Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **30 September 2015**

Public Authority: **City University London**
Address: **Northampton Square**
London
EC1V OHB

Decision (including any steps ordered)

1. The complainant has requested various information from City University London (the University) in connection with student exam results and sponsorships for its Graduate Diploma in Law (GDL) and Bar Professional Training Course (BPTC) courses.

2. The Commissioner's decision is that City University London has correctly applied sections 36(2) and 43(2) to the information requested by the complainant. However, he has decided that it breached section 10 of the FOIA by failing to respond to the complainant's request within twenty working days.

3. The Commissioner does not require the public authority to take any further steps to ensure compliance with the legislation.

Abbreviations used

4. The abbreviations in this Decision Notice stand for the following; GDL-Graduate Diploma in Law, BPTC-Bar Professional Training Course, BSB-Bar Standards Board[1] and the LPC-Legal Practice Course.

[1] https://www.barstandardsboard.org.uk/

5. The Graduate Diploma in Law (GDL) is a law conversion course allowing able non-law graduates from any discipline to fulfil the academic stage of legal training in preparation for further vocational study leading to qualification as barrister or solicitor (the BPTC or LPC courses respectively).

Request and response

6. On 19 August 2015 the complainant wrote to the University and requested information in the following terms:

"This request is made pursuant to the Freedom of Information Act. Please supply me with the following information:

1. A breakdown of the percentages of full-time students at The City Law School that achieved each grade in the GDL for each year in the last five years.

2. A breakdown of the percentages of full-time students at The City Law School that achieved each grade in the BPTC for each year in the last five years.

3. The percentage of GDL students who stay with The City Law School to undertake either the LPC or BPTC.

4. The percentage of students completing the BPTC that commence pupillage within two years of finishing.

5. The percentage of students you give some sort of scholarship to for the GDL (full-time) and the average value of the award.

6. The percentage of students you give some sort of scholarship to for the BPTC and the average value of the award."

7. The University responded on 6 October 2014. In relation questions 1, 2, 3, 5 and 6 of the request it said that it was withholding the information under sections 41(1) and 43(2) of the FOIA. In relation to question 4 it said that it did not hold the information.

8. On 6 October 2015 the complainant requested an internal review.

9. Following the intervention of the Commissioner the University completed the internal review and wrote to the complainant on 20 February 2015. It reiterated that it did not hold any information to answer question 4 and part of question 2, in relation to the academic

year 2009/10. In relation to the remaining questions the University upheld its position in relation to the exemptions under sections 41(1) and said it also wished to rely on section 36(2) of the FOIA. It pointed out that the Commissioner had upheld its application of section 36(2) in similar earlier case in his Decision Notice FS50544323 dated 9 December 2014[2].

Scope of the case

10. The complainant contacted the Commissioner on 24 November 2014 prior to the outcome of the internal review, and again on 2 January 2015 once the review had been completed, to complain about the way his request for information had been handled. In particular, he complained about the University's decision to withhold the requested information.

11. The complainant confirmed to the Commissioner on 10 January 2015 that he was happy for the scope of his complaint to be restricted to the University's response to questions 1, 2, 3, 5 and 6 of his request. He also confirmed he accepted the University's explanation that it did not hold any recorded information for the BPTC figures for 2009/10 referred to in question 4 of his request.

Chronology

12. On 12 January 2015 the Commissioner contacted the University to request a copy of the withheld information together with its further arguments in relation to what information was held and the application of the various exemptions it had cited. In respect of question 1 of the complainant's request, the Commissioner pointed out that an identical request submitted to the Law Society[3] resulted in the GDL information being disclosed in respect of City Law School, Kaplan Law School, BPP University and the University of Law (London centres only)[4]. In respect

[2] https://ico.org.uk/media/action-weve-taken/decision-notices/2014/1042888/fs_50544323.pdf

[3] Although the Law Society is not an authority covered by the FOIA is does deal with requests for information under its own code. See http://www.lawsociety.org.uk/get-in-touch/freedom-of-information/

[4] https://www.whatdotheyknow.com/request/gdl_statistics_3

of question 5 and 6, the Commissioner also pointed out that the complainant made a similar request to the Middle Temple[5], the Inner Temple[6] and Lincoln's Inn[7] for information on GDL and BPTC scholarship awards and all three bodies disclosed the requested information.

13. The University responded on 20 February 2015 and provided the Commissioner with a copy of the recorded information held together with its further arguments in relation to the application of the exemptions cited. In relation to questions 1, 2 and 3 of the complainant's request, it said that it upholding its application of sections 36(2), 41 (for question 2 only) and 43(3) of the FOIA. In relations to questions 5 and 6 it said it was still relying on sections 36(2) (question 6 only) and section 43(2).

14. The University also made a reference to an earlier Decision Notice (FS50544323 dated 9 December 2014)[1] concerning the University where the Commissioner upheld its application of section 36(2) in relation to a request for similar information concerning the BPTC as specified in question 2 of the complainant's request. In relation to the information disclosed by other organisations, the University stated that it was not its policy to proactively publish examination data. Also it stated that piecemeal disclosure on an ad hoc basis in response to FOIA requests would be detrimental to it and its students.

15. On 20 March 2015 the Commissioner contacted the University again and invited it to clarify and review its response to questions 1, 5 and 6 of the complainant's request.

16. The University responded on 11 May 2015 and stated that it was maintaining its position to withhold the information requested in questions 1, 5 and 6 of the complainant's request. In relation to question 1 it said that it would continue to rely upon section 36(2) of the FOIA. In respect of questions 5 it said it would still rely upon section 43(2). However, in respect of question 6 is said it would no longer rely upon section 36(2) but continue with its reliance on section 43(2).

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[5] https://www.whatdotheyknow.com/request/scholarship_statistics_2#incoming-566313

[6] https://www.whatdotheyknow.com/request/scholarship_statistics_3#incoming-561068

[7] https://www.whatdotheyknow.com/request/scholarship_statistics_4#incoming-560569

Reasons for decision

17. The University has relied on the exemptions in sections 36(2)(c), 41 and 43(2) of the FOIA to justify its decision to withhold the requested information. The Commissioner will now deal with each exemption in turn.

Section 36(2)(c) - Prejudice to the effective conduct of public affairs

18. The University has applied section 36(2)(c) of the FOIA in relation to questions 1, 2, and 3 of the complainant's request. During the course of the complainant's investigation it stated it no longer wished to rely upon section 36(2) in relation to question 6.

16. Section 36(2)(c) provides that:

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –

…(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

17. In order to determine whether section 36(2)(c) has been correctly applied the Commissioner has:

(i) ascertained who the qualified person was for the public authority;

(ii) established that an opinion was given;

(iii) ascertained when the opinion was given; and

(iv) considered whether the opinion given was reasonable.

The engagement of section 36

19. The University confirmed that the opinion in relation to the application of section 36 was given by its Vice Chancellor. The Commissioner is satisfied that he was the appropriate qualified person for these purposes.

20. Section 36(2)(c) provides that:

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act -

…(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

21. In order to determine whether section 36(2)(c) has been correctly applied the Commissioner has:

(i) ascertained who the qualified person was for the public authority;

(ii) established that an opinion was given;

(iii) ascertained when the opinion was given; and

(iv) considered whether the opinion given was reasonable.

The engagement of section 36

22. The University confirmed that the opinion in relation to the application of section of section 36(2)(c) was given by its Vice Chancellor, Professor Paul Curran. The Commissioner is satisfied that he was the appropriate qualified person for these purposes.

23. In support of the application of section 36, the University has provided the Commissioner with details of the submission to the qualified person, which identifies the information to which it is suggested that section 36(2)(c) should be applied. The Commissioner notes that the qualified person's opinion was provided on 17 December 2014 on the basis that he believed that disclosure of the withheld information would have the effects set out in section 36(2)(c). The qualified person accepted that section 36(2)(c) was engaged for the following reasons:

- In relation to question 1 of the complainant's request, the University does not routinely publish exam results for individual courses. If exam results are disclosed into the public domain, it is only with the consent of individual students. The disclosure of course exam results on an ad hoc basis would undermine the relationship between students and the University.

- In relation to questions 2, 3 and 6 of the complainant's request, if the University was to provide the information requested it would jeopardise the "safe space" in which the University is able to liaise with the Bar Standards Board (BSB) as a BTPC course provider and fulfil its obligations as set out in the information sharing agreements in place between the BSB and all BTPC course providers.

- In relation to question 2 of the complainant's request, the wider context of public affairs, the duty of confidentiality requires preservation. It is in the public interest for the Bar Standards Board to decide the detail and the timing of publication of information about the course after consultation with all course providers. This position would be undermined by the premature disclosure of information by individual course providers.

- In relation to questions 2, 3 and 6 of the complainant's request, disclosure would also damage the working relationship between the BSB and the University to the detriment of both University staff and students and have an adverse impact on the credibility and reputation of the University within the higher education sector.

24. The Commissioner notes that his guidance on section 36 makes clear that:

"The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that **no** reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the **most** reasonable opinion that could be held; it only has to be a reasonable opinion." (para. 21)

25. Provided that the Commissioner is satisfied that the opinion is in accordance with reason and not irrational or absurd, in short, that it is an opinion that a reasonable person could hold, then he will regard it as a reasonable opinion for the purposes of section 36.

26. After reviewing the withheld information, the Commissioner has concluded that it was reasonable for the qualified person to conclude that section 36(2)(c) applied to it.

27. As section 36 is a qualified exemption, it is subject to a public interest test. The Commissioner therefore went on to consider whether the public interest in maintaining the exemption outweighed the public interest in disclosure of the information**.**

Public interest test

28. The Commissioner notes that the qualified person's opinion was that disclosure of the withheld information "would" have the effects set out in section 36(2)(c), as opposed to that it "would be likely" to have those effects. In his view this means that means that prejudice is 'more probable than not'. In other words, there is a more than 50% chance of

the disclosure causing the prejudice, even though it is not absolutely certain that it would do so.

29. In Guardian Newspapers & Brooke v Information Commissioner & BBC (EA/2006/0011 & EA/2006/0013), the Tribunal noted the distinction between consideration of the public interest under section 36 and under the other qualified exemptions contained within the Act:

"The application of the public interest test to the s 36(2) exemption involves a particular conundrum. Since under s 36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person, it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s 36(2)(b), or indeed of prejudice under s 36(2)(a) or (c). But when it comes to weighing the balance of public interest under s 2(2)(b), it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice."

30. The Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and so

"…does not necessarily imply any particular view as to the severity or extent of such inhibition (or prejudice) or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant."

31. Therefore, in the Commissioner's opinion, this means that while due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of the likely prejudice to the effective conduct of public affairs.

Public interest arguments against disclosure

Questions 1, 2 and 3 of the complainant's request

32. In its submissions to the complainant and the Commissioner, the University acknowledged the public interest in disclosure to demonstrate openness and transparency in its decision making process and to help to ensure that it was held accountable for its decisions. However, it believed that this was outweighed by the public interest of a number of other factors. Firstly, if it was to disclose the requested information it would jeopardise the 'safe space' in which it was able to liaise with the BSB as a BPTC course provider and fulfil its obligations as set out in the information sharing agreements in place between the BSB and all BPTC course providers. Secondly, in the wider context of public affairs, the duty of confidentiality requires preservation. The University considers that it is in the public interest for the BSB to

decide the detail and timing of the publication of information about the course after consultation with all course providers. This position would be undermined by the premature disclosure of information by individual course providers. Thirdly, disclosure would damage the working relationship between the BSB and the University's Law School to the detriment of its staff and students and have an adverse impact of the credibility and reputation of the University within the higher education sector. Finally, disclosure of the course exam results would undermine its relationship between students and the University.

Questions 1 and 3

33. The University has argued that it is not in the public interest for its GDL exam results and the percentage of its GDL students who remain with it to undertake the LPC or BPTC to be disclosed under the FOIA as to do so would undermine its relationship with the students and might also lead to market distortion.

34. In relation to question 1, the University acknowledges that the requested information is already in the public domain having been disclosed in October 2014 by both the Law Society and the Solicitors Regulation Authority (neither of which are public authorities for the purpose of the FOIA) in response to separate requests made by the complainant.

35. However, it has pointed out that it does not proactively publish examination data and believes that do so on an ad hoc basis in response to FOIA requests might lead to the creation of unofficial course league tables. This in turn might result in market distortion if the information became, in isolation, the only way of benchmarking one case provider against another in what is a competitive market. The University has added that if examination results for individual courses are disclosed into the public domain it is only with the consent of individual students.

36. Although it is not the University's policy to proactively publish examination data, it has pointed out to the Commissioner that it does provide some assessment data to the Higher Education Statistics Agency (HESA) under its statutory duty. This data is published according to a planned schedule or provided within established procedures as part of HESA's bespoke data service.

37. The University believes that the publication of data by HESA satisfies the public interest in making the public aware of its performance.

38. In relation to question 3, the University has pointed out that the requested information is not already in the public domain and to

disclose it under the FOIA would be likely to cause damage to its commercial interests. There are a number public and private organisations that run the GDL[8] course and the market is a competitive one. The requested information is not routinely published by other organisations and the University believes that if it was to do so in isolation it would put it at a commercial disadvantage, especially in relation to those organisations in the private sector.

Question 2

39. In relation to question 2, the University has referred to the detailed comments made by the Commissioner in his Decision Notice FS50544323 dated 9 December 2014[9] when he upheld its application of section 36(2)(c) of the FOIA in relation to a similar request for information about BPTC examination results That case concerned the number of students that sat two specific subject examinations together with their results for the period 2009-2013.

40. Although the Commissioner is not bound by his previous decisions, he considers that the information requested in this case in relation to the BPTC results is substantially similar to that which is the subject to his previous Decision Notice. Accordingly, he applies the same arguments and reasoning to this case as those set out in paragraphs 15 to 59 of his earlier Decision Notice.

Public interest arguments in favour of disclosure

Questions 1, 2 and 3 of the complainant's request

41. The University acknowledges that there are general public interest factors in favour of disclosure of information to demonstrate openness and transparency in its decision making process to ensure that it is accountable for its decisions.

42. The complainant believes that there is a public interest in the information specified in questions 1, 2 and 3 of his request being disclosed as it was created by the University and relates to its activities. In relation to question 2 he has pointed out that the information was not created by the BSB nor does it concern its activities.

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[8] http://www.sra.org.uk/students/courses/cpe-gdl-course-providers.page http://allaboutlaw.co.uk/law-courses/gdl

[9] https://ico.org.uk/media/action-weve-taken/decision-notices/2014/1042888/fs_50544323.pdf

Balance of the public interest arguments

43. The Commissioner recognises there is a general public interest in universities being open and transparent so they are accountable for their decisions. He also accepts that there is a public interest in information regarding the performance of universities in terms of examination pass rates and also its student retention rates.

44. However, in this case the Commissioner is of the view that the public interest arguments in favour of disclosure are outweighed by those against disclosure for the reasons stated by the University. (See above).

45. As the Commissioner is satisfied that the exemption under section 36(2) of the FOIA is engaged in respect of questions 1, 2 and 3 of the complainant's request with the public interest being balanced in favour of maintaining the exemption, he has not gone on to consider the other exemptions cited by the University under sections, 41 and 43.

Section 43(2) of the FOIA

46. The University has withheld the information requested by the complainant in questions 4 and 5 of his request under section 43(2) of the FOIA on the grounds that it is commercially sensitive and disclosure would be likely to harm its commercial interests.

47. Section 43(2) of the FOIA provides an exemption from disclosure for information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is therefore subject to the public interest test.

48. The term 'commercial interests' is not defined in the FOIA; however, the Commissioner has considered his awareness guidance on the application of section 43. This states that:

"a commercial interest relates to a person's ability to participate competitively in a commercial activity, ie the purchase and sale of goods and services"

49. The construction of section 43(2) of FOIA means that a public authority is initially required to consider the prejudice test. This test has three stages, each of which must be satisfied in order for the exemption to be engaged.

50. First, the harm that is envisaged would, or would be likely to, occur should relate to the applicable interest described in the exemption. Second, there is a causal relationship between the potential disclosure

of the withheld information and the prejudice that the exemption is designed to protect against. Third, there is a real risk of prejudice arising through disclosure, with the public authority able to demonstrate that either disclosure 'would be likely' to have a prejudicial effect or the higher threshold that disclosure 'would' have a prejudicial effect.

51. Although the first limb of the prejudice – 'would be likely' – places a weaker evidential burden on a public authority, the risk of prejudice must nevertheless be real and significant and more than a hypothetical possibility. Section 43(2) is also qualified by the public interest test. This means that if the exemption is found to be engaged on the basis that the prejudice test is satisfied, the public authority must go on to assess the balance of the public interest in disclosure.

52. The University has stated it was relying on the lower threshold of the test that disclosure of the withheld information 'would be likely to' prejudice its commercial interests.

53. The withheld information relates to the percentage of students that the University awards a scholarship award to and the average amount of that award for its GDL and BPTC's courses.

54. The University has stated that scholarships awards are an integral part of its marketing strategy to recruit students in what is a competitive market for the provision of legal courses such as the GDL and BPTC.

55. The Commissioner accepts that this information is commercial in nature as it relates to the University's ability to participate competitively in a commercial activity, i.e. the recruitment of students for particular legal courses.

56. The University has stated that the provision of legal courses such as the GDL and BPTC is a commercial activity in a market for which there are a number of organisations in both the public and private sectors competing to attract students.

57. The University has made the complainant and the Commissioner aware of the information already on its website relating to the number and value of scholarships and bursaries[10] that it publishes annually. It has

[10] http://www.city.ac.uk/study/undergraduate/funding-and-financial-support/scholarships-and-bursaries

also made specific reference to the Postgraduate scholarships it offers to its City Law School students[11].

58. On the University's website it states that 'the City Law School will offer up to 10 full fee Scholarships, for 2015/16. These will not be linked to any particular course and both UK/EU and International students are eligible to apply. In addition, we will also offer up to 100 x £3,000 scholarships, again not linked to a particular course'. This scholarship offer applies to the following Postgraduate courses;

- 'Graduate Diploma in Law (GDL)
- Graduate Entry LLB (GE LLB)
- Bar Professional Training Course (BPTC)
- Legal Practice Course (LPC)
- Master of Laws (LLM) - excluding International Business Law distance learning'

59. The University has pointed out that information relating to its scholarships is part of its marketing strategy to attract students and to disclose any additional information to that already available on its website under the FOIA would give its competitors an unfair advantage, particularly those in the private sector.

60. The complainant does not accept that disclosure of the requested information would be likely to prejudice the University's commercial interests.

61. The Commissioner is aware that in August 2014 the complainant submitted requests to the Middle Temple, Inner Temple and Lincoln's Inn for information concerning the number and amount of scholarship awards for the GDL, CPE and BPTC courses. This information was disclosed in September 2015. However, the Commissioner is aware that the three organisations concerned are not public authorities for the purposes of the FOIA and disclosed the information under separate provisions.

62. The Commissioner made the University aware of the position taken by some of the Inns of Court who responded by stating that it uses

[11] http://www.city.ac.uk/law/support/financing-your-study/scholarships

scholarships as part of its marketing strategy. The University added that disclosure of this information by the Inns of Court would not be a concern for them as they would be keen to promote their own schemes.

63. The Commissioner accepts the University's arguments that the disclosure information about its scholarships would be likely to prejudice its commercial interests in relation to the marketing of its GDL and BPTC courses.

Public interest arguments in favour of maintaining the exemption

64. The University has pointed out that there is a public interest in ensuring that it is able to participate freely and competitively in its commercial activities and a strong public interest in universities being able to generate commercial revenue and reduce their reliance on public sector funding. In the present case, the University believes that disclosing the withheld information might harm its commercial interests by providing its competitors with commercially and strategically valuable information. The University believes this would place it at a considerable strategic disadvantage against its competitors and over time might undermine its position in terms of pricing and quality of provision for students.

65. There is also a public interest in both public and private organisations running commercial legal courses such as the GDL and BPTC to operate on a 'level playing field' when competing for new students.

Public interest arguments in favour of disclosure

66. The University recognises there is a public interest in disclosing information about the scholarships it offers to students. It believes it has satisfied this interest by the information it already publishes on its website. (See above).

67. The University also recognises that there is a general public interest in it publishing information about its financial and commercial activities. It believes it satisfies this interest with the information it already

publishes on its website[12] including its Financial Statements[13] and Annual Reports[14].

Balance of the public interest arguments

68. The Commissioner accepts that there is a public interest in the University disclosing information about its scholarship awards and other financial statistics. However, he is of the view that this interest is satisfied by the information the University already publishes on its website and accepts that the disclosure of more detailed information of the type which the complainant has requested would be like to prejudice its commercial interests.

69. The Commissioner is therefore satisfied that section 43(2) of the FOIA is engaged in respect of questions 5 and 6 of the complainant's request with the public interest balanced in favour of maintaining the exemption.

Section 10 of the FOIA

70. The Commissioner notes that the University responded to the complainant's request dated 19 August 2014 on 6 October 2014. This was in breach of section 10 of the FOIA which stipulates that a public authority should respond to a request for information promptly and in any event no later than 20 working days following receipt.

71. The Commissioner would like to take this opportunity to remind the University of its obligations under the FOIA and request that complies with the statutory requirements in the future when responding to information requests.

Other Matters

72. The Commissioner also notes that the University took 45 working days from 5 October 2014 until 18 December 2015 to respond to the complainant's request for an internal review.

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[12] https://www.city.ac.uk/about/city-information/finance

[13] https://www.city.ac.uk/about/city-information/finance/financial-statements

[14] https://www.city.ac.uk/about/city-information/city-annual-report-2013

73. The Commissioner would like to take this opportunity to remind the University that it is good practice to respond to an internal review request within 20 working days or in exceptional circumstances, 40 working days.

Right of appeal

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

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

    Tel: 0300 1234504
    Fax: 0870 739 5836
    Email: GRC@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

75. 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.

76. 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
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