is a clear public interest in people understanding how universities choose to spend the money they receive from the public purse. The fact that details of salaries of high earning individuals are relevant to the public debate on the subject of university funding and resource allocation, is evidenced by the fact that many of the leading UK newspapers, including the Guardian, the Independent and the Times, reported on the Vice-Chancellors' salaries, as the articles at pages 299 - 327 of the open bundle show.
106. He accepts that the information published by the College, in its annual financial statements, goes some way to meeting that legitimate public interest. However, he says that because the individuals concerned all earn in excess of £100,000 and occupy senior positions, many of which are public facing and/or involve responsibility for influential policy and expenditure decisions, it is reasonable for the College to disclose the individual job titles, departments, and salaries in bands of £10,000. The information that is already in the public domain is presented in high level, aggregate form which prevents the public being able to determine how the College chooses to prioritise the allocation of its resources between academic and non-academic staff, and between different types of non-academic staff. The less detailed information that is available in the public domain, makes it more difficult to draw useful conclusions about the allocation of resources in relation to non-academic staff.

The College's arguments

107. The College accepts the public interest arguments made by the Commissioner, but says that this is adequately met by the information it published in its annual financial statements, which lists the number of staff earning over £100,000, in £10,000 bands.
108. The College also says that disclosure of the Disputed Information is not necessary. In terms of informing any public debate about how the College spends its money, disclosure will add nothing or little of value to the information already made public by the College.
109. Although the published information would not allow the public to distinguish between the salaries paid by the College to its academic staff, as opposed to its PSS, the College says that that distinction would not inform public debate about how the College's resources are allocated. There may well be a debate about the upward trend of salaries, but that debate can be properly informed by information that is already in the public domain.

Findings

110. There is no dispute that disclosure would be for the purposes of a legitimate interest, namely an interest on the part of the public about salaries funded by the public purse generally, and university salaries in particular. There is no reason to consider that the public interest in university salaries, is limited to the salaries of Vice-Chancellors. At a time when the subject of tuition fees, and the quality of the education offered by different universities is very rarely out of the news, and when all aspects of public expenditure is closely scrutinised, we consider there is a legitimate public interest in the way in which the College, which receives a substantial amount of public funds allocates its resources. That, as we have already said, is not in dispute. For completeness we would say that it has not been argued that the legitimate interest is lessened by the fact that the College is not fully funded by public funds. It is clear that the public funding it receives is substantial, running into well over 100 million pounds every year. What is in dispute is whether disclosure is necessary for the purposes of that legitimate interest.
111. “Necessary”, in this context, has been held to reflect the meaning attributed to it by the European Court of Human Rights when justifying an interference with a recognised right, namely that there should be a pressing social need and that interference must be both proportionate as to the means, and fairly balanced as to ends. See **Corporate Officer of the House of Commons**, paragraph 43.
112. More recently, in **Farrand**, the Upper Tribunal stressed (at paragraphs 26), that “necessary” does not mean essential or indispensable. That is too strict a test. Rather, the word connotes a degree of importance or urgency that is lower than absolute necessity, but greater than a mere desire or wish.
113. In **Farrand**, the requester had sought information about a fire that had occurred in a basement flat in the building where he lived. He had asked for and was provided with the fire investigation reports, but some of the text and most of the photographs were redacted on the grounds that they were personal data. The Requester said that he wanted to see the redacted material in order to discover the cause of the fire, with a view to preventing it from happening again. Upper Tribunal Judge Jacobs considered that it was not necessary, for the Requester’s interest in identifying the cause of the fire, to see the redacted material. The evidence was that the cause of the fire had never been established, although the most likely cause was a naked flame. The fire investigator’s description and analysis are all that was necessary to understand, as far as possible, the cause of the fire. The information that had been disclosed satisfied the Requester’s proper interest and disclosure of the redacted material was not necessary.
114. In the present case, to understand the spending decisions of the College as regards salaries, in particular, does require knowing more than just how many employees are paid over £100,000 (in bands of £10,000). To understand its spending decisions also means understanding how the salary paid for one role compares with what is paid for another. This is informed by knowing, for example, whether a salary of £200,000 appearing in the College’s published accounts, is in respect of the head of fund-raising, or the

head of IT. If that is £50,000 more than is paid to the Dean of a health school, what does that indicate about the College's priorities as compared to the priorities of other competitor universities, and are those are priorities that the public agrees with? We consider that there is a legitimate interest in such questions and that disclosure is necessary for that interest.

Would disclosure be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects?

115. This issue is closely related to the question of fairness and the parties have not raised any points additional to what they had already raised in relation to fairness. We therefore adopt what we have said, above, in relation to fairness, and we find, for the same reasons as set out above, that in the case of the PSS who are on the PCT, disclosure is not unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects.

Findings

116. For all these reasons, we find that disclosure of the Disputed Information in relation to those members of the PSS who are on the PCT, is not exempt under section 40(2) of FOIA.

Is the disputed information exempt under section 43(2) of FOIA?

117. The College also relies on the exemption in section 43(2). Since the Commissioner has accepted that the salary information of academic staff is exempt under section 40(2), and since we have found that information in relation to those members of the PSS who are not on the PCT, is exempt under section 40(2) of FOIA, the question of whether section 43(2) is engaged is now relevant only to those limited number of PSS who are on the PCT.
118. Section 43(2) states that information is exempt if disclosure would, or would be likely to prejudice the commercial interests of any person, including the public authority holding it. By virtue of section 2, the exemption is only engaged if in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure. As already noted, the College has said that it relies on the lower threshold test, namely that disclosure "would be likely to" prejudice its commercial interests (rather than "would" prejudice its commercial interests).

The College's arguments

119. The College says that there is a real and significant risk of prejudice to its commercial interests if the Disputed Information is disclosed. It says that it operates in a highly competitive environment which is different to that of other public authorities (for example local or central government departments), and that it competes nationally and internationally with other universities for "talent". Its success depends on being able to recruit high calibre individuals, not just in the academic arena, but also for PSS roles.

120. It says that if the Disputed Information were to be disclosed, it would prejudice its commercial interests in several ways. First, it would increase the cost of recruiting and retaining staff because, *inter alia*, competitor universities or private sector organisations, would know what salary level they would have to offer to lure people away.
121. Second, disclosure would impede salary negotiations by encouraging candidates to seek higher salaries based on salaries paid for posts they regard as being comparable.
122. Third, the College says it would lose PSS or fail to attract PSS who did not wish to have information about their salaries disclosed. Although this might not put the College at a competitive disadvantage, nationally, if other institutions are also required to disclose that information, it would put them at a competitive disadvantage internationally, because comparable institutions in countries such as the USA and Australia, do not have to disclose such information. They would also lose or fail to attract candidates from the private sector.
123. In addition, the College says that disclosure would impact on a range of other matters which would also prejudice its commercial interests. If the information is disclosed, it would lead to ill-feelings between colleagues who work together in teams and this would impact the effectiveness of those teams. It would likely also lead to adverse publicity, as has been the case in relation to Vice-Chancellors' salaries, thereby damaging the College's reputation and standing in the market place. As well, it would also potentially impact on the willingness of donors who may disagree with the College's spending priorities or who may be put off by adverse publicity about salaries.

The Commissioner's arguments

124. The Commissioner accepts that the College has commercial interests that it is entitled to protect, and he also accepts that there is a causal connection between the potential disclosure of the Disputed Information, and the claimed prejudice to its commercial interest. However, he does not accept that the evidence shows that there is a real and significant risk of prejudice, as opposed to a mere hypothetical possibility. He says that the position of PSS is significantly different in this regard from the "superstars" of the academic world in respect of which he accepts that recruitment and retention is uniquely competitive. He says that in the case of PSS, there is a bigger pool of individuals who can be recruited, and the evidence is that they are usually recruited in the UK rather than internationally. He also says that the evidence does not show that recruitment of PSS involves the same challenges as recruiting academic staff.
125. The Commissioner says that if he is wrong about this, and there is, in fact, a real and significant risk of prejudice as a result of disclosure of the Disputed Information, the exemption is still not engaged because the public interest in disclosure of the information outweighs the public interest in maintaining the exemption. He reiterates the public interest considerations referred to in relation to section 40(2), as set out above although recognising that the

balancing exercise in the case of a qualified exemption like section 43(2), is different from that required by section 40(2).

Findings

126. As already noted, the question of whether section 43(2) is engaged is now relevant only to those 6 PSS who are on the PCT. The question is whether disclosure of the information in relation to those PSS, would be likely to prejudice the commercial interests of the College, and if so, whether the public interest in maintaining the exemption outweighs the public interest in disclosure. Again, the College has not put its case on the basis that there is a distinction to be drawn between one member of the PSS and another. Its position is that disclosure of this information in relation to this category of employees engages the exemption in section 43(2), and therefore we have not considered the individual position of those concerned.
127. We recognise that the College is one of the leading universities in the UK, and we accept that as emphasised by the witness evidence, the College operates in a competitive environment, both nationally and internationally. We also accept that like any organisation operating in such an environment, in order to remain competitive, the College needs to attract high calibre staff, including for PSS roles.
128. Because the issues in this appeal initially concerned both the academic staff and PSS, a great deal of the evidence in the witness statements, has been about the effort that is devoted to recruiting academic staff, particularly research-active academic staff. This evidence was intended to show how important the academic staff are, for the reputation of the College and for its ability to attract students and funding, and why publication of the salaries would exacerbate the existing difficulties with recruiting such candidates.
129. The Commissioner found this evidence sufficiently compelling that he accepted that section 43(2) is engaged in relation to the academic staff. We are not satisfied, however, from the evidence, that the College has made out its case as to the prejudice to its commercial interests in relation to the PSS. There may be some exceptional cases of course, but one cannot draw on examples from exceptional cases to extrapolate as to the position of the PSS generally. We find that it is clear from the evidence that in general, the recruitment of PSS takes place from a wider, national pool, and that the skills are not as unique to specific individuals as in the academic sector.
130. As already noted, the College has said that there are several ways in which disclosure would prejudice its commercial interests, First, it says that disclosure would increase the cost of recruiting and retaining PSS because, *inter alia*, competitor universities or private sector organisations, would know what salary level they would have to offer to lure people away.
131. We accept that the College does have to compete for the best PSS, but we do not find it likely that the College's remuneration rates are particularly unique or that the recruiting efforts of competitor organisations are likely impaired by a lack of salary information. By its own evidence, the College bases its salary for any given candidate on his or her existing salary. It is

reasonable to expect that that salary would generally reflect prevailing market rates, so what the College then offers would likewise bear a relationship to those market rates.

132. We do not suggest that this is a precise science; we accept that salaries of senior individuals rarely are, but we find it implausible that there is no correlation between the salaries that different universities or other organisations pay for a particular role. No doubt, there are variations which take into account a multitude of factors, including amongst other things, whether the role is in the private or public sector, and the success in financial terms, of the institution in question. Despite Mr Dempster's claim that he has no idea at all what his counterparts in other universities are paid (which we find particularly surprising given his position as Director of Human Resources, a role which we would expect would entail being aware of the extent to which the College's salaries are or are not competitive), the College accepts that the senior candidates in issue are going to be sophisticated individuals. We find it reasonable to expect such candidates would know the market for their skills, and further that those trying to recruit them would also know this from the salaries of the incumbents or would be able to ascertain that information using the services of head hunters for the relevant sector. The College says it uses such services for senior individuals, and there has been no suggestion that this is unusual, or that competitor organisations do not do likewise.
133. In addition, we do not accept that the likely effect of disclosure is that the College will have to pay more to recruit PSS. Although Mr Dempster said, in his evidence, that the recent inflationary trend in Vice Chancellor salaries was because their salaries are published, Mr Large (whose evidence we found to be altogether more balanced), accepted that this is not in fact the case, and we do not find that the evidence supports a finding that publishing the salaries of the PSS would lead to those salaries being increased. There has been no data produced in evidence, for example, that that has been the effect in any other sector where salaries have been published.
134. We also find, as indeed the College accepted, that as far as other universities are concerned, if publication of salaries facilitates poaching, then that would work both ways.
135. Second, the College says that disclosure would impede salary negotiations by encouraging candidates to seek higher salaries based on the amounts paid for posts they regard as being comparable. We do not find that the evidence before us supports such a finding, and we consider that this concern, too, has been over-stated. Unlike the case of academic staff where there are likely to be a number of comparable posts (for example, heads of departments), the evidence is that that is not the case for PSS roles.
136. We also see no reason to find that the College would not have rational reasons for such salary differentials as may exist, nor that such comparisons would only work against the College. Justifying salary differentials both to existing employees and new candidates, is a challenge we expect would often be faced by employers in organisations where salaries are individually negotiated. While we accept that if salaries are published, such discussions

with employees, existing or potential, may take place on a more transparent basis, and that there may be some difficult conversations to have, we do not find that it follows that it would result in prejudice to the College's commercial position.

137. Third, the College says it would lose PSS or fail to attract PSS who did not wish to have information about their salaries disclosed. It says that although this might not put the College at a competitive disadvantage, nationally, if other institutions are also required to disclose that information, it would put them at a competitive disadvantage internationally, because comparable institutions in countries such as the USA and Australia, do not have to disclose such information. The College also says that they would lose or fail to attract candidates from the private sector.
138. We note that the evidence of a number of the PSS quoted in Mr Dempster's witness statements do say that if salary information is published, they will reconsider their position. Although, as noted, there has been no opportunity for their evidence to be tested in cross-examination, we accept that there may be some individuals who will feel so strongly about such matters that it may determine whether they take up or remain in a particular position. However there is no evidence before us that that would generally be the case. It has not been suggested, for example, that otherwise suitable candidates are deterred from applying for the post of Vice Chancellor at any University in this country simply because the salaries for those posts are routinely published, nor that in other sectors where salaries are published, it has a marked effect on the willingness of candidates to apply.
139. We also find, on the evidence, that the recruitment market for PSS is usually national rather than international in scope. Indeed, Mr Dempster says that of the 50 or so PSS who have been recruited while he has been at the College, only one was recruited from overseas. We find, in short, that the prospect of losing employees or candidates to universities outside the UK which are not subject to FOIA, is overstated.
140. In addition, the College says that disclosure would lead to ill-feelings between colleagues and impact the effectiveness of those teams, lead to adverse publicity, as has been the case in relation to Vice-Chancellors' salaries, thereby damaging the College's reputation and standing in the market place, and may also impact on donations.
141. As to disparities between colleagues, our views are as set out at paragraphs 132 to 133 above. Even if there is initial unrest upon publication of the salaries, we see no reason to find that that expectations would not adjust. As to adverse publicity, the natural consequence of there being a public interest in the information is that the information may well be examined, and opinions expressed. As we indicated earlier, there is no reason to consider that the College does not make its remuneration decisions on a rational basis, or would not be able to justify their decisions. We also do not find, on the evidence, that the publication of these salaries would affect donor willingness. There is no evidence that donor willingness has been affected by the adverse publicity in relation to Vice Chancellor salaries. Also, while we accept that academic salaries are sometimes funded by gifts, and also

that confidentiality terms may be agreed with the donors, it has not been suggested that donors fund PSS positions.

142. In short, we are not satisfied even taking these factors into account cumulatively, that there is a real and significant risk that disclosure of the information in relation to the PSS who are on the PCT, would be likely to prejudice the commercial interests of the College. The exemption in section 43(2) is therefore not engaged.
143. The findings as set out above in relation to section 43(2) are the findings of the majority. One member of the panel considers that disclosure would be likely to prejudice the commercial interests of the College because disclosure would affect the collegiate working of the PCT itself, that the College may indeed lose PSS as a result of disclosure and this would cause disruption, and further that adverse publicity arising from disclosure may affect donor willingness.
144. With the majority having reached the finding that disclosure would not be likely to prejudice the commercial interests of the College, we do not need to go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.
145. For completeness, we note that the College has suggested that if we require disclosure, we should do so by reference to larger pay bands of £30,000 rather than £10,000. There is no proper basis for us to direct disclosure on that basis. The request was for the information in bands of £10,000, and that is what was addressed in the Decision Notice under appeal.

Decision

146. The Commissioner has accepted that the exemption in section 43(2) is engaged in relation to the College's academic staff. The College is not required, therefore, to disclose the requested information in relation to those employees.
147. We find that the exemption in section 40(2) is engaged in relation to the PSS who are not on the PCT. The College is not required, therefore, to disclose the requested information in relation to those employees
148. We find that the exemption in section 43(2) is not engaged in relation to the PSS who are on the PCT. The College is required, therefore, to disclose the requested information in relation to those employees.

Signed

Anisa Dhanji

Judge

Date: 30 September 2014