

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 21 October 2008

Public Authority: Imperial College London
Address: Level 4 Faculty Building
South Kensington Campus
Exhibition Road
London
SW7 2AZ

Summary

The complainant requested a copy of a document which was used as an informal guide by some of the public authority's staff to assist with decisions related to the recognition of overseas qualifications when recruiting students. The public authority refused to disclose the document on the basis of the exemption contained in section 43(2) (prejudice to commercial interests) of the Act. The Commissioner determined that section 43(2) was not applicable and ordered that the withheld information be disclosed to the complainant. He also found the public authority in breach of sections 1(1)(b) and 10(1).

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 10 January 2007 the complainant requested a number of pieces of information from the public authority. These related to the recognition of overseas qualifications and included a request for a copy of the code of practice used for the recognition of international qualifications.
3. On 6 February 2007 the public authority disclosed some information to the complainant. It explained that it held no formal document regarding the evaluation of overseas qualifications but held an informal document which summarised some of its decisions with regard to overseas qualifications. This was used by its

Registry staff. However, the public authority informed the complainant that it considered this information commercially sensitive and was exempt from disclosure under section 43 of the Act.

4. On 14 March 2007, following further correspondence with the public authority, the complainant requested that it carry out an internal review of its decision.
5. On 6 April 2007 the public authority wrote to the complainant to confirm that the result of the internal review was to uphold its original decision.

The Investigation

Scope of the case

6. On 21 May 2007 the complainant wrote to the Commissioner to ask him to determine whether the public authority had correctly applied section 43(2) to the document which had been withheld.

Chronology

7. On 3 July 2008 the Commissioner wrote to the public authority to request a copy of the withheld information. He also asked the public authority to provide him with any additional arguments it wished to raise in relation to its application of section 43(2).
8. On 29 July 2008 the public authority wrote to the Commissioner to provide him with a copy of the withheld information and to set out the reasons why it believed that section 43(2) was applicable to that information. These arguments are detailed in the "Analysis" section of this notice.
9. On 19 August 2008 the Commissioner contacted the public authority to seek clarification as to whether it was arguing that the disclosure of the withheld information would have prejudiced its commercial interests, or, whether it would have been likely to prejudice its commercial interests. He explained that if it were claiming the former, this would place a greater evidential burden on the public authority to establish that the exemption was engaged.
10. On 19 August 2008 the public authority confirmed that it was seeking to rely on the argument that disclosure of the withheld document would have been likely to prejudice its commercial interests.

Analysis

11. The full text of the sections of the Act which are referred to can be found in the Legal Annex at the end of this notice, however the relevant points are summarised below.

Exemption

Section 43(2) – Prejudice to commercial interests

12. The public authority argued that the document that had been requested was exempt from disclosure under section 43(2).
13. Section 43(2) provides an exemption from the disclosure of information which would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
14. The document in question consists of 28 typed pages with headings for different countries. Under each heading there is a description of the qualifications that are available from that country and indications as to what qualifications may be acceptable for admittance to courses offered by the public authority.
15. The recruitment of students for its courses is one of the main ways in which the public authority generates its income. It is clearly in competition with other educational organisations in the UK and abroad in attempting to do this. The Commissioner accepts that the document that was withheld related to its commercial activities as it contained information which was potentially relevant to the recruitment of students. He therefore accepts that it fell within the scope of the exemption contained in section 43(2).
16. The public authority argued that disclosure of the withheld document would have been likely to prejudice its commercial interests. In dealing with the issue of the likelihood of prejudice, the Commissioner notes that, in the case of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*, the Information Tribunal confirmed that “the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.” (para 15). He has viewed this as meaning that the risk of prejudice need not be more likely than not, but must be substantially more than remote.
17. The public authority informed the Commissioner that the document concerned was not a statement of formal College policy and had not been approved by any College body. It was not intended to be a definitive or exhaustive list of qualifications from around the world. It was used as an informal aide memoire by two or three key staff within its Registry rather than as a rigid set of guidelines as to the suitability of an applicant.
18. The document was intended to provide pointers for Registry staff on the issues that should be considered when assessing applications from outside the UK. The

public authority explained that the staff who assessed applications took into account many factors when deciding who should be offered a place. All of these factors were not necessarily included in the document. In addition, it had a special cases procedure which allowed any students to be considered for entry based on their work experience, regardless of their qualifications.

19. The public authority stated that the document concerned was fluid as it was continually evolving. Because it was not formally approved, there was no set procedure for updating the document. Even if the document were to be disclosed, the public authority had no intention of continuing to publish updated versions. As a consequence applicants would rely on out of date information, which would be worse than not having the information in the first place.
20. The public authority contended that even if it released an updated version after each amendment it would be very difficult to ensure that applicants were considering the latest version of the document. It therefore believed that putting the document in the public domain had the possibility of being seriously misleading and consequently damaging to its recruitment programme.
21. It was pointed out by the public authority that, in some instances, the document referred to specific institutions in a particular country, where they were known to its Registry. However, it was not possible to summarise a country's entire higher education system in one or two short paragraphs. There would be a danger that a prospective student might see that their particular institution was not mentioned and wrongly conclude that their application would not be welcomed.
22. In addition, the public authority informed the Commissioner that the document had not been structured in the normal form for an official College document, had no formal status and had not previously been published. It believed that its publication would tend to give the document a definitive status outside the College that was not warranted in its present unstructured format.
23. The public authority confirmed that it had considered the possibility of disclosing the withheld document accompanied by a statement of its published formal minimum registration requirements. However, it was of the view that, if it were to have done this, its formal minimum entry requirements would have been subverted by being published along side informal notes used by a few staff as part of the overall admissions process.
24. Furthermore, because the factors used to determine equivalences were many and varied and depended on the experience and expertise of individuals in the College's Departments and its Registry, it was not possible to quantify these in a publishable form that would provide clear and transparent information for potential applicants.
25. The public authority argued that the release of the information could have adversely affected recruitment from non-UK applicants. Those applicants might have decided to apply to other universities based solely on the contents of the document when their application would have been accepted by the public authority due to factors not addressed in the withheld document.

26. The Commissioner acknowledges the public authority's concerns about the possibility of the disclosure of the withheld information leading to misunderstandings as to its recruitment policies. However, he is not convinced that there would have been a real and significant risk that disclosure would have led to the consequences feared by the public authority if it were to have provided a clear statement accompanying the document which explained its status and confirmed that it should not be relied on as a guide as to whether potential overseas student would gain a place on a course.
27. In addition, the public authority is rated as one of the best higher education institutions in the world by, for example, the Times Higher Education Supplement and Newsweek. It consequently seeks to recruit some of the best academic applicants from around the world. The Commissioner would expect that such potential applicants would be able to comprehend the nature of this document if it were accompanied by an appropriate explanation of its status and, if they were still unclear having read the explanation, that they would seek further guidance from the public authority.
28. The public authority also argued that releasing the document would have given information to its competitors which had been built up from staff expertise over many years. This would have provided its competitors with something akin to a free red Michelin guide. It did not believe that others in the higher education sector should be able to benefit from information which had been compiled over a period of many years at its own expense. The public authority stated that it took significant measures to safeguard its intellectual property in academic matters and considered this to be a similar issue.
29. However the public authority also stated that the document in question was an informal guide which had no formal status. Recruitment decisions were taken on a case by case basis based on a range of factors which may not have been reflected within the document. It was also fluid in nature and consequently the information within it became out of date very quickly.
30. Given the above factors, the Commissioner is not convinced that the disclosure of the document would have been of assistance to other higher education institutions, either in seeking to rely on it for their own recruitment purposes or as a reliable indication of the public authority's possible recruitment strategy. It would have been readily apparent to other institutions that the document was not a reliable indication of the public authority's recruitment strategy, particularly if an appropriate explanatory statement accompanied it.
31. The Commissioner is not satisfied that disclosure of the withheld information would be likely to prejudice the commercial interests of the public authority. He therefore does not believe that section 43(2) is engaged. Consequently, he has not proceeded to consider the application of the public interest test under the Act.

The Decision

32. The Commissioner has decided that the public authority did not deal with the following elements of the request in accordance with the Act:

- it incorrectly applied section 43(2) to the information that had been requested;
- it breached section 1(1)(b) by not providing the complainant with the requested information;
- it breached section 10(1) by not providing the complainant with the requested information within 20 working days of the request.

Steps Required

33. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- to disclose to the complainant the information that he requested.

34. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

35. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

36. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

37. 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.

38. Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 21st day of October 2008

Signed

**Anne Jones
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Commercial interests.

Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”