

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 14 August 2017

**Public Authority:** University of East Anglia  
**Address:** Norwich Research Park  
Norwich  
NR4 7TJ

### Decision (including any steps ordered)

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1. The complainant made a request to the University of East Anglia (the University) for marketing data. The University refused the request under sections 43(2) (commercial interests) and 44(1)(a) (prohibitions on disclosure).
2. The Commissioner's decision is that section 43(2) was correctly applied and the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

### Request and response

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3. On 4 November 2016 the complainant requested the following information:

*'Q1 Please state how much your university spent on marketing in (i) the 2014/15 financial year and (ii) the 2015/16 financial year?*

*Q2 In each of these years please state how much was spent with (i) google, (ii) twitter and (iii) Facebook?*

*Q3 In each of these years please state how much was spent in advertising/promotion of your institution using professional sports teams? Please state the name of the team, how much was spent and what exactly was provided for this fee.'*

4. On 10 November 2015 the University provided a response to Q3 (no funds spent in advertising using professional sports teams) and cited sections 43 (prejudice to commercial interests) and 44 (prohibitions on disclosure) to refuse the information requested at Q1 and Q2.
5. The complainant requested an internal review on 5 December 2016. The University sent him the outcome of its internal review on 3 January 2017 upholding the decision.

### Scope of the case

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6. On 16 February 2017 the complainant wrote to the Commissioner and argued that

*'[on section 43] Release of the bald spending figures would not give competitors any insight into their marketing strategies just an idea of the spend, which to be fair they could get a rough idea of just by looking at the internet. By way of contrast, I attach copies of four replies from other establishments to exactly the same request where none have felt the need to resort to exempting the information.*

*I further believe that the use of the Section 44(1) exemption, citing Section 2(1) of the Competition Act 2005, is something of a red herring as I am not convinced the Competition Act 2005 would be applicable to the requested information in the way suggested.'*

7. The Commissioner has focussed her investigation on whether the University correctly applied the exemptions under sections 43(2) and 44 of the FOIA to Q1 and Q2 of the complainant's request.

## Reasons for decision

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### Section 44

8. Section 44(1)(a) of FOIA states that information is exempt if its disclosure is prohibited by or under any enactment.
9. The University contends that to reveal information on its expenditure on marketing into the public domain would constitute an exchange of confidential, strategic information that would lead competitors to understand how and what benchmarks have been set. Release of strategic, or strategically useful, information would adversely affect the free competition between institutions which would be in breach of section 2(1) of the Competition Act.
10. The University has explained that it operates in an extremely competitive environment in relation to student admissions and that disclosure of marketing strategy could be damaging to the University.
11. The University has referred to the guidance supplied by Universities UK (UUK) ([Competition law: further guidance on information exchange between higher education institutions](#). London: Universities UK, 2012): *'Institutions must not disclose to each other strategically useful information about their activities...Explicitly listed as an example of such 'strategically useful' information is "Confidential information about recruitment or marketing strategies". (page 6)'*
12. The University holds the opinion that information released under FOIA, and by implication across the sector, would constitute an exchange of confidential information and would be an agreement or understanding that restricts competition.
13. Section 2(1) of the Competition Act 1998 (with some exceptions in relation to mergers for example) prohibits *"...agreements between undertakings, decisions by associations of undertakings or concerted practices which*
  - (a) *may affect trade within the United Kingdom, and*
  - (b) *have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom..."*

(The full Act can be accessed via

<http://www.legislation.gov.uk/ukpga/1998/41/part/I/chapter/I/crossheading/the-prohibition>)

14. In order for the prohibition to be infringed, each of the four elements listed above must be satisfied i.e. there must be:-  
  
an agreement, decision or concerted practice;  
  
between undertakings or associations of undertakings;  
  
which may affect trade within the UK; and  
  
which has as its object or effect, the prevention, restriction or distortion of competition within the UK.
15. The Commissioner notes the responses provided by the University to the complainant and to the Commissioner including the guidance from Universities UK. However, the Commissioner considers that the University does not appear to have satisfied the first element of the prohibition i.e. the University has not demonstrated how the release of the information under FOIA would amount to an agreement between undertakings, decisions by associations of undertakings or concerted practices.
16. The prohibition does not cover only formal written agreements between undertakings, but could include informal arrangements or understandings whether oral or in writing and whether or not intended to be legally enforceable. This element requires some form of understanding between entities as to concerted action or decision. In this situation, the release of the information would be as a result of the application of the FOIA and not by virtue of an agreement, decision or concerted practice between undertakings. It would therefore appear that the first element is not satisfied.
17. Therefore, the Commissioner's decision is that the University has incorrectly applied section 44(1)(a) to withhold the requested information in this case and she will now consider the application of the other exemption.

### **Section 43(2) - Commercial interests**

18. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it. The exemption is subject to the public interest test which means that even if it is engaged account must be taken of the public interest in releasing the information.
19. The exemption can be engaged on the basis that disclosing the information either 'would' prejudice someone's commercial interests, or, the lower threshold, that disclosure is only 'likely' to prejudice those

interests. The term 'likely' is taken to mean that there has to be a real and significant risk of the prejudice arising, even if it cannot be said that the occurrence of prejudice is more probable than not.

20. For section 43(2) to be engaged the Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the University alleges would be likely to occur if the withheld information was disclosed has to relate to the commercial interests;
- Secondly, the University must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice to those commercial interests; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e. whether there is a real and significant risk of the prejudice occurring.

#### *Commercial interests*

21. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner has considered the meaning of the term in her awareness guidance on the application of Section 43. This comments that:

*"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."*<sup>1</sup>

22. The University has explained that it operates in an extremely competitive environment in relation to student admissions.

- Student recruitment is a commercial activity for all universities. The University's success in recruiting students, and the manner in which it does so, directly affects both its reputation and financial position. It follows that information about how the University markets itself to potential students can readily be seen as commercially sensitive.
- The UK Higher Education sector is a highly competitive environment. Recent regulatory changes, such as the lifting of the cap on university places in England, have increased competition

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<sup>1</sup> See here: [https://ico.org.uk/media/for-organisations/documents/1178/awareness\\_guidance\\_5\\_v3\\_07\\_03\\_08.pdf](https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf)

between institutions. Universities all seek to recruit the best students from a limited pool of prospective UK and international applicants, as well as competing to attract high quality staff, research funding and accreditation.

- The manner in which the University directs funding to create a comprehensive and engaging marketing strategy provides the University with a possible advantage compared to those competitors who undertake this activity less effectively.
  - Details of tactical marketing activities/ funding are not shared between institutions nor are they publicised or made public in any way, particularly in the key areas of marketing interest such as social media and the internet more generally.
  - Even the release of a total figure for marketing spend would provide competitors with the insight to match and potentially exceed the University's activities.
  - There is a linkage between marketing expenditure and the ability to attract the number and quality of students desired.
23. The Commissioner is satisfied that the actual harm alleged by the University relates to its commercial interests. Accordingly, she is satisfied that the first criterion is met.

#### *Causal link*

24. When investigating complaints which involve a consideration of prejudice arguments, the Commissioner considers that the relevant test is not a weak one and a public authority must be able to point to prejudice which is "real, actual or of substance" and to show some *causal* link between the potential disclosure and the prejudice.
25. The University has provided the Commissioner with details of the way in which it believes its commercial activities would be affected by disclosure of the requested information. The University has pointed out that:
- the range of activities undertaken to market a university offering is varied – but it is usually within a limited number of channels. If an institution knew the parameters of a competitor's gross budget along with the number of channels they were advertising on, it would be able to make decisions regarding the level of expenditure required to compete per channel, or whether to try and compete at all.

- The amount spent on marketing with Google, Facebook and Twitter reveals the importance placed on each outlet and the amount that competitors need to spend in order to obtain greater visibility in that outlet.
26. The complainant has argued that other universities have provided the same information.
  27. The University states that it has '*canvassed opinion in the HE sector and are aware that at least one other institution withheld information relevant to both questions so the HE community is not of one mind in this regard*'.
  28. The Commissioner is satisfied that the University has provided reasonable arguments to suggest that there is a causal link between the requested information and its commercial interests.

*Likelihood of prejudice*

29. In *Hogan and Oxford City Council v the Information Commissioner* [EA/2005/0026 and 0030] the Tribunal said:

"there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not." (paragraph 33)

30. In this case, the University has confirmed that it is relying on the lower threshold to engage the exemption. The University has argued that disclosure would be likely to prejudice its own commercial interests and its competitiveness in the Higher Education sector. The Commissioner's view is that "would be likely to" places an evidential burden on the public authority to show that the risk of prejudice is real and significant.
31. The University has pointed out that it devotes significant resources to its marketing strategy '*as the degree to which the recruitment of the number and value of applicants is now critical to any university's success*'.
32. The Commissioner has seen the withheld information and she is satisfied that it would be of use to a competitor by providing valuable insight into the marketing strategy of the University.
33. This is not in itself a reason not to disclose the information under FOIA. However, it does indicate the importance that the University attaches to

this information and the prejudice that would be caused if it was disclosed.

34. For all of these reasons the Commissioner has found that the section 43(2) exemption is engaged and therefore has now gone on to consider the public interest test.

**Public interest test**

35. Section 43(2) is a qualified exemption which means that even where the exemption is engaged, information can only be withheld where the public interest in maintaining that exemption outweighs the public interest in disclosure.



### **Public interest arguments in favour of disclosure**

36. The complainant stated that the public interest would be better served *'by there being an open, honest and transparent view of how the University's finances are being spent'*.
37. The University considered that the factors in favour of disclosure included transparency of University functions and decision making.

### **Public interest arguments in favour of maintaining the exemption**

38. As regards the public interest in maintaining the exemption the University explained that: *'there is a linkage between marketing expenditure and our ability to attract the number and quality of students we desire. Awareness of an institution's course offering, academic reputation, and local setting is key to any prospective student's decision to attend and the marketing available to any such student is critical to shaping such awareness. In a very crowded and competitive commercial environment, should the amount of such exposure be reduced or supplanted by another institution, our ability to recruit quality students is thus impaired.'*
39. The University has *'reason to believe that other institutions monitor our marketing activities and attempt to match or exceed them and it seems inconceivable that they would not use additional information in the same manner.'*
40. The University said that there was a public interest in ensuring that it operates in a proper competitive environment: *'flattening the market by eliminating points of competitive difference between institutions is not in the public interest.'*
41. The University stated that prejudice to its commercial interests outweighed any benefit accruing from the release of the information.

### **Balance of the public interest arguments**

42. The Commissioner considers that there is always some public interest in the disclosure of information. This is because it promotes the aims of transparency and accountability, which in turn promotes greater public engagement and understanding of the decisions taken by public authorities.
43. However, the Commissioner's view is that in this case there is a stronger public interest in protecting the commercial interests of the University and ensuring that it is able to compete fairly to recruit its students and staff.

44. The Commissioner understands that release of the information into the public domain would undermine the University's competitive advantage and impact on recruitment.
45. Therefore, the Commissioner has decided that in all the circumstances of the case, the public interest in maintaining the section 43(2) exemption outweighs the public interest in disclosure.

## Right of appeal

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46. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

47. 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.
48. 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 .....

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**