Neutral Citation number: [2023] UKFTT 782 (GRC)

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2022/0391

Heard by CVP on 22 August 2023

Decision Given On: 26 September 2023

Before

JUDGE ANTHONY SNELSON
TRIBUNAL MEMBER KATE GRIMLEY EVANS
TRIBUNAL MEMBER ANNE CHAFER

Between

MR JULIAN TODD

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

On hearing the Appellant in person and reading the written representations on behalf of the Respondent, the Tribunal unanimously determines that:

(1) The appeal is allowed.
(2) A Decision Notice is substituted in the following terms.

> **(i) Staffordshire University ('the public authority') has correctly cited the exemption under the Freedom of Information Act 2000 ('FOIA'), s43(2) and that exemption is engaged, but the public interest in disclosure outweighs the public interest in maintaining the exemption.**
> **(ii) The public authority has incorrectly cited the exemptions under FOIA, s36(2)(b)(i) and (ii) and neither is engaged.**

(iii) Accordingly, not later than 35 calendar days after the date of promulgation of this Decision, the public authority is ordered to deliver to the Appellant the information sought by his request dated 2 February 2022, subject to redaction of personal information as necessary.

REASONS

Introduction

1. On 2 February 2022 the Appellant, Mr Julian Todd, wrote to Staffordshire University ('the University') requesting, pursuant to the Freedom of Information Act 2000 ('FOIA')[1]:

> **(1) Copies of the annual external examiners reports for all the courses provided by the LMA (Liverpool Media Academy) for the last three years;**
>
> **(2) Copies of the approved school responses that accompany these reports when they were made available to students as a matter of course. (Section 8.3 of External Examiner Policy)…**

2. The University responded on 2 March 2022, refusing to supply the information and citing FOIA, s36 (effective conduct of public affairs) and s43(2) (commercial interests).

3. Mr Todd took issue with that response but on 4 April 2022, following an internal review, the University reaffirmed its stance.

4. On 11 April 2022, Mr Todd complained to the Respondent ('the Commissioner') about the way in which his request for information had been handled. An investigation followed.

5. By a decision notice dated 12 November 2022 the Commissioner determined that the exemption relied under s43(2) was engaged and that the public interest favoured maintaining the exemption. In those circumstances he did not judge it necessary to deal with the s36 arguments.

6. By a notice of appeal dated 28 November 2022, Mr Todd challenged the Commissioner's adjudication.

7. The Commissioner resisted the appeal in his response dated 13 December 2022, which addressed both s43(2) and s36.

8. To that Mr Todd served a reply dated 17 December 2022.

[1] To which all references to section numbers below refer

9. The dispute came before us in the form of a 'remote' hearing, held by Cloud Video Platform. The Commissioner had said that he was content for the appeal to be determined on the papers, but Mr Todd had exercised his right to ask for a hearing. The Commissioner did not attend the hearing, being content to rely on his written case. We were satisfied that it was just and in keeping with the overriding objective to adopt this procedure.

The Law

10. FOIA, s1 includes:

> **(1) Any person making a request for information to a public authority is entitled–**
>
> **(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and**
> **(b) if that is the case, to have that information communicated to him.**

11. FOIA, s36 includes:

> **(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 –**
> **…**
> **(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 …**

In this context, a 'qualified person' means 'any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown' (s36(5)(o))(iii)).

12. In *Information Commissioner v Malnick & ACOBA* [2018] UKUT 72 (AAC) the Upper Tribunal cited with approval earlier case-law to the effect that, depending on the particular case, conflicting opinions may both be reasonable [47] and also confirmed that 'reasonable' in the s36(2) context means substantively reasonable and not procedurally reasonable [56].

13. By s43(2), information is exempt if its disclosure under FOIA 'would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).'

14. In assessing prejudice and/or the risk of prejudice for the purposes of s43, we direct ourselves in accordance with the decision of the FTT in *Hogan and Oxford City Council v ICO* (EA/2005/0026), which proposes three questions. First, what interest (if any) is within the scope of the exemption? Second, would or might prejudice in the form of a risk of harm to such interest(s) that was 'real, actual or of substance' be caused by the disclosure sought? Third, would such prejudice be 'likely' to result from the disclosure in the sense that it 'might very well happen', even if the risk falls short of being more probable than not?

(*Hogan* is, of course, not binding on us but it draws directly on high authority[2] and has been specifically approved by the Court of Appeal: see *Department of Work and Pensions v IC* [2017] 1WLR 1.)

15. If a qualified exemption, such as any under ss36 or 43, is shown to apply, determination of the disclosure request will turn on the public interest test under s2(1)(b), namely whether, 'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information'. The proper approach, as explained by the Upper Tribunal in *APPGER v IC* [2013] UKUT 560 (para 149) is:

> **… to identify the actual harm or prejudice that the proposed disclosure would (or would be likely to or may) cause and the actual benefits its disclosure would (or would be likely to or may) confer or promote. This … requires an appropriately detailed identification, proof, explanation and examination of both (a) the harm or prejudice, and (b) benefits that the proposed disclosure would (or would be likely to or may) cause or promote.**

16. The relevant date for the purposes of applying any public interest balancing test and, it seems, determining the applicability of any exemption, is the date on which the request for information was refused, not the date of any subsequent review: see *Montague v ICO and DIT* [2022] UKUT 104 (AAC), especially at paras 47-90.

17. Where more than one exemption is relied upon, each must be considered and balanced separately. It is not permissible to 'aggregate' public interests under different exemptions when applying the public interest balancing test: see *Montague*, paras 15-46.

18. The appeal is brought pursuant to the FOIA, s57. The Tribunal's powers in determining the appeal are delineated in s58 as follows:

> **(1) If on an appeal under section 57 the Tribunal consider –**
>
> **(a) that the notice against which the appeal is brought is not in accordance with the law; or**
> **(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,**
>
> **the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the tribunal shall dismiss the appeal.**
>
> **(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.**

The Rival Cases

[2] In particular, on the meaning of "likely", the judgment of Munby J in *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin).

Mr Todd's case

19. Given the way in which the Commissioner had approached the matter, Mr Todd gave attention principally to the exemption under s43(2). He did not strongly dispute that a commercial interest was engaged, in the cases of both the University and LMA. But he submitted that the public interest clearly favoured disclosure. Publication of the external examiners' reports would serve the general public interest in openness and transparency in matters pertaining to education and the more particular public interest in enabling students to make well-informed choices between higher education options. The grounds relied on by the University for resisting disclosure were feeble and, in some instances, specious. In particular, the point that reports and third party providers' responses are routinely disclosed by the University to students who have enrolled on the relevant courses misses the point that such disclosure will be too late to inform a considered choice of course. And the Commissioner's reliance on the availability within the public domain of other sources of information was misplaced. External examiners reports were unique in conveying independent, skilled, professional assessments of course content and delivery.

20. As for s36(2), Mr Todd pointed out that there is no evidence that the 'Qualified Person' holds, or at the time of the request held, the opinion on which the University relies. Moreover, the stated opinion, if held, is perverse and unreasonable. Disclosure of the external examiners' reports would not inhibit free and frank provision of advice. There is no rational basis for supposing that examiners would 'water down' their assessments or express themselves in a more guarded way if they knew that their reports would be published. Nor would disclosure of the reports, or any response from a third party provider, inhibit the free and frank exchange of views for the purposes of deliberation. Under the University's External Examiner Policy (a copy of which was in the bundle before us) the report is prepared some time after an 'Initial Feedback' meeting, which takes place at Award Boards. That meeting is the occasion for free and frank exchange of views and there is no reason why a practice of publishing the reports would inhibit frank communication when the feedback is delivered and discussed. In the circumstances, Mr Todd argued that neither exemption under s36(2)(b) was engaged.

21. Even if the Tribunal found the exemptions (or either of them) engaged, Mr Todd submitted that the public interest favoured disclosure. His arguments under s43(2) were repeated.

The Commissioner's case

22. The main arguments of the Commissioner on s43(2) were as follows. There is fierce competition between Universities for students. The incomes of all higher education bodies depend on headcounts. Accordingly, publication of external

examiners' reports would be liable to prejudice any University's commercial interests. Therefore the exemption is engaged.

23. Turning to the public interest, the Commissioner submitted that the balance favoured maintaining the exemption. Healthy and fair competition between Universities served the public interest and granting Mr Todd's request would give other Universities, and third party providers competing with LMA an unfair advantage. Such disclosure would be to the whole world and would not entail any duty of confidence. Undermining fair competition would be liable to reduce the choice available to students. Moreover, performance information was available to prospective students on Universities' websites and on the Higher Education Statistics Agency website.

24. As to the exemptions under s36(2)(b), the Commissioner contended that the 'qualified person' was properly identified as the Vice-Chancellor and that the opinion set out in the University's message of 2 March 2022 was, in the circumstances, reasonable.

Analysis and Conclusions

Commercial interests

25. Rightly, Mr Todd did not seek to advance a positive case on whether the exemption under s43(2) was engaged. With the advantage of having seen the disputed information, we are persuaded that it is. We are not in a position to say more in these open reasons, since doing so would be liable to reveal the nature and tenor of the external examiners' judgements. In a short confidential annex we explain our thinking in a little more detail.[3]

26. On the public interest, we have reached the clear view that Mr Todd's case is to be preferred. Our reasons are these. First, we agree with the Commissioner that healthy competition between educational institutions is in the public interest. But that competition is best served where the qualities and weaknesses of course content and delivery at different establishments are publicly documented. In this way, strong reputations may be built and maintained on a sound evidential basis and, where necessary, hard lessons may be learned and changes for the better implemented. The overall effect of publication should, we think, promote higher standards generally.

27. Second, disclosure would serve the strong public interest in transparency about standards in tertiary education, a sector of vital importance to our society.

[3] In the usual way, the annex will initially be served on the Commissioner only but a further copy will go to Mr Todd 14 days after the later of: (a) the date when time for making an application for permission to appeal expires or, if such an application is made, (b) the date of disposal of all appellate proceedings.

28. Third, disclosure would also serve the narrower but no less important interests of those students faced with deciding on what University courses to apply for. The potential value of a recent assessment of any course by a skilled and disinterested professional is self-evident.

29. Fourth, we agree with Mr Todd that there is very little in the Commissioner's point that some 'performance information' is already available on public websites, including those of the University and HESA. In our judgment, such material is of much less value to any prospective student than a recent, independent, skilled, professional assessment of the sort provided by an external examiner.

30. Fifth, we do not agree with the Commissioner that disclosure would put the University at an unfair disadvantage. Favourable assessments could not be the subject of complaint at all. And our starting-point would be that any critical comment would be likely to reflect a permissible, evidence-based view. There is nothing unfair about proper, measured criticism. Moreover, publication of the response of LMA would enable it to challenge or mitigate any criticism it judged unfair.

31. Sixth, nor do we see much force in the point that disclosure would discriminate against the University and LMA in the sense that (apparently) the prevailing practice is that external examiners' reports and responses thereto are not published. There are two difficulties with this argument. The first is that it permits no change to the *status quo*. The fact (if it is a fact) that a practice self-evidently inimical to the core presumption of freedom of information has become ingrained cannot be allowed to justify refusing what is otherwise a valid request. The second point is that, if our decision is followed, there would seem to be good reason to anticipate, no doubt over time, a reversal of the practice of higher education bodies to suppress publication of external examiners' reports and responses thereto.

32. Seventh, in any event, the public interest in the fair and consistent treatment of institutions in the matter of publishing external examiners' reports must be set against the (as we see it) weightier imperative of ensuring fair treatment of students. The choice of a University course is often a decision which sets a young person's direction for life. No public interest can be served by perpetuating a state of affairs in which prospective students are denied key information about bodies and courses before they make their applications.

33. Eighth, we also share Mr Todd's view that there is no mileage in the University's argument that external examiners' reports and responses are made available to students once they have enrolled. To state the obvious, the public interest lies in ensuring that key information is available to prospective students *before* they commit themselves to any particular course of study.

Effective conduct of public affairs

34. Is either exemption under s36(2)(b) engaged? We remind ourselves that it is for the public body to show that any exemption is engaged. This involves demonstrating two things: first, that the 'qualified person' has in fact formed an opinion that disclosure would, or would be likely to, cause one or both of the consequences referred to in s36(2)(b); and second, that that opinion was reasonable.

35. In our judgment, the first of those two elements is not made out. It is common ground that the Vice-Chancellor is legislatively appointed as the 'qualified person'. But the section is not concerned with a role or title. It is concerned with the views of the flesh-and-blood *person* who holds the role or title. We have not been supplied with the name of the 'qualified person' at the date on which Mr Todd's request was refused. We have been shown no statement purporting to have been written by the 'qualified person'. We have not even been given any evidence from any third party purporting to explain how such third party came by an understanding as to what opinion the 'qualified person' held. The University's response to the request dated 2 March 2022 (the author of which is not identified) merely recounted without explanation what was said to be the 'qualified person's' opinion.

36. Accordingly, the Commissioner's case under s36(2)(b) falls here, for want of evidence substantiating the alleged opinion in fact. But had we decided the factual question differently, we would have found that the stated opinion was unreasonable and that, on that ground, the exemption was not engaged in any event. As to s36(2)(b)(i), the University's resistance to disclosure was explained in the message of 2 March 2022 in these terms:

> **There is a real and significant risk that the external examiners would be much more guarded in their advice if their reports were to be disclosed to the public at large. The result is that the University would not be properly appraised [sic] of the partners' performance and could not make a proper assessment of the academic standards of the courses delivered by the partner or undertake appropriate remedial action, which would ultimately be to the detriment of the students.**

Mindful as we are of the need to accord due respect to the 'qualified person', we simply cannot accept that this stated concern is reasonable (*ie* that it falls within a range of reasonable concerns). There is, to our minds, simply no rational basis for supposing that entirely independent external examiners would temper their advice if they knew that their reports would be made public. Their obligation to advise clearly and with candour would remain. Why should they struggle to honour it? Where is there any evidence of such an inhibiting effect in other contexts? None has been shown to us. In our judgment, the stated concern amounts to mere assertion for which no warrant is given.

37. In respect of s36(2)(b)(ii), the University's message of 2 March 2022 states:

> **The external examiners' reports also include the responses from the relevant schools to the external examiners' assessment. Those responses are critical to effecting improvements in the quality and standards of programmes delivered. In particular, it is of critical importance that schools' responses acknowledge any deficiencies identified by the external examiners and propose ways in which those deficiencies can be remedied. If put into the public domain, there is a very real risk that schools will be much more defensive in their responses and they will seek to challenge the external examiners' assessments. Without the schools' constructive cooperation in the process, the reports' primary purpose of improving quality and standards would be compromised.**

Here again, with due respect to the 'qualified person,' we are satisfied that the stated concern is unreasonable. We accept that third party providers might take a somewhat defensive line in any written response, on the ground that it was to be made public. But we see no rational basis for the professed fear that the purpose of improving quality and standards would be compromised. If third party providers could see that a valid criticism had been made by the external examiner, why should they not respond positively and constructively, at least in private? It could only serve their interests to do so.

38. For these reasons, we conclude that, even if we are wrong to find that the opinions relied on are not shown to have been held by the 'qualified person', the exemptions under s36(2)(b) are not engaged because, to the extent that they were held, they were unreasonable.

39. Finally, we record that, had we found that the exemptions under s36(2)(b) were engaged (or either one of them was), we would have held in any event that the public interest in disclosure substantially outweighed the public interest in maintaining the exemption, for the reasons already given in relation to s43(2).

Disposal

40. On all of the grounds stated, we conclude that the appeal has merit and must be allowed. The Commissioner's decision was not in accordance with the law. The disputed information must be disclosed.

Anthony Snelson

Judge of the First-tier Tribunal

Date: 22 September 2023