

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 November 2013

Public Authority: The Universities and Colleges Admissions Service (UCAS)

Address: Rosehill
New Barn Lane
Cheltenham
GL52 3LZ

Decision (including any steps ordered)

1. The complainant requested admissions information, by institution, relating to applicants holding a conditional firm offer for an F3 (Physics) course. In response, UCAS explained that it is only designated as being subject to FOIA for a limited purpose and argued that the requested information fell outside of this designation. The effect of this is that UCAS found it was not under a duty to consider the requested information under FOIA. The Commissioner disagrees with this position and has decided that the requested information relating to the institutions referenced in the designation order is potentially accessible from UCAS under FOIA. The Commissioner therefore requires UCAS to consider the requests in accordance with the legislation and issue an appropriate response.
2. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

3. On 18 March 2013 the complainant wrote to UCAS and requested information in the following terms:

By institution, for applicants holding a CF [conditional firm] offer for an F3 (Physics) course when the A-level results are

announced in August, how many: (a) go to UF [unconditional firm] automatically having met their offer; (b) go to UF at the discretion of the institution as "near miss" candidates; (c) are declined by the institution.

4. UCAS initially responded on 19 April 2013 by directing the complainant to UCAS Media Limited as the body responsible for managing bespoke analysis of applications and admissions data. At the prompting of the complainant, however, UCAS subsequently considered whether the requested information should be provided under FOIA.
5. In its substantive response of 23 April 2013, UCAS explained to the complainant that the Freedom of Information (Designation as Public Authorities) Order 2011 ('2011 Order') had made it subject to FOIA but only to a limited extent. This was where information was held with respect to the function of the provision and maintenance of a central applications and admissions service in relation to the institutions referenced in the 2011 Order. UCAS found that the requested information fell outside the scope of the 2011 Order and was not therefore covered by FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 23 April 2013 to complain about UCAS' handling of his requests and particularly its position that the requested information is not covered by FOIA.
7. The question for the Commissioner is therefore to decide whether the requested information potentially falls within the scope of the information described by the 2011 Order. Insofar as it does, UCAS would have a duty to process that specific information under FOIA.

Reasons for decision

UCAS' designation under FOIA

8. The application of the 2011 Order has recently been considered by the Commissioner in a decision notice involving UCAS on FS50453565 (22 May 2013)¹. The case itself dealt with a number of different issues, but

¹ http://www.ico.org.uk/~/media/documents/decisionnotices/2013/fs_50453565.ashx

importantly for the Commissioner's present purposes included the handling of two requests that asked for data about applications to universities and data about the accuracy of predicted grades of applicants to universities respectively.

9. The Commissioner found against UCAS to the extent that he considered that all of this information was in principle accessible under FOIA. However, he went on to find that the requested information was either exempt from disclosure under s43(2) (commercial interests) of FOIA or was otherwise not held. UCAS has appealed the Commissioner's interpretation of the 2011 Order to the First-tier Tribunal (Information Rights) and, at the time of writing, the appeal is waiting to be heard. The Commissioner is aware that the requested information in this case is not the same as the information analysed in FS50453565. Nevertheless, he has found it appropriate to adopt the same approach to the 2011 Order.
10. The 2011 Order itself was issued under section 5 of FOIA and set out the extent to which UCAS is covered by FOIA:

[...] The persons listed in column 1 [ie UCAS] of the Schedule are designated as public authorities under section 5(1)(a) of the Freedom of Information 2000 with respect to the function or functions specified in column 2.

[...] The provision and maintenance of a central applications and admissions service in relation to:

(a) an institution listed in paragraphs 53(1)(a) to (e) and 55(1)(a) and (b) of Part 4 of Schedule 1 to the Freedom of Information Act 2000;

(b) an institution listed in Part 5 of Schedule 1 to the Freedom of Information (Scotland) Act;

(c) the College of Agriculture, Food and Rural Enterprise.²

² http://www.legislation.gov.uk/uksi/2011/2598/pdfs/uksi_20112598_en.pdf

11. At paragraphs 18 – 20 of his decision notice on FS50453565 the Commissioner outlined how UCAS had understood the effect of the 2011 Order:

18. UCAS stressed that the wording of the designation order specifically stated that only functions which are designated as falling within the scope of FOIA are the 'provision and maintenance' of the central applications and admissions service.

19. UCAS explained that it has a number of functions, including but not limited to: 'inform services', 'search services', 'apply services' and 'analytical services'. It only considers the 'apply services' to be within the scope of the designated function. The apply services include the common application service via a single gateway; management of information exchange between Higher Education (HE) provider in respect of application level and simple operational summary information essential to provide a central applications and admissions service; the provision of qualifications results and advice provision to both applicants and HE providers on the operation and mechanics of the application and admissions system during a live cycle.

20. Furthermore, UCAS argued that not only must the requested information be within the FOI designated function, but the information will only be accessible under FOIA if it relates to a specific institution referenced in the order. Therefore, not all institutions involved in, or in relation to which UCAS exercises its FOI designated function are necessarily covered by FOIA.

12. Flowing from this interpretation, UCAS devised a two part-test that qualified when admissions information it holds should be considered as being held, at the time of the request, for the purposes of FOIA. UCAS has maintained that this is the relevant test that should be applied in this situation and, in accordance with his findings on FS50453656, the Commissioner agrees. The test is as follows:
- i) UCAS must be exercising its designated function, i.e. the information is obtained, gathered, held or otherwise used or processed for the provision and maintenance of a central applications and admissions service; and
 - ii) UCAS is doing so in relation to specific institutions that are referenced in the section 5 designation order.
13. Where both parts of the test are satisfied, UCAS further argued (and continues to argue) that it necessary to then assess whether the requested information is also held to a *significant extent* for some other

(commercial) purpose outside the 2011 Order and whether the immediate object of holding that information is for these non-designated functions. If so, UCAS considered this would demonstrate that the information should not be properly classified as falling within the scope of the 2011 Order. UCAS takes the view that this additional layer of analysis reflects both the intentions of the authors of the 2011 Order, and the information they were seeking to protect, and the case law on the interpretation of the derogation that came out of the *BBC v Sugar* cases³. Like UCAS, the BBC is subject to FOIA but only to a limited extent.

14. To support its position, UCAS has reaffirmed the distinction between information requested about live admissions cycle data, which it considered would potentially satisfy the first limb of the test, and historic admissions cycle data, which would not. The importance of the distinction is that, in UCAS' view, the immediate objective of the information that it holds is likely to change with the passage of time. To return to his decision on FS50453656, and particularly paragraph 29, UCAS has previously explained that it operates on an annual application and admissions cycle where information collected in one year (ie one cycle) for the immediate object of the FOI designated function may no longer be held immediately for such function later in that year or subsequent years.
15. UCAS has similarly argued here that the immediate object or direct link in these circumstances moves away to other non-designated functions, such as member services (for example, the analytical service and/or more generally available commercial services). In other words, UCAS considers that any relevant information it holds is 'historic' and therefore falls outside of the scope of the 2011 Order. In forming this view, UCAS has acknowledged that the request – in referring to results announced in August – covers applications for the 2012/2013 academic year, which was the current admissions cycle at the time of the request. However, it has advised that the admissions cycle for entry to the academic year 2012/2013 closed at the beginning of November 2012 and therefore considered that this closure effectively marked the transition from a 'live' cycle to a 'historic' cycle.

³ Mr Sugar submitted a request to the BBC for a copy of the 'Balen' report, which reviewed the BBC's coverage of the Middle East and in particular the Israel and Palestine conflict. The Supreme Court ultimately upheld the BBC's position that the report was derogated, ie was not accessible under FOIA. [Sugar v BBC \[2012\] UKSC4](#)

16. According to UCAS, the effect of the transition from information relating to a 'live' cycle to a 'historic' cycle is that the information either converts to forming the basis of UCAS and UCAS Media Limited's data related products and services purchased by universities, colleges, individuals and other third parties from UCAS Media Limited or becomes a part of the subscription services provided to UCAS' members. As such, once a live cycle is over, the information will be held to a significant extent by UCAS and UCAS Media Limited for its commercial and/or other non-FOIA functions - meaning the immediate object is now for non-designated purposes.
17. In FS50453565, and equally here, the Commissioner has adopted an approach that is at odds to the one endorsed by UCAS.
18. Firstly, the Commissioner allows that the concepts of 'live' and 'historic' data may be instructive when deciding for what purpose information is held at the time of a request. However, he does not accept that all data associated with an admissions cycle becomes 'historic' as soon as that particular cycle ends. In forming this view, the Commissioner acknowledged UCAS' explanation that historic admissions data is not 'critical and necessary to delivering the current and future applications and admissions service' (paragraph 49). However, the Commissioner went on to say in the same paragraph that in his opinion 'this does not mean that admissions data from recent years, such as that which is the focus of these requests, is not used for some element of management planning purposes in order to support the current and future implementation of the designated function.' To find otherwise would, in the Commissioner's view, support the position that UCAS provides and maintains the application and admissions service for each live cycle in some sort of vacuum.
19. Secondly, the Commissioner also disagrees with UCAS that an additional test to be applied is whether information is held 'to a significant extent' for the purposes of a non-designated function. Rather, the Commissioner believes that the correct test is whether there is a 'sufficiently direct link' between the requested information and UCAS designated function. This difference in position ultimately stems from a divergence in the way that the Supreme Court's findings on *Sugar* were understood to clarify the effect of UCAS' designated FOI function.
20. As these respective positions were outlined in some depth in FS50453565, the Commissioner has not felt it necessary to reproduce the relevant considerations again other than to reiterate how he considers the principles of the *Sugar* decision apply to the 2011 Order (paragraph 42). In short, if there is a 'sufficiently direct link' between UCAS' designated FOI function and the requested information, then the requested information will be held by UCAS for the purposes of FOIA.

21. In the Commissioner's opinion this means that simply because the requested information is held by UCAS for multiple functions, as long as there remains a sufficiently direct link between the requested information and UCAS' designated FOI function, then the information is still held for the purposes of UCAS' designated FOI function. This remains the case even if the dominant purpose of holding the information is not for the designated purpose.
22. The consequence of this approach is the Commissioner has decided that there is requested information that could potentially be accessed under FOIA. This, however, will only be to the extent that the information relates to the institutions stated in the 2011 Order (referred to at part (ii) of UCAS' test set out at paragraph 12). Accordingly, the Commissioner finds that UCAS should consider whether this particular information can and should be provided under FOIA.

Right of appeal

23. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

24. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
25. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Rachael Cragg
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF