

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 December 2020

Public Authority: London South Bank University
Address: 103 Borough Rd
London
SE1 0AA

Decision (including any steps ordered)

1. The complainant requested information from London South Bank University ("the university") about the Confucius Institute for Traditional Chinese Medicine, which operates at the university. The university provided the complainant with the majority of the relevant written agreements, but redacted some information relating to funding under section 43(2) of the FOIA – prejudicial to commercial interests.
2. The Commissioner's decision is that the exemption is not engaged in respect of the withheld information.
3. The Commissioner requires the university to take the following step to ensure compliance with the legislation.
 - Disclose all of the information withheld under section 43(2), to the complainant.
4. The university must take this step 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

5. On 30 January 2020, the complainant wrote to the university and requested information in the following terms:

"Under the Freedom of Information Act 2000, I request the following: Agreements and supplementary agreements with the Office of Chinese Language Council International (Hanban) and the Heilongjiang University of Chinese Medicine on the establishment / continuation of the Confucius Institute for Traditional Chinese Medicine in London".

6. The university responded on 25 February 2020. It confirmed that it held information falling within the scope of the request, but refused to provide it under section 43(2) of the FOIA – prejudicial to commercial interests.
7. Following an internal review, the university, having reconsidered the request, provided the complainant with a copy of a contract between itself and the Office of Chinese Language Council International, dated 27 February 2014 ("the 2014 Agreement"). However, some parts of this agreement were redacted under section 43(2), and some personal details were redacted under section 40(2) – personal information.

Scope of the case

8. The complainant contacted the Commissioner on 31 March 2020 to complain about the way his request for information had been handled. He confirmed that he wished to receive the information redacted from the 2014 Agreement under section 43(2).
9. Following the involvement of the Commissioner, the university identified two further agreements which fell within the scope of the request. It redacted some information from the agreement dated 24 May 2007 ("the 2007 Agreement") under section 43(2). The complainant confirmed that he wished this to be included in the scope of the investigation.
10. This decision covers whether the redacted information in the 2007 Agreement and the 2014 Agreement was correctly withheld from disclosure under section 43(2) of the FOIA.

Background to the request

11. The Office of Chinese Language Council International, known colloquially as "Hanban", is a Chinese organisation (affiliated with the Chinese Ministry of Education) which has the published aim of *"providing Chinese language and cultural teaching resources and services worldwide"*. Its aims are, in part, carried out through the operation of Confucius Institutes, which are paid partnerships between Hanban and other

educational establishments around the world. There are several Confucius Institutes in the UK, mostly located within UK universities.

12. The Confucius Institute which operates at London South Bank University, the relevant university in this case, is the Confucius Institute for Traditional Chinese Medicine ("CITCM"). Its website states that: *"CITCM was founded in 2007, and since then, we have received many awards including the Confucius Institute of the Year Award (2009, 2010, 2011, 2012 and 2013) and Model Confucius Institute status (2014). CITCM runs in partnership with Heilongjiang University of Chinese Medicine, Harbin Normal University and the Office of Chinese Language Council International (more commonly known as Hanban). We aim to enhance cross cultural understanding and engagement by offering academic courses, workshops and events. We are distinctive from other Confucius Institutes because we were the world's first Confucius Institute for Traditional Chinese Medicine"*.

Reasons for decision

Section 43(2) – prejudicial to commercial interests

13. Section 43(2) of the FOIA states that information is exempt from disclosure if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it. It is a qualified exemption and is, therefore, subject to the public interest test.
14. As the wording sets out, the exemption can be engaged either because disclosing the information *"would"* prejudice commercial interests, or on the lower threshold that disclosure *"would be likely"* to prejudice those interests.
15. In this case, the university considered that disclosure of the requested information would be *likely* to prejudice both its own commercial interests and those of Hanban (its arguments are set out in more detail below). Following the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005), *"would be likely"* is taken to mean that there has to be a real and significant risk of the prejudice arising: the Commissioner must be satisfied that the prejudice would be more likely to occur than not.
16. The university has argued:

"The [information] would be likely to harm the university's ability to negotiate mutually beneficial agreements with Hanban and with other organisations in the future. It would also be likely to harm Hanban's

ability to negotiate with other higher education providers. The reason for this is that it provides a competitive advantage to other providers when negotiating with Hanban, as they are able to see the terms agreed by other institutions such as LSBU.

LSBU believes that the [information is] confidential and if disclosed would result in providing a competitive advantage to other universities when engaging with Hanban, prejudicing our commercial interests. In addition, by publicising the amounts paid under our agreement with Hanban we would also negatively impact on their ability to negotiate on an individual basis with other organisations in the future."

17. The Commissioner notes that, in the 2007 Agreement, information has been redacted from article 6 which relates, respectively, to the obligations of Hanban and the obligations of the university with regard to start-up funding. A statement has also been redacted from article 7, which relates to funding.
18. With regard to the 2014 Agreement, information has been redacted from the "Background" section as well as from clauses 2 and 14.2 respectively. All of the redacted information relates to funding.
19. For Section 43(2) to be engaged three criteria must be met:
 - The actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to commercial interests; and
 - The public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the withheld information 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, meaning whether there is at least a real and significant risk of the prejudice occurring.
20. With regards to the first criterion, the Commissioner accepts, on the basis of the university's reasoning, that the majority of the information in question is commercial in nature, and that the prejudice it envisages would be to its commercial interests and those of Hanban. With regard to the majority of the redacted information, she is satisfied that the first criterion is met.

Background section of the 2014 Agreement: part D, first sentence

21. However, with regard to part of the information redacted from part D of the Background section of the 2014 Agreement, the Commissioner considers that it is not commercial, but rather is general in nature, including defining one of the following terms of the Agreement. The information in question is all of the first sentence of part D and ends with the words "(the Model Institute)".
22. Since the this sentence does not contain commercial information, she has determined that it is not covered by the exemption at section 43(2) of the FOIA.
23. The Commissioner orders that the first sentence of part D of the Background section to the 2014 Agreement be disclosed to the complainant.

Remainder of the withheld information

24. The following paragraphs of this notice concern the remainder of the withheld information. As stated in paragraph 20, above, the Commissioner is satisfied that the first criterion for the exemption to be engaged, is met with regard to that information.
25. The Commissioner also accepts that it would be the disclosure of that information under the FOIA which (in the university's view) would be likely to lead to this prejudice occurring (the second criterion).
26. The Commissioner has considered the third criterion in some detail. That is, whether disclosure of the information, under the legislation, would be likely to lead to the envisaged prejudice occurring.
27. The Commissioner does not accept the university's statement that disclosure would be likely to prejudice *"the university's ability to negotiate mutually beneficial agreements with Hanban"*, since Hanban itself naturally has a copy of both of the agreements in question.
28. She has considered, separately, whether (as the university also asserts) disclosure would be likely to prejudice the university's ability to negotiate mutually beneficial agreements with other organisations, and, whether it would be likely to prejudice Hanban's ability to negotiate agreements with other higher education providers.
29. In order to form a view on this, she has taken into account whether other universities and educational establishments which entered into agreements with Hanban have made those agreements (including funding information) publicly available. Her reasoning is that, if the agreements which established Confucius Institutes at those

establishments, and supplementary agreements, are available for public scrutiny, it would be unlikely that those parties considered that publication would lead to a real and significant risk of prejudice to their own commercial interests, which may be relevant here.

30. The Commissioner notes that several comparable agreements between Hanban and other UK educational establishments have been made publicly available. These agreements, however, are not identical. While they tend to be have a similar layout in terms of the overall structure of the documents, in general they do not contain the very specific type of funding information that has been redacted in this case.
31. The Commissioner has noted, however, that at least one university has made public its agreements with Hanban, which contain the precise funding arrangements between itself and Hanban, without redacting this type of information.
32. The Commissioner notes that Hanban has continued to establish Confucius Institutes at various organisations (from 2005 onwards) and that in many cases, the relevant agreements have been renewed. Hanban, evidently, has been able to continue to negotiate terms, despite the terms of some agreements being publicly available, and Confucius Institutes have continued to operate at the organisations for many years.
33. The Commissioner is, therefore, not persuaded that Hanban's ability to negotiate would be likely to be prejudiced by the disclosure of the withheld information in this case.
34. She has also considered the university's own commercial interests, and whether it is likely that these would be prejudiced by the disclosure of the withheld information.
35. The Commissioner accepts that the university has a concern about disclosing the precise nature of the funding arrangements that were agreed in 2007 and 2014, and how this may impact upon its commercial interests. In the Commissioner's view, there may be a remote risk of some prejudice occurring, in the sense that other universities may seek to offer more favourable terms to Hanban, or in the sense that a different organisation may use its knowledge of the agreements to drive negotiations with the university.
36. However, the Commissioner is not persuaded that the envisaged prejudice reaches the threshold of being *likely* to occur. With regard to Hanban's relationship with other universities, it has shown itself to be very keen to agree terms with multiple organisations, but this has been with a view to opening individual Confucius Institutes at each site. Many

are now in operation around the UK and the world. Hanban has not, as far as the Commissioner is aware, shown any inclination to bring relations with the university in this case to an end, in order to move the CITCM to a different location. Neither does it appear to be the case that other universities are seeking to “poach” the CITCM away from the university; rather, they have evidently been keen, and able, to agree to the establishment of individual Confucius Institutes at their own sites. The Commissioner does not, therefore, think that it is likely that the university’s own relationship with Hanban would be prejudiced by other organisations being able to view the information.

37. Neither is the Commissioner persuaded that prejudice would be likely to occur in the event that the university sought to negotiate terms with organisations other than Hanban, in the future, in order to establish other cultural (or comparable) institutions within the university. She considers that the nature of Confucius Institutes, and the nature of Hanban’s relationships with the various educational establishments around the world, are relatively unique in any event. Should the university wish to agree terms with a different organisation to establish a comparable institution, the circumstances would be likely to be sufficiently different that any negotiations would not be significantly influenced by the funding arrangements contained within the Hanban agreements, and would be taking place in the prevailing market conditions at the time.
38. The Commissioner has determined, in this case, that the exemption at section 43(2) of the FOIA is not engaged in respect of the information withheld under that section. She orders that the information be disclosed to the complainant, within the time-frame set out at the beginning of this notice.

Other matters

39. In this case, the Commissioner has concluded that the exemption is not engaged, and she has not had to consider the balance of the public interest in the disclosure of the information. However, she would note that she considers that there is a need for transparency with regard to a university’s funding arrangements, which in this case is heightened by media interest from around the date of the request in the level of “influence” from China that was, in some quarters, perceived to exist in UK universities. There is nothing that she is aware of in the university’s published accounts which can be directly linked with Hanban or the Confucius Institute, and so the relevant information is not currently accessible elsewhere. Other universities have published the full terms of their agreements. Had she been required to consider the factors in

favour of disclosing the information, the Commissioner considers that they would have been significant.

Right of appeal

40. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

41. 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.
42. 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

Phillip Angell
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