



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL (INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000.**

EA/2016/0287

**Between:**

**MICHAEL CARLEY**

Appellant

and

**THE INFORMATION COMMISSIONER**

Respondent

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**Tribunal**

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**Brian Kennedy QC  
Henry Fitzhugh  
Narendra Makanji**

**Oral Hearing 9 May 201 – Field House, London  
11 August 2016 London**

**Subject Matter: Application of exemptions under s36 of the Freedom of Information Act 2000 (“FOIA”)**

**Result: Appeal refused.**

**Introduction**

**[1]** This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”) The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice dated 8 November 2016 (reference FS50633981) which is a matter of public record.

**[2]** The Tribunal Judge and lay members sat to consider this case on 9<sup>th</sup> May 2017. The Tribunal dismisses the appeal.

## **Factual Background to this Appeal:**

[3] Full details of the background to this appeal, Dr Carley's request for information and the Commissioner's decision are set out in the Decision Notice and not repeated here, other than to state that, in brief, the appeal concerns the question of whether University of Bath ("the University") was correct to withhold information regarding the considerations of implementation of the Living Wage.

## **CHRONOLOGY**

8 Dec 2015	Appellant's request for information regarding any considerations relating to the implementation of the Living Wage
21 Jan 2016	University's refusal, citing s12 FOIA
8 March 2016	Appellant requests internal review
9 April 2016	University seeks opinion of Qualified Person
12 April 2016	Qualified person gives opinion verbally
14 April 2016	University upholds refusal, citing s36 FOIA
16 June 2016	Appellant complains to the Commissioner
8 Nov 2016	DN FS506339 upholding the University's reliance on s36

## **RELEVANT LEGISLATION**

### **[4]**

#### **s36 FOIA Prejudice to effective conduct of public affairs.**

(1) This section applies to -

- (a) information which is held by a government department or by the Welsh Assembly Government and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

- (a) would, or would be likely to, prejudice -
  - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
  - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
  - (iii) the work of the Cabinet of the Welsh Assembly Government.
- (b) would, or would be likely to, inhibit -
  - (i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or  
(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

(3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).

## **COMMISSIONER'S DECISION NOTICE**

**[5]** The Commissioner's guidance on s36(1) explains that information may be exempt under s36(2)(b)(i) and s36(2)(b)(ii) if its disclosure would, or would be likely to, inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. The guidance says that the rationale for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision making by the public authority. Regarding s36(2)(c), the prejudice arising from disclosure must be different to any other prejudice listed in s36(2), but has been held to include disrupting an authority's ability to provide effective public service.

The Qualified Person was identified as Glynis Breakwell, Vice-Chancellor of the University, and her opinion was provided through the appropriate form to the Commissioner. She was of the opinion that disclosing such advice would "*inhibit ability for University's decision making bodies to receive advice, consider all available options and deliberate fully, thus would be like to inhibit quality of decisions taken*". She was of the opinion that this would impact upon the University's decision-making abilities more generally and therefore have a detrimental impact upon the management of the University, engaging s36(2)(c). The Commissioner found that these were opinions a reasonable person could so have, and therefore the question turned to the public interest test.

The Commissioner found that the factors in favour of disclosure (a general interest in transparency especially regarding expenditure, previous statements made by the University regarding salaries) were outweighed by the factors in favour of maintaining the exemption. The manner in which the University proposed to implement the Living Wage was a sensitive matter with long-reaching financial implications for the institution. Disclosure may weaken the University's position regarding on-going negotiations with trades union and disrupt its decision-making processes by inhibiting candour in

discussions. She therefore found that the University correctly applied the exemptions and the information should not be disclosed.

## **NOTICE OF APPEAL**

**[6]** The Appellant moved two grounds of appeal:

- i) the information was not used in any discussions at the University's decision-making bodies; and
- ii) the public interest is in favour of disclosure

### ***Ground I – use of the information in the University's decision-making***

The Appellant described the governance structure of the University, and argued that the University had not identified a decision-making body. The statutes hold that the University Council has decision-making powers, and the University has not said that the information was shared with the Council, only the "executive committee". The Council is a formal body that publishes minutes of its meetings and decisions whereas, according to the Appellant, the executive committee is an "ad-hoc body with no formal decision-making authority" that frustrates the purpose of FOIA by avoiding proper scrutiny.

### ***Ground II – Public Interest***

The Appellant argues that the University cannot justify a claim about the effectiveness of the University's decision-making body without reference to the Council. The Council is required to conduct its affairs in an open and transparent manner whilst permitting redactions of minutes in compliance with data protection requirements.

## **COMMISSIONER'S RESPONSE**

**[7]** The question of the likelihood of prejudice means that there must be a real and significant risk of prejudice being suffered. The opinion of the Qualified Person must be objectively reasonable, and the Commissioner must form his own view on the severity and extent of the prejudice to be suffered.

### ***Ground I – use of the information***

Having reviewed the withheld information, the Commissioner is satisfied that it is information developed through deliberations and discussions that would be used to inform decisions of the Vice Chancellor. Therefore, the Commissioner was satisfied that decision-

making would be negatively impacted by the inhibiting effect on free and frank sharing of advice. This is especially pressing, as the deliberations at the time of request were live.

***Ground II – public interest***

The Commissioner accepts that decisions of the Vice Chancellor and the Council may be informed by the deliberations of others within the University, but rejects the contention that this is a method of avoiding scrutiny. The Commissioner reiterated the determination of the Decision Notice in finding that the factors weighed in favour of exemption.

**REPLY BY THE APPELLANT**

**[8]** The Appellant submitted supplementary argument, pointing out that the Council had delegated its authority on staff remuneration to the Vice Chancellor with an obligation to bring decisions on remuneration to the governing body for approval. This was done, he states, in order to maintain the transparent scrutinisation of the decisions, and therefore withholding the information from the Council is an attempt to frustrate the principles of transparency.

**[9]** Crucial to this appeal, and the exemption claimed is the question of whether or not the Commissioner was correct to be satisfied that it is information developed through deliberations and discussions that would be used to inform decisions of the Vice Chancellor. In that regard, the Commissioner was satisfied that decision-making would be negatively impacted by the inhibiting effect on free and frank sharing of advice adding that this is especially pressing, as the deliberations at the time of request were live. We accept and adopt that reasoning.

**[10]** The Vice Chancellor has general responsibility for maintaining and promoting the efficacy and good order of the University and in that way requires a degree of confidentiality and sensitivity on certain matters when administering those duties. The Commissioner has properly acknowledged the need for transparency and accountability in that administration and accepts section 36 is engaged. In applying the balancing exercise, required in this engaged but qualified exemption under FOIA, she has placed significant weight to the fact that the request involved sensitive “live” issues, which were under consideration in the course of that administration. We accept and adopt the Commissioners’ reasoning. This Tribunal also have had the advantage of inspecting the

closed information (the subject of the request herein) and are persuaded that pay negotiations on employee's pay and/or conditions were on-going matters at the time of the request. In any event arguably may remain on-going sensitive matters. Disclosure through FOIA is to the world at large. Observation of the closed bundle by this Tribunal demonstrates that there was an important live issue and on-going discussions on such matters as low pay and living wages. In these circumstances we are satisfied that the Commissioners reasoning was sound and we accept and adopt it.

**[10]** Accordingly we dismiss the appeal.

Brian Kennedy QC

14 JUNE 2017.