



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2018/0162

**Heard at Field House
On 22nd and 23rd January 2019**

Before

**JUDGE
MISS FIONA HENDERSON**

**TRIBUNAL MEMBERS
MS ROSALIND TATAM
MR ANDREW WHETNALL**

Between

UNIVERSITY OF BRISTOL

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

University of Bristol represented by Mr Christopher Knight (Counsel)
Information Commissioner represented by Ms Khatija Hafesji (Counsel)

DECISION AND REASONS

1. The Appeal is allowed for the reasons set out below.

Introduction

2. This is an appeal against the Information Commissioner's decision FS50713237 dated 10th July 2018 that the University of Bristol had incorrectly applied s40(2) personal information and s43 (commercial interests) of FOIA to the withheld information. The

University were required to disclose the annual salaries of all senior managers specified in the request by reference to their job titles and departments in £5,000 salary bands.

Information Request

3. On 21st June 2017 the requester wrote to the University asking:
*“I would like to request the current annual salaries of your senior managers (by full job title and department). For clarity this includes:
Senior executive team,
Faculty Deans
Heads of School
Divisional heads.
Disclosure in £5,000 bandings, as recommended by the Information Commissioner’s Office is acceptable”.*
4. The University refused the majority of this request on 4th September 2017¹ in reliance upon s40(2) FOIA which was upheld on internal review on 3rd November 2017² where s43 FOIA was also relied upon. The requestor complained to the Commissioner on 27th November 2017. In his correspondence to the University and the Commissioner the requestor relied upon public interest in disclosure of individual staff salaries outside the senior executive team and knowing how public money is apportioned across an organisation³.
5. The Commissioner’s decision⁴ was that the University had incorrectly applied s40(2) FOIA as disclosure would not be unfair and there was insufficient evidence of the prejudice or likely prejudice to its commercial interests to show that s 43 FOIA was engaged and the University were required to disclose within 35 days the annual salaries of all senior managers specified in the request by reference to their job titles and departments in £5,000 salary bands.

Appeal

6. The University appealed by notice dated 9th August 2018⁵. Their grounds can be summarised as:
 - i. Disclosure of the disputed information would not be fair, necessary or comply with condition 6(1) Schedule 2 DPA 1998⁶.
 - ii. Disclosure of the disputed information would prejudice the commercial interests of the University, and the public interest does not favour disclosure⁷.
7. The Commissioner opposed the appeal in her response dated 13th September 2018 for the same reasons as set out in her decision notice. The requestor was notified of the appeal but did not apply to be joined and took no part in the appeal proceedings.

The Disputed information

8. The University disclosed to the requestor the annual salaries in £5,000 bands of certain members of its senior executive team⁸ and directed the requestor to the other publicly

¹ P59 OB

² P67OB

³ P75 OB

⁴ The Commissioner also found that the University breached s10(1) FOA due to the time it took to respond to the request. but this is not subject to appeal.

⁵ An extension of time pursuant to rule 5(3)(a) was granted to extend the time limit for lodging the appeal.

⁶ Grounds 2 and 4

⁷ Ground 1 and 3

available information (such as senior salary bands within its financial statements) in its initial response. In its internal review it provided the requestor with a table structured by bandings of £10,000 which identified the number of the requested posts within each band. The requestor was thus able to tell how many people from each specified role fell within each strand of the bandings.

9. Following the Decision Notice on 17th August 2018 the University disclosed the annual salaries in (£5,000 bandings by reference to job titles) of the following posts:
 - The outstanding members of the senior executive team:
 - i) The Vice Chancellor
 - ii) The Deputy Vice-Chancellor and Provost
 - iii) Registrar
 - iv) 5 Pro Vice-Chancellors and
 - v) The Deputy Registrar
 - Certain Divisional Heads who sit on the University Planning and Resources Committee (UPARC) namely:
 - i. Chief Financial Officer
 - ii. Deputy Chief Operating Officer and Chief Information Officer,
 - iii. Director of Development and Alumni Relations,
 - iv. Director of Estates,
 - v. Director of Human Resources and
 - vi. Director of Strategy Planning and Change.⁹
10. At the hearing the University confirmed that there had been certain clerical errors in the way that the information had been presented to the Commissioner and in consequence the information in £10,000 salary bandings divided by group was resubmitted¹⁰ as was the closed information.
11. In front of the Tribunal the remaining withheld material related to:
 - a) The Faculty Deans, (6)
 - b) The heads of School (23) and
 - c) The Divisional Heads who were not on UPARC. (11)

Scope

12. A number of academic members of the University staff are in receipt of additional payments in the form of NHS clinical excellence awards. These awards may be paid either by the NHS or by the University depending on the terms of the honorary and substantive contract that have been agreed. The University had construed the term “salary” not to include any clinical excellence awards received by individual postholders within the scope of the request.¹¹ The requestor confirmed that the request is for the baseline annual salaries of those members of staff not for any supplementary wages or expenses.¹²

⁸ The Vice-Chancellor, deputy Vice-Chancellor, Chief Financial Officer and Registrar/Chief Operating Officer

⁹ It was confirmed that this related to information as at 21.06.17 and did not include clinical supplements received by staff with University/NHS contracts.

¹⁰ The University confirmed that this would also be provided to the information requestor who was not a party to the appeal.

¹¹ P96 OB

¹² p 119 OB

13. In light of its findings in relation to s40 FOIA which was determinative in relation to all the withheld material, the Tribunal has not gone on to consider s43 FOIA.

The Evidence

14. The case was determined following a 2 day hearing at which the parties were both represented. The Tribunal had regard to all the evidence before it including an open bundle of documents (and a closed bundle including the withheld information) and oral evidence was heard from:

- i. Ms Clare Buchanan (Human Resources Director - now Chief People Officer at the University of Bristol since 31.10.17)
- ii. Professor Guy Orpen Deputy Vice Chancellor and Provost,
- iii. Professor Philip Ireland - Dean of the Faculty of Social Sciences and Law.

Although the Tribunal was in receipt of a closed bundle and heard very brief evidence and argument with reference to the withheld figures in closed session, it has been able to articulate the arguments and its reasons without the need to refer to the specific figures in dispute. Consequently, there is no closed annex attached to this decision.

15. The Tribunal also had regard to Annex C¹³ which was a collation of views (from those who responded to an enquiry from the University who were in post at the relevant date or are in post now) indicative of their expectations in relation to their salary information, concerns if any about disclosure and the reasons for them. They were anonymous but recorded according to the role held. There were responses from 28 heads of school 4 Divisional Heads and 3 Deans. The views expressed by Heads of School were not unanimous but overwhelming opposed disclosure in £5,000 bands. In relation to Divisional Heads because the information was anonymous it was not known whether these were responses from those on UPARC (whose salary has now been disclosed). The responses were 50:50 in terms of the expectation of confidentiality. In relation to the 3 Deans there was no consensus (although one Dean appeared to have misunderstood the information that was in scope relying upon the public availability of information which was excluded from the definition of salary information under consideration.)

16. From the written and oral evidence, the Tribunal accepts that the University is a leading academic institution in the UK with an international reputation and profile. Its places are in high demand by students, its reputation depends upon the quality of its staff in particular its academic staff. The University is a charity and receives considerable money from students and research funding bodies as well as the public purse.

17. We accept Professors Orpen and Ireland's evidence that the University is having to compete with national and international academic institutions and commercial organisations that are in a position to offer highly remunerated employment even to relatively junior academics (especially in engineering, data science, digital technology and statistics). As a result they have to offer performance related recruitment and retention payments (R and R) which leads to significant variations in base academic salaries¹⁴. They can be very large and there are 2 types:

¹³ P149 et seq

¹⁴ From Annex C we accept that variation occurs dependent upon time on M1, Movement to M2 or beyond, research status, R and R agreements, negotiation for external appointments and absence of same for internal appointments.

- R and R 1 - Blanket supplements applying to everyone in a particular school (the minority) and
- R and R 2 - Those which are personal and individually negotiated.

Consequently, many Senior academics earn salaries well in excess of the Heads of School and Deans who manage them.

18. Heads of School's are senior and established academics generally of Professorial rank. Their primary function is to support the academic endeavour of their colleagues in teaching and research. Their pay is calculated on 5 Grade M spine points above academic salary on the expectation that it will be reviewed each year in line with annual pay awards¹⁵. On standing down their academic salary is normally enhanced by 2 spine points so their individual substantive academic salary can be readily deduced from their pay as Heads of School. They are members of Senate. Heads of School were not members of UPARC and are generally less well remunerated than those on UPARC.
19. Deans are key academic leadership positions within the University. They line manage the heads of school in the faculty and faculty officers. By way of example from an advertisement for the Dean of Engineering in September 2018¹⁶ the Faculty of Engineering encompassed 500 members of academic staff, 3400 taught and research students. The role was advertised at Grade M. They sit on Senate and are ex officio members of UPARC. The role of Dean is not wholly managerial. Professor Ireland estimated he spent 60-70 per cent of his time on management as Dean with the rest on teaching and research. Deans are typically appointed for a 4 year rotation, the majority retire or "return to the ranks" going back to a solely academic role (although it is accepted that some like Professor Orpen follow a "management track" becoming Head of School, Dean and then Pro Vice Chancellor; this is by far the minority.) Upon a return to the ranks a Dean may find that their academic salary has fallen behind that of their peers because of the limited time they have to undertake research.
20. Unlike Heads of school, Deans' remuneration is not by a simple increment but takes into account quality of performance in the role as well as substantive professorial salary prior to appointment. Professor Ireland's evidence was that disclosure of a snapshot Dean's salary would give a false impression as it changes in response to performance during the term of Dean. As a Dean has generally not done that role before, the starting level is lower and adjusted if they are very good in the role. His current salary is higher than it was when he started as Dean. When he returns to the ranks it will drop significantly.
21. The Tribunal observes that no Dean would be expected to accept a role that paid less than they would be paid as head of school and that therefore any Dean's academic salary if the Heads of School increment is taken off provides a ballpark figure for their academic salary. This was consistent with Professor Ireland's oral evidence on the point. The earlier a Dean is into the role, the closer their salary is likely to be to their base academic salary. Therefore, the prejudice that attaches to disclosure varies with length of time in the role and would not be equal for each Dean whose information fell to be disclosed.

¹⁵ As per p 291 OB Although this post dates the relevant date we are satisfied that it is sufficiently proximate to give an indication of the role and responsibilities of the Dean at the relevant date.

¹⁶ P279 OB Advertisement for Dean of Faculty of Engineering September 2018

22. From Ms Buchanan's evidence we accept that divisional heads are leaders of the professional services divisions. They will be Grade M¹⁷ (the salary range is 24 increment points £64,000 to £118,000).¹⁸ They may be paid outside of the M salary range. Divisional Heads that are not on UPARC are generally less well remunerated than those on UPARC. Although the title of "divisional head" is the same, in practice the roles are not equivalent with each other and will vary greatly depending upon the number of staff and extent of their remit. Although all post holders will have general managerial skills and may have career paths both within and outside of the Higher Education Sector (as has been the case for Ms Buchanan) there are some posts which are more specifically targeted towards the higher education sector e.g. Academic Registrar and Student Recruitment Access and Admissions and a lot of the post holders have previous experience in other HE establishments.

UPARC

23. In its consideration of the request relating to the Divisional Heads, the University has defined the Management body as being the University Planning and Resources Committee (UPARC). It is accepted that there are structures above it e.g. the Trustees and that some of its decisions have to be ratified by e.g. the Finance committee. Ms Buchanan provided the terms of reference of UPARC¹⁹. Since the information request there has been a restructuring and UPARC has been replaced by the University Management Team²⁰ however, we are considering the position at the date of the request and do not therefore take the restructuring into consideration in this appeal. More Heads of division sit on the UMT however, this represents a change and none of the Divisional Heads whose information is withheld sat on UPARC. Ms Buchanan's evidence was that although any head of school, or divisional head could be invited to attend the UPARC meeting to present information this was not of right and was no different to any other person with information that would be of assistance to UPARC.

24. The Deans were ex officio members of UPARC, the Tribunal is satisfied that there is a distinction in that Divisional Heads on UPARC are there for the duration of their employment by the University. Each individual Dean is in effect there in a temporary capacity for the term of their appointment as Dean.

25. From the terms of reference we accept that UPARC was a high level management group dealing with major strategic issues across the institution. They considered the draft budget, financial plans and capital programme prior to their consideration and approval by Finance and Major Protects Committee and then the Board of Trustees. They received and approved recommendations on Capital Investment or submitted them to the Finance Committee or the Board of Trustees as appropriate. Additionally, it routinely received the following reports for discussion:

- School Reviews
- Divisional Reviews,
- Deans Annual Reports on their Faculties.

26. We are satisfied the divisional heads who sat on UPARC had more responsibility and consequently are more accountable than those who did not because those on UPARC

¹⁷ Grade M is often broken down into narrower bands of M1, M2 and M3 those bandings are publicly available.

¹⁸ Professor Ireland p 166 OB

¹⁹ p 145 OB

²⁰ UMT

contributed to key decisions relating to strategic priorities, risk assessment and budget processes. We accept from the terms of its remit that it effectively manages the finances, infrastructure, strategy and development of the University with some input into the viability of academic endeavours although academic content is the remit of Senate and not UPARC.

27. The ICO sought to argue that UPARC was one of a number of management structures and thus membership was not determinative of seniority. She pointed to Divisional Heads who were present at a Trustees Board Meeting²¹ however, we are satisfied that Divisional Heads who attended in that capacity were no different from anyone else with information that the Trustees wished to hear. We take into consideration that one example relied upon was a joint presentation with a much more junior colleague. In particular she relied upon the existence of Senate as being in her argument a parallel management structure. The evidence was that all Heads of School and Deans were members of Senate although it was not the evidence that any of the Divisional Heads were. Before the Tribunal²² Professor Orpen's evidence which we accept, was that Senate was the oversight body of the academic endeavour. New degree programmes had to be presented and to pass through a quality assurance programme. Whilst it is accepted that a new course has funding implications and strategic consequences, the evidence was that viability would be considered by UPARC who would present to Senate²³. Senate could lobby and request the funding but did not have the authority to approve a new course although the course content was its responsibility. In light of the academic focus of Senate the Tribunal would expect there to be a much wider input from students and more junior academics in its work and is satisfied that it does not manage the operation of the University and as such membership of Senate in our judgment is not material in the assessment of accountability and seniority.

The Law

28. S40 FOIA²⁴ provides:

(2) Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data... and

(b) the first ... condition below is satisfied.

(3) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act—

(a) would contravene any of the data protection principles...

29. Personal data is defined in s1(1) of the DPA as

“...data which relate to a living individual who can be identified—

(a) from those data, or

²¹ 7.10.16

²² His witness statement made no reference to Senate.

²³ OB145 UPARC 'advises .. senate on ... academic matters

²⁴ S40 FOIA has been amended to reflect DPA 2018 however, the Tribunal must apply the law as it stood at the date of the request.

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

30. There is no dispute between the parties that in light of the link to job title the salary band information that has been withheld constitutes personal data. The Appellant relied upon the first data protection principle²⁵ as set out in Part I of Schedule 1 which provides:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

(a) at least one of the conditions in Schedule 2 is met,

31. The relevant condition in Schedule 2 it is agreed is condition 6 which provides:

(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

32. It was agreed between the parties that in assessing fairness the Tribunal must balance the reasonable expectations of the data subject and the potential consequences of disclosure on the data subject against the legitimate public interest in disclosing the information²⁶.

33. The case of *Goldsmith International Business School v The Information Commissioner and Home Office [2014] UKUT 0563 (AAC)* set out the approach to be taken when considering the application of condition 6 Schedule 2 namely

Proposition 1: Condition 6(1) of Schedule 2 to the DPA requires three questions to be asked:

“(i) Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?

(ii) Is the processing involved necessary for the purposes of those interests?

(iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?”

Proposition 2: The test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.

Proposition 3: “Necessity” carries its ordinary English meaning, being more than desirable but less than indispensable or absolute necessity.

²⁵ It was not argued by any party that any other data protection principle was relevant.

²⁶ *Haslam v IC and Bolton Council [2016] UKUT 139 (AAC) at [33]*

Proposition 4: Accordingly the test is one of “reasonable necessity”, reflecting the European jurisprudence on proportionality, although this may not add much to the ordinary English meaning of the term.

Proposition 5: The test of reasonable necessity itself involves the consideration of alternative measures, and so “a measure would not be necessary if the legitimate aim could be achieved by something less”; accordingly, the measure must be the “least restrictive” means of achieving the legitimate aim in question.

Proposition 6: Where no Article 8 privacy rights are in issue, the question posed under Proposition 1 can be resolved at the necessity stage, i.e. at stage (ii) of the three-part test.

Proposition 7: Where Article 8 privacy rights are in issue, the question posed under Proposition 1 can only be resolved after considering the excessive interference question posed by stage (iii).

Proposition 8: The Supreme Court in South Lanarkshire did not purport to suggest a test which is any different to that adopted by the Information Tribunal in Corporate Officer (Information Tribunal).

34. We accept that there is no presumption that openness and transparency should take priority over personal privacy.²⁷ This Tribunal considers this apparent from the fact that disclosure under s40 FOIA can only take place subject to the protections as set out in the DPA 1998.

Fairness

35. In assessing fairness, we have had regard to the seniority and level of responsibility and accountability within each role. Additionally, we have had regard as to the extent to which it is a public facing role or internally focused (although we are satisfied that alone this is not determinative).

Seniority

36. The University has sought to reflect the responsibilities of divisional heads by reference to UPARC because of UPARC’s role in decision-making which guides the University and therefore in its submission, accountability is appropriate. The Commissioner’s case is that notwithstanding that they do not sit on UPARC they are nevertheless sufficiently senior to have a reasonable expectation that their salary bands are disclosed. She argues that divisional heads are senior employees because they are head of their respective divisions and the matters for which they are responsible are not inconsiderable concerning functions integral to the effectiveness of the university including:

- Budgetary responsibility for the Divisions, and
- they can be expected to represent their divisions at outside functions.

37. We repeat our findings as set out above as to the status of UPARC and in our judgment it is a material distinction between the respective seniorities of divisional heads. The Tribunal has regard to the role and responsibilities of the individual. We accept that

²⁷ CSA v Scottish Information Commissioner 2008 UKHL 47

Divisional heads' roles vary widely they are not a homogeneous group with different levels of staffing and focus. Seniority is a sliding scale and those not on UPARC are not setting the strategy or the budgets but applying them. We accept that the majority of a budget is the fixed staff costs.

38. From the witness evidence we accept that Deans and Heads of School hold their respective budget allocations within which they are expected to operate but need senior executive team authority to go outside the normal pay range when recruiting or to make performance related remuneration decisions. These are largely salary costs over which they have limited control as the budgets are set centrally by the senior executive team and UPARC. They do not have authority to make major capital expenditure decisions. In terms of budget they can have a "wish list", they can lobby but they have no power to achieve it outside of the governance structure.
39. In relation to Heads of school and Deans we accept that their role is time limited and it is a routine expectation for senior academics that at some point they will take on this duty. The view held by the University witnesses and articulated within Annex C is that this is an internal middle management position, not an executive position and the incumbents perform a hybrid role of teaching, research and management. We accept that appointment is generally a 4 year rotation, wherein they temporarily manage their peers. The majority of these post holders are not on a managerial career track. By the fact that Deans line manage heads of School it is evident that Deans are more senior and have more responsibility which is consistent with the advertised role and their ex officio appointment to UPARC.

Public facing

40. A public facing role is defined by the Commissioner as an employee who has some responsibility for explaining the policies or actions of their authority and not simply because an employee deals with enquiries from the public or sends out material produced by others²⁸. The evidence was that Deans and Heads of School are student focused. Whilst Heads of School have some contact with prospective students on open days and other occasions when the public may be invited into the faculty, Deans are less likely to. Neither Deans nor Heads of School are required to deal with the "public at large". Some divisional heads will also have contact with potential applicants and the wider public (the Tribunal thinks of the Director of Student Services and the Director of Communications and Marketing) but other Divisional Heads would be less likely to (Acting Director of Library services) have an external focus. However, in our judgment they were none of them expected to represent the University, to defend its policies and strategies to the outside world.

Reasonable expectation

41. Ms Buchanan agreed that the "working at Bristol" section of the University's website details include job title, job type/description, division and school and salary (both precise and range) and where range this information is provided these can range from less than £1,000 to just over £10,000.²⁹ Nevertheless we accept that the general policy on transparency is that the University treats individual salaries as confidential to the individuals concerned apart from the Vice Chancellor. The annual statement includes collated information in £10,000 bands on all salaries above £100,000. She told the

²⁸ P236 OB

²⁹ And P107 OB

Tribunal that a subsequent post holder (apart from the HR director) would not expect to know the salary of their predecessor.

42. We are satisfied that this was consistent with the majority of the feedback from the role holders concerned including Professor Ireland and those whose views are represented in Annex C namely that a salary is personal and private and not something most employees expect to be released to the world. This view is sufficiently entrenched that some expressed doubt whether they would have accepted the position if they had known that their salaries would be disclosed. From the evidence before us we are satisfied that this constitutes the “industry norm” in relation to other UK Higher Education institutions as explained below.
43. The ICO argued that it was not reasonable for the data subjects to expect that their salary would not be disclosed. As a recipient of some public funding and being subject to FOIA the reasonableness of their expectation should have been informed by the expectations relating to other public authorities namely:
- i. Government Departments and other public bodies now routinely publish, names, job titles and salaries (Senior Civil Service Level 2 and above) on www.data.gov.uk in £5,000 bands³⁰.
 - ii. Local authorities, fire and police authorities and certain other bodies in England are required to publish the actual remuneration paid to each employee over £50,000 with the names of those who earned over £150,000.³¹
 - iii. Local authorities³² should disclose the current salaries with job description and names³³ of those earning over £58,200 (which is equivalent to the senior civil service minimum pay band)³⁴ with job descriptions and names (with an option for refusal of consent for publication of the name).
44. The Tribunal is not satisfied that these provisions set the expectation for the University’s employees because it is not suggested that the University does routinely publish salary information on www.data.gov.uk and the 2009 Regulations and 2011 Code specifies the bodies to whom it applies which do not include the University.
45. The University relies upon its publication in bands of £10,000 of the number of salaries over £100,000. This has been done in reliance upon the “Definition document for Universities and other Higher Education Institutions”³⁵ which provides as a minimum, for the publication of salary information for:
- senior staff (which for the purpose of this document means staff earning over £100,000 per annum and on the Senior Management Team or equivalent level) in bands of £10,000,
 - more junior posts levels of pay should be identified by salary range.
46. The Tribunal observes that it is surprising that in assessing reasonable expectation in the Decision Notice that the ICO did not register or reference that the ICO had itself issued sectorally specific guidance on the usual terms for reporting salary structures³⁶ The

³⁰ sections 42-45 ICO guidance as per p105 OB

³¹ Accounts and Audit (Amendment no 2) (England) Regulations 2009

³² As defined in s4 p 267

³³ With an option for individuals to refuse consent to their name being disclosed)

³⁴ The Code of practice for local authorities on data transparency published in September 2011

³⁵ P300 OB

³⁶ The definition document

Definition Document was raised by the University who like the tribunal expressed surprise that the ICO had relied upon guidance that on its face does not apply to the Higher Education sector but had ignored the guidance issued to Universities. Despite this the ICO did not explain the omission of their consideration of this document in its pleadings before the Tribunal.

47. The ICO argued before the Tribunal (in response to the University's reliance on the document) that this was the minimum level of automatic disclosure required without further consideration by the HE institution and that disclosure in £5,000 bands did not conflict with the Commissioner's guidance for Universities and was not a bar to more detailed disclosure in response to requests. The Decision notice simply failed to recognise that the sectoral guidance existed. This has not been explained, and may have been no more than an oversight. At the hearing the ICO's arguments implied a criticism of their own sectoral model of disclosure as inadequate (e.g. it was their case that disclosure in £10,000 bands was too wide to provide useful transparency). If the ICO's current view is that the sectoral guidance for publication schemes is inadequate, the Tribunal observes this would only slowly be remedied by the trickle-down effect of piecemeal disclosure by Universities in response to individual requests. A formal and consultative approach across the sector would provide a better opportunity to assess the need for and scope of any change. Any resulting change would provide for parity across the sector, and any resulting commercial or competition impacts could be assessed on the basis of evidence, without random disadvantages for institutions obliged to make isolated departures from the sectoral norm through information requests.
48. Whilst it is of course right that disclosure in response to an information request must be considered in relation to the applicable exemption(s) and not ruled out because it is inconsistent with a structure of reporting suggested in a publication scheme, in our judgment the Definition document is consistent with the ICO being content with information being provided in £10,000 bandings generally and thus is material to the reasonable expectations of University employees.
49. The fact that the Commissioner has set out separate guidance that is explicitly linked to Universities, in our judgment is more likely to inform the expectation of those within the University sector (than the automatic provisions applicable to other organisations) since it is undeniably applicable. That there is a difference in banding between the University provisions and those of other public authorities in our judgment makes it likely that those in the University sector would consider the wider band to be applicable to them and that they had in that regard been distinguished from the general run of public authorities. The Commissioner was not able to explain why a different banding and threshold had been specified in the Definition document, in our judgment it is consistent with a recognition by the Commissioner that the circumstances of the University sector are different reflecting:
 - i. The personal nature of academic reputation,
 - ii. That the institution is only partly publicly funded (a similar situation applies to the BBC where the University argued that their standard disclosure relates to even wider salary bands with a higher salary threshold than that provided for in the University Definition document),
 - iii. Unlike a traditional public authority the University is not exercising power over citizens and
 - iv. The unusual market conditions involving some sector specific expertise in competition with private institutions (industry) and countries with no expectation of disclosure.

50. Additionally, we have had regard to the impact of the decision in Kings College London v ICO EA/2014/0054. In this case it was agreed by the parties that academic staff earning over £100,000 were not in scope of the appeal.³⁷ In the determination a distinction was drawn between those who sat on the University PCT (Principal's Central Team; the twelve officers who form the Executive) and those who did not. The Tribunal in that case was not asked to consider any other basis for distinction and was explicit that their finding was not to say that it would always be unfair in respect of those not on the PCT.³⁸ This Tribunal is satisfied that the findings of that Tribunal are not material as a question of law in this case (as it is a first tier tribunal decision it is not binding). However, to the extent that the effect of that case was that salary bands of £10,000³⁹ were in consideration and the outcome was that no academic salaries were disclosed and for non academic roles the salary information for those not on the PCT were not disclosed; we are satisfied that a general awareness of this case in the public domain would be likely to add to the reasonable expectation of employees that academic salaries were not likely to be disclosed and neither were the salaries of those not on UPARC. In our judgment this is consistent with this being the "industry norm". In reaching this conclusion the Tribunal would not expect that the precise details would have been studied by those who heard of it and might have been influenced by their understanding of its findings.
51. In relation to Heads of School we take into consideration our findings as set out above that the salary information is reputational information which would enable their academic salary to be discerned to within £5,000. Allowing for the uplift of 5 spine M points for performing the administrative role from the information in £10,000 bands already disclosed the vast majority⁴⁰ of these office holders had academic salaries under £100,000 which they would not have expected to be disclosed either because it was academic and because it was below £100,000. None of their academic peers would be subject to that level of exposure. They do not sit on UPARC and would not expect scrutiny in that regard in reliance upon the Definition document, the University's existing levels of disclosure and the industry norm.
52. Although the situation is less clear cut for Deans whose salaries can evolve during the currency of their tenure we take into consideration that the proximity to academic salary will be more apparent the earlier into the role an individual is. Even taking off the 5 spine M points which would be the minimum increment it is apparent from the £10,000 banding in the public domain that the majority had academic salaries below £100,000 which they would not have expected to be disclosed pursuant to the definition document. We remind ourselves that the academic salary is not based on their administrative work but it is reputational. as it is pegged to their teaching and research history. Although they sat on UPARC unlike the divisional heads they would expect to return to the ranks following the end of their term and in any event the Definition document provides for disclosure in £10,000 bands. It is accepted as was demonstrated by the ICO using generic examples that the effect of using £10,000 bands is that there can be a difference of £2 or £19,999 between colleagues in

³⁷ The ICO accepted that s43(2) FOIA was applicable (based on the facts of that case). P 201 OB

³⁸ P218 OB

³⁹ Because of the terms of the request in that case

⁴⁰ Even though p 127 has now been updated this conclusion is consistent with the accurate and up to date closed material before the Tribunal.

neighbouring bands consequently the expectation from the definition document is one of much less personal exposure.

53. In considering the reasonable expectation of Divisional Heads we have had regard to the proportion that were earning under £100,000 and all we are concerned with are not on UPARC. We accept that there was considerable recruitment from within the HE sector and that non disclosure of salaries of less senior managers in the HE sector was the industry norm as evidenced by Ms Buchanan and as was explicitly stated by one respondent in Annex C.

Potential Consequence

54. From Annex C we accept that there is a concern by some who are or who have been Deans or Head of School this is misleading and unfair. This broadly falls into 3 categories:

I. Reputational:

- i. People would make presumptions about the value of the academic discipline or the competence of the role holder when salary variations occurred because of factors such as time on M1, Movement to M2 or beyond, research status, R and R agreements, negotiation for external appointments and absence of the same for internal appointments. The Tribunal observes that explaining the discrepancies would require even more intrusive personal data to be disclosed
- ii. The information relates to an individual's personal career history and not just the management role they were undertaking.
- iii. As salaries are not static, disclosure at a point in time as per the request would further distort the picture and risk individuals being seen to be of little value to the university.
- iv. Disclosure would impact upon a role holder's future ability to negotiate a salary with another employer (where the recruitment process did not require disclosure of current salary by applicants) including potentially commercial non-academic employers. We are satisfied that this would put them at a disadvantage compared to their peers whose academic salary would not have been disclosed with this level of specificity.

II. Intrusion:

- i. Role holders would feel singled-out as disclosure would reveal the substantive salary when other academics in the University were not being asked to do so⁴¹.
- ii. £5,000 is a very narrow band (barely two M points).
- iii. Those at the top or bottom of the range were concerned they would not be comparable to other colleagues and thus "stand out". From looking at the closed material we are satisfied that there would those who would be specifically exposed by being in different bands from the majority.

III. Operational:

- i. Disclosure will enable comparison exercises which undermine the collegiate atmosphere in an academic institution. Where there was accidental disclosure of a professorial salary in the school previously this caused a lot of unrest resentment and bad feeling⁴².
- ii. Junior colleagues were largely ignorant of the extent of professorial salary scales and principles of operation. It would be unhelpful for reasons of perception to have

⁴¹ P154 OB

⁴² P151 OB

specific individual salaries made public. In particular disclosure of a snapshot Dean's salary would give a false impression as it changes in response to performance during the term the office is held

- iii. Heads of School and Deans line manage those with a greater salary and disclosure potentially undermines their authority.
 - iv. In light of the market issues relating to particular fields of study disclosure would fuel tensions within and between schools.
55. The ICO argued that The University already voluntarily disclosed the salaries of its most senior staff and its more junior staff without apparent prejudice. In relation to the salaries of its most senior staff although we note the evidence of Professor Orpen who had had his salary information disclosed in a £5,000 band and who told the Tribunal that he personally had not had problems as a result; nevertheless, we accept that his experience is not determinative. He is a Pro Vice Chancellor with no expectation of "returning to the ranks" as such there is no internal comparator pool. In relation to Junior post salary information we are satisfied that this is reputationally less significant and consequently less intrusive as they can be expected to be more formulaic and reflect an earlier stage of the career.
56. In relation to divisional Heads from Annex C although the pool of respondees was small there was some expectation of salary confidentiality and we accept that that for one role holder this was the case with previous roles including 2 senior roles at other HE providers which in our judgment supports Ms Buchanan's evidence that this is the industry norm. In our judgment this prejudices the data subjects against others working in other higher education institutions in terms of future salary negotiations and scrutiny by their peers. The arguments relating to comparison, departmental bad feeling and in light of the salaries at the lower end of the scale the perception of the departments' value and value of the role holder in our judgment are all equally applicable. Ms Buchanan in her evidence was clear that although the job titles were the same the roles were not and that a new incumbent could not expect to be paid the same as their predecessor which would depend upon a variety of market factors (such as experience and the degree of additional training or support required).
57. The ICO argued that prejudice would even out over time with other requests being disclosed from this and other Universities. In our judgment this form of piecemeal disclosure would not prevent the prejudice to those at the forefront of the disclosure and as KCL has shown would not lead to consistency across the sector. In our judgment this prejudice can only be mitigated by changing the industry norms.

Public interest in disclosure

58. It is accepted that there are important public interests in transparency and accountability in relation to senior salaries of University employees as the University is in receipt of some public funding. However, we observe that the information in dispute is a very small sample (e.g. only 6 Deans) and as such statistically insignificant, we also repeat our findings about the changeability over time of the Dean's salary and that disclosure of the requested information provides an incomplete picture that requires further information to put it into context.
59. With regard to all the posts in dispute, we have had regard to the salary information that is already in the public domain namely:
- i. University pay scales are published.

- ii. The annual statement includes collated information in £10,000 bands on all salaries above £100,000
 - iii. The grouped banding information provides a good picture of all salaries not just senior office holders.
 - iv. There is an upward pressure and banding captures that adequately.
60. We are also satisfied that in assessing the public interest in disclosure we have to look at the negative consequences of such specific disclosure including:
- i. Salary pressure is particularly acute in social sciences (most notably Economics, Finance and Management) because of the need to recruit significant numbers of international students which is done based on academic and research reputation.
 - ii. More detailed salary information we accept will create an expectation of a “going rate” for a particular post and is likely to precipitate pressure from those less well remunerated to achieve parity with other post holders (regardless of differences in their experience, the specifics of the role and market pressures).
 - iii. Increased exposure for academic post holders (compared to their academic peers) may act as a disincentive to accept the role which would impact upon the University’s ability to recruit the best candidates for the role.
61. From this we are satisfied that the data subjects whose information is in dispute had a reasonable expectation that their salary information with this level of specificity would not be disclosed. This expectation was reasonable in light of our assessment of the seniority, accountability and outlook of their role. In our judgment there is limited public interest in disclosure of this information which can be met by the salary information already known and in light of their identifiability, the granularity of the banding and the reputational impact of disclosure on the academic data subjects we are satisfied that disclosure would not be fair.
62. We accept that the fairness in relation to Deans is more finely balanced in light of their membership of UPARC (which is where the line has been drawn in relation to Divisional heads) however, we are satisfied that the fact that the salary information is pegged to the academic salary with its reputational impact, disclosure is in smaller bands than provided for by the Definition document and the short term nature of the role means that disclosure would nevertheless be unfair.
63. For the sake of completeness we are also satisfied that disclosure would not comply with Condition 6 Schedule 2. There is considerable overlap between this and the assessment of fairness and the Tribunal repeats all the points articulated above insofar as they are applicable to consideration of Condition 6 of Schedule 2. However, additionally we would add the following.

Legitimate Interest

64. The Tribunal must have regard to the requestor’s legitimate interest rather than general public interest conditions⁴³. In the request for an internal review the requester quoted the Commissioner’s guidance:
- “There is a legitimate public interest in knowing how public money is apportioned across an organisation which includes salaries at lower levels. In order to meet this interest it*

⁴³ Cox v ICO and Home Office 2018 UKUT 119

may be sufficient to disclose the advertised salary range for these posts. If the range is particularly wide or there is a significant element of performance related pay in addition to the advertised range, it may be necessary to disclose more detailed information, in order to give a true picture. In such cases the legitimate interest may be met by disclosing the salary figures in bands of £5,000.”

He added:

“This is all I am asking for. The salaries of more junior staff roles are routinely made available via salary bandings in job advertisements and disclosure under FOI – why should more senior staff not be subject to the same scrutiny given the level of decision making responsibility they have? As senior managers they should have a greater expectation of scrutiny, at least equal to that of junior staff in relation to salary bands.”⁴⁴

65. In his complaint to the Commissioner the requestor stated:

“More junior members of staff have salary levels made public via salary bandings and public job adverts and such information should also be disclosed in response to a FOI request./ Senior management salaries are also disclosed under FOI or otherwise in the public domain, so there is an apparent gap in salary transparency in the middle and I do not believe this is right or fair. Senior managers who are not part of the senior management team can expect less transparency about their level of salary than junior staff ... who have no budgetary or decision making responsibility”⁴⁵

66. It is accepted that Public pay accountability and fair remuneration, equality, openness and consistency of approach (all of which are implicit in the requestor’s reasoning) are legitimate interests however: in determining whether disclosure of this information is necessary we are not satisfied that disclosure would meet this legitimate interest. We take into account that in relation to the salary information disclosed relating to Junior posts:

- i. From Ms Buchanan’s evidence, there is “wiggle” room in the bands advertised some of which are wider than the £5,000 requested here.
- ii. The advertised band or salary is not determinative of what is paid as there is still the option to be paid outside of the band with R and R supplements.
- iii. We are satisfied that with Junior posts salary information is reputationally less significant and consequently less intrusive as they can be expected to be more formulaic and reflect an earlier stage of the career. Consequently, disclosure of the requested information would not provide equivalent fairness, equality or consistency.

67. Necessity is defined as more than desirable but less than indispensable or absolute necessity. The University relies upon the information already available to argue that it is not reasonably necessary for transparency to know who falls into which band in order to achieve that legitimate interest. The more general the interest disclosure serves the less specific the disclosure has to be. We agree. We accept that the following information is already available:

- Specific salary of Vice Chancellor (which is the industry standard)
- Number of employees paid over £100,000 by £10,000 bands.⁴⁶
- Salaries for senior executive team £5,000 bands.⁴⁷
- Salaries of those divisional heads and SMT who were on UPARC in 2017 in £5,000 bands⁴⁸

⁴⁴ P61 OB

⁴⁵ P75 OB

⁴⁶ P227 OB

⁴⁷ P137 OB (this goes beyond the minimum standard of the Definition document)

- The No. of Deans, Heads of School and Divisional Heads by Category in £10,000 bands including 29 whose salary was below £100,000⁴⁹.
- The pay scales generally including the Professorial and Divisional Heads Bands on the website.
- The explanation of the 5 point increment payment for Heads of School (and hence by default this sets the minimum ball park figure for the Dean’s increment).

68. The ICO argued that transparency was material for transparency on gender equality of pay in senior roles and average salaries for the role, there was also some discussion as to analysis by disability and ethnicity. It was not explicit that this was part of the legitimate interest articulated by the requester but in any event we are not satisfied that this information is reasonably necessary in this regard either. Ms Buchanan’s evidence is that the University is obliged to and already reports on the gender pay gap. We observe that some information by way of gender and ethnicity will be available in terms of the public biography of those who hold the roles who can be determined from job title. Additionally, some analysis can be done from the £10,000 banding information. We take into account that this is a small pool of individuals at one snapshot in time and therefore statistically insignificant.

69. The test of “necessity” under stage (ii) of Proposition 1 of *Goldsmith* not having been met we have not gone on to consider the balancing test under stage (iii).

Conclusion

70. For the reasons set out above we are not satisfied that disclosure would be fair, neither are we satisfied that disclosure is necessary pursuant to Condition 6 Schedule 2 DPA. The Appeal is therefore allowed. In light of its findings relating to s40 DPA the Tribunal has not gone on to consider s43(2) FOIA.

Signed Fiona Henderson

Judge of the First-tier Tribunal

Date: 15th April 2019

As amended pursuant to rule 40 on 18th April 2019

⁴⁸ P 137 OB (this goes beyond the minimum standard of the Definition document)

⁴⁹ P127 (this goes beyond the minimum standard of the Definition document) and it is accepted that this needs to be resent to the requester in its updated format