

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 February 2023

Public Authority: Office for Students
Address: Nicholson House
Lime Kiln Close
Stoke
Gifford
Bristol
BS34 8SR

Decision (including any steps ordered)

1. The complainant has requested data relating to the National Student Survey.
2. The Commissioner's decision is that the Office for Students ('OfS') is entitled to withhold the requested information under section 43(2) (commercial interests) of FOIA.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 2 November 2021 the complainant wrote to the OfS and made the following requests for information:

"...Please provide us with the 2021 NSS data meeting normal publication thresholds for the NSS except for response rate which should be 40% or broken down by provider and CAH level 1 subject code for the six covid-19 questions..."

and

"...Please provide us with the 2021 NSS data meeting normal publication thresholds for the NSS by teaching provider broken down

by provider and CAH level 1 subject code for the six Covid-19 questions.”

5. The OfS responded on 24 November 2021 and refused to provide the requested information, citing section 43(2) (commercial interests) of FOIA.
6. The complainant requested an internal review on 29 November 2021.
7. The OfS provided the outcome of its internal review on 4 February 2022. It upheld its original position.

Background information

8. The OfS has explained that ‘The NSS [National Student Survey] is a UK-wide survey undertaken by final year higher education students to give feedback on their courses. The survey is managed by the OfS for Students (OfS) on behalf of the four UK funding and regulatory bodies. The survey is a key component of the quality assurance and wider regulatory landscape in UK higher education.’
9. The OfS has also explained ‘The Covid-19 questions formed a bolt on survey to the core question set in 2021. Their purpose was to assess the sector level response to the pandemic and give providers insight and information to improve their provision. Only online respondents were asked at the end of the core questionnaire if they would be willing to complete a further 6 questions on their experience during the pandemic. These were entirely optional and did not form part of the core survey (i.e., non completion was not an incomplete response for the core survey). These questions were not asked to telephone respondents. Furthermore, these questions underwent some cognitive testing but were not subject to the same rigour (regarding testing and consultation) as the core questions.’
10. The Commissioner understands that far fewer students responded to the COVID-19 questions than the core NSS questions. Also, the COVID-19 questions related to far fewer providers than the core NSS questions.
11. The Commissioner also understands that the OfS’s ‘publication thresholds for the NSS are set at a minimum of 10 student responses per course and a response rate of 50% for the survey as a whole. The OfS employs this publication threshold to ensure that the published data reflects a representative sample of the surveyed population.’

Reasons for decision

Section 43(2) – commercial interests

12. Section 43(2) states '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).'
13. The Commissioner's guidance¹ 'Section 43 - Commercial interests' states 'A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent.'
14. The OfS is concerned that disclosure would be likely to prejudice the commercial interests of Universities, particularly smaller establishments. Whilst Universities are first and foremost higher education providers, they are also businesses that must operate in a competitive market.
15. The Commissioner, and the complainant, note that Universities are not named in the data requested; they are assigned a unique provider ID. First, the Commissioner must satisfy himself that individual providers can be identified from the requested information, as the OfS says they can. If they can, he will then go on to consider whether disclosure would be likely to prejudice the commercial interests of these providers.
16. The OfS is concerned that 'Many providers offer unique or unusual combinations of subjects. From an initial assessment, we concluded that around 180 providers have a unique combination of subjects in the published National Student Survey results, and many more have a combination of subjects that is shared with only one or two providers. Were the OfS to release the data requested, it would be trivial to identify some providers from the associated combination of subjects. While this identification would be hindered to some extent by lower response rates for the COVID-related questions, we judge that re-identification remains a very real risk.'
17. The OfS has also explained that, since the complainant has specifically requested information that 'meets normal publication thresholds', it is looking at the data that meets the response rate threshold of 50% (as explained in the background information of this notice). Therefore, 'it

¹ [Section 43 - Commercial interests | ICO](#)

can be easily inferred that the sample size for each combination falls between the response rate, and double that number.'

18. The OfS is concerned that 'Using these two approaches in combination would further increase the risk of identification.'
19. In order to verify this claim, the OfS has provided the Commissioner with an example. It has signposted the Commissioner to the published NSS data for 2021 and identified two providers which only have responses from students studying two specific subjects. The OfS has then, using the methods outlined in paragraphs 16 and 17, and then 16 and 17 together, deduced the identity of the two providers in relation to the COVID-19 questions.
20. The OfS also explained that 'We considered whether we could release the information requested while suppressing rows which can be linked to a named provider using the approaches described above. However, this is not a straightforward task, and would involve designing, writing, and checking new code. We judged that carrying out this additional task would require us to spend significantly more than 18 hours preparing the information and would therefore likely fall under s.12 of FOIA, as the request would exceed the appropriate limit.'
21. Section 12 (cost of compliance would exceed appropriate limit) is not the focus of this investigation – section 43(2) is. The complainant has emphasised that they have requested anonymised data but, from the analysis above, the Commissioner is satisfied that this is not possible. The Commissioner is mindful that disclosure under FOIA is disclosure to the world at large and he agrees with the OfS that individual providers can be identified from the responses to the COVID-19 questions, if not by the complainant, then by someone else. Therefore, he'll go onto consider whether disclosure would be likely to prejudice the commercial interests of these providers.
22. The OfS is concerned that the response rate to the COVID-19 questions were variable and extremely low. Therefore, the OfS does not consider the data to be a true reflection of the student experience at the institutions concerned. The OfS is concerned that the data 'contained views which in some cases may be negative and therefore damaging to those providers identified.'
23. Ultimately, the OfS is concerned that 'Releasing information where response rates are low and variable would not be fair or reasonable as these responses are based on an unrepresentative sample of students. Future students reading these responses may be less likely to enrol at these providers, and this reduction in enrolment would cause damage to the commercial interests of the provider. This in turn would dampen these providers' abilities to compete fairly in the higher education sector

and would be advantageous to those providers whose performance was not reflected in the responses received through the NSS 2021. It would not be in the public interest to distort the market competition in this way.'

24. When considering the commercial interests of third parties a public authority must, in the majority of circumstances, consult the third parties in question to seek their views. The OfS has explained it 'contacted four umbrella body representatives to ascertain their views on disclosure of the information requested and specifically whether disclosure would or would be likely to prejudice the commercial interests of their providers. The majority of representatives have confirmed that there is likely to be prejudice to the commercial interests of their providers if information is disclosed.'
25. The OfS has elaborated that one of the bodies was 'the only representative body to confirm they would be happy to release this data, but with a caveat that contextual information should also be published. It was noted that (the representative body) generally represent the larger, established providers who would be less affected.'
26. As the Commissioner has previously outlined, the institutions represented in the dataset in question are education providers but also businesses and must be able to compete as such. The Commissioner is satisfied that the harm identified relates to the interests that section 43(2) is designed to protect. Furthermore, the Commissioner is satisfied that there is a causal link between disclosure and the prejudice that the OfS envisages. The Commissioner is also satisfied that the OfS has chosen to engage section 43(2) on the basis that disclosure 'would be likely' to prejudice the commercial interests of the providers in question. This lower threshold has been appropriately applied since there is no evidence that the prejudice would be more likely than not to occur.
27. The OfS is also concerned that disclosure would mean 'that those providers were less likely to willingly engage with the OfS in future, thereby prejudicing the OfS' ability to perform its functions. As the OfS had assured providers that the responses to the COVID-related questions would not be published without consultation, releasing such data could make providers less willing to engage with the OfS in the future.' Since the OfS has failed to explain how this would prejudice the commercial interests of any party, the Commissioner has disregarded this argument.
28. With the above in mind, the Commissioner is satisfied that section 43(2) is engaged. As a qualified exemption, the Commissioner will now go onto consider whether the public interest lies in disclosure or in maintaining the exemption.

The public interest

Public interest arguments in favour of disclosure

29. The OfS recognises that 'There is a public interest in transparency in providers' performance. Releasing the requested information could be useful to understanding the subjective Covid-19 related experiences of students and how they responded.'
30. The Commissioner also notes that there is always a public interest in openness and accountability, which is fulfilled when a public authority discloses information in response to a request for information.
31. The complainant has also argued that 'The whole purpose of the National Student Survey is to expose good and bad practice which, in its very nature, would be prejudicial to the commercial interests of HE providers which score poorly. Such outcomes are published for the main survey questions and it is difficult to see why publication of the specific covid questions could be any more prejudicial. There is therefore no reason to treat these questions any differently.'

Public interest arguments in favour of maintaining the exemption

32. The OfS has explained that it is not within the public interest to publish misleading or inaccurate data or statistics. The OfS is concerned that 'The Covid-19 questions were not researched, developed or tested in the same way as the standard NSS questions. In this context the data they generate will not have the same statistical quality as NSS data and may not even meet the ONS standards for publication. Covid-19 is a phenomenon for which the specific context of a subject, course delivery model, level of workplace integration, etc. will be critical to understanding the subjective experiences of students, and how they might respond to a uniform set of questions, but for which there could be no accurate summary without contextualisation being applied to the raw data set.' The OfS is concerned that, without said contextualisation, individuals may be misled into believing that certain providers behaved poorly, in comparison to their competitors, during the pandemic.
33. Ultimately, the OfS is concerned that 'If the data were released and as a result, future enrolment of certain providers was impacted negatively, it would prevent these providers from competing fairly within the higher education sector and would provide unfair advantage to those providers who did not provide responses to the specific covid questions. This could result in the dampening of the competition of the higher education sector.'

The balance of the public interest test

34. The Commissioner considers the public interest lies in maintaining the exemption.
35. He acknowledges the complainant's concern, that the whole purpose of the NSS data is to determine student satisfaction and, to a large extent, the performance of individual providers. However, the COVID-19 data is not a large, complete, or accurate representation of the way in which providers dealt with the COVID-19 pandemic. Therefore, the Commissioner doesn't consider disclosure proportionate in comparison to the reputational damage, and subsequent damage to commercial interests, that disclosure would be likely to cause, especially to smaller providers.

Other matters

36. The complainant requested an internal review on 29 November 2021 and this internal review outcome was not provided until 4 February 2022. This is outside of the timeframe recommended by the Commissioner; internal reviews should take no longer than 20 working days to complete, and even in exceptional circumstances the total time taken should not exceed 40 working days.

Right of appeal

37. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

38. 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.
39. 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

Alice Gradwell
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