First-tier Tribunal
General Regulatory Chamber
[Information Rights]

Heard: GRC Remote Hearing Rooms

Neutral Citation Number: [2024] UKFTT 479 (GRC)

Heard on: 18 April 2024.
Decision given on: 07 June 2024

Before Panel:
Judge Brian Kennedy KC with Specialist Members, Jo Murphy and Dave Sivers.

Between:

JENNA CORDEROY

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

The GOVERNING BODY of the UNIVERSITY of OXFORD

Second Respondents

Representation:

The Appellant as a Litigant in Person.
For the Respondent: Sapna Gangani, by written Response on behalf of the Commissioner.
For the Second Respondent: Robin Hopkins of Counsel.

Decision: The appeal is Dismissed.

REASONS

Introduction:

1. The Appellant appeals under section 57 of the Freedom of Information Act 2000 ("FOIA"), against the Commissioner's Decision Notice dated 18 April 2023 with the reference number IC-217933-T3T1 ("the DN") which is a matter of public record.

2. As required by rule 23(3) of the 2009 Rules, the Commissioner states that he opposes the Appellant's appeal and invites the Tribunal to dismiss it.

3. The Appellant seeks an oral hearing of this case. The Commissioner considers that this is an appeal which may appropriately be dealt with on the papers. In view of this, the Commissioner does not propose to be represented in person at any oral hearing of this matter, instead being content to rely upon the contents of his DN and the written representations in his Response to the Grounds of Appeal.

Factual Background to this Appeal and Decision Notice:

4. On 20 June 2022, the Appellant wrote to the Governing Body of the University of Oxford, the Public Authority herein (hereinafter referred to as "the P.A.") to align with the DN and for brevity), in relation to this 2- part request for information as follows;

"In 2018, Oxford University announced that it received a £10 million donation from the British Foundation for the Study of Azerbaijan and the Caucasus (BFSAC) ...*I would like to request the following information:"*

1) Please disclose the ultimate source of the £10 million funding. Please provide their full name. ("Part 1")

2) All correspondence and communications held by the donations review committee in relation to the £10 million donation." ("Part 2")

5. The P.A. responded on 18 July 2022. It relied on sections 40(2) and s43(2) of FOIA to withhold the requested information.

6. The P.A. upheld reliance on these exemptions following an internal review – although it additionally confirmed that the person making the donation did not

hold a government position and was not subject to international financial sanctions.

7. The P.A. maintained s40(2) FOIA applied to the name of the Donor. Although admitting the DN does not discuss Part 1 and Part 2 of the request separately, the Commissioner agreed s40(2) applies to the name of the Donor because:

i. The name of the Donor is clearly that person's personal data - § [15] DN.

ii. In then considering whether there is a lawful basis for the name to be released § [25] DN, the Commissioner noted the Donor explicitly refused to give consent for its name to be published § [26] DN. The only other relevant lawful basis on which the information could be published would be if it was necessary in order to satisfy a legitimate interest § [27] DN.

iii. The P.A. accepted the legitimate interest in knowing who it was receiving money from § [28] DN. The Commissioner noted that the large size of the donation, plus concerns of reputation laundering shared by the Appellant and others amplified the legitimate interest § [31-32] DN and that publication of the name was necessary to achieve this interest since there were no less-intrusive methods of determining the source of the donation § [29] DN.

iv. However, the rights of the Donor had to be balanced against the legitimate interest, and the Commissioner was not persuaded the legitimate interest in knowing the name of the Donor outweighed their right as a data subject § [33] DN.

8. The Commissioner reasoned this was because:

i. Having viewed the withheld information the Commissioner has seen no evidence that the Donor has been accused of any improper activity § [39] DN and wanting to be anonymous should not be equated to a desire to conceal nefarious activity § [38] DN;

ii. The P.A.'s donation to accept an anonymous decision is legal and should be respected, as well as that Donor's wish to remain anonymous § [38] DN.

iii. Taking into account all of the above, disclosure would be contrary to the Donor's reasonable expectations § [39] DN and their rights as a data subject outweigh the legitimate interest. As a result, there is no lawful basis on which the information could be published and thus the public authority is entitled to rely on section 40(2) of FOIA to withhold the Donor's identity § [41] DN.

9. On 27 March 2023, during the course of his investigation the Commissioner obtained submissions and a heavily redacted copy of withheld information from the P.A.

10. The P.A. stated the redactions were made to information it opined was out of scope.

11. The Commissioner made his determination upon the redacted copy of the withheld information, agreeing s40(2) and/or s43(2) applied to a majority of the information. In respect of the information that did not engage these exemptions the Commissioner ordered the public authority to disclose it. He outlined what needed to be disclosed in a Confidential Annex which was sent to the public authority only. The P.A. provided this information to the Appellant on 16 May 2023, hence complying with this step of the DN.

12. Prior to the publication of the DN, the Commissioner was furnished with an unredacted copy of the withheld information. Having viewed the now unredacted i.e. additional information, the Commissioner was satisfied that it was not personal data, and nor was it sufficiently covered by the arguments the P.A supplied in relation to s43 for the Commissioner to be comfortable accepting that s43 would definitely apply § [10] DN.

13. The Commissioner recorded a breach of s1 FOIA in the DN as the P.A. held more information than it originally identified - § [2] DN.

14. Recognising this, the Commissioner ordered the P.A. to issue a fresh response in respect of this additional information, which may be a refusal notice § [11] DN. The Commissioner noted the P.A. did issue a new refusal notice on 16 May 2023, exempting all the information under sections s40(2) and s43(2). However, this development the Commissioner regarded as out of scope of this present DN as no substantive finding was made in relation to this particular information. As far as the Commissioner is aware, the P.A. complied with the step in the DN by issuing a refusal notice. The Appellant has not challenged this understanding.

15. A summary of the outstanding withheld information (i.e. the redacted copy minus the disclosure of the information as outlined in the Confidential Annex), and the Commissioner's detailed reasoning were illustrated in a helpful table by the Commissioner and are not rehearsed herein. - The Commissioner noted and recognised the P. A's arguments that receiving donations was a competitive and important function of any university. The donations received enables it to maintain and enhance the quality of its research and teaching and thereby it is

able to continue attracting the most talented students and staff. Publishing such information would deter donors, losing the significant funding the public authority receives, with obvious implications for its commercial interests § § [47-49] DN.

16. The P.A. did not explicitly confirm which level of prejudice it was applying but the Commissioner considered the lower threshold of *"would be likely to"* applied- § [50] DN.

17. The Commissioner then considered the public interest and opined that the balance of the public interest favours maintaining the exemption § [61] DN because *"The Commissioner has already set out above the information about the public authority's procedures for considering donations that is in the public domain. He considers that the public interest in disclosure is considerably lower in relation to this particular information because it relates to proposed donations that were not made. The public interest will be highest in relation to donations that the public authority actually accepted. It is difficult to see how anyone could attempt to exert influence by proposing, but not actually making, a donation."* § [60] DN.

18. The Commissioner recognised the majority of the document identifies the Donor § [23] DN hence s40(2) applied to this, and these aspects could be withheld using the same s40(2) considerations as previously. The Commissioner noted the remainder of the document engaged s43(2) FOIA for reasons set out in §§ 52, 53 and 60 of the DN. Appendix One Part 1 is thus withheld in its entirety. Appendix One Part 2 - This section was provided fully redacted when it was initially provided and so the Commissioner, upon receipt of the unredacted copy ordered the public authority to issue a fresh response, which it has done so by way of refusal notice, on 16 May 2023 and as indicated above the Commissioner confirms that this part of the request is outside the scope of this appeal and has not been challenged in this regard.

Legal Framework

19. A person requesting information from a public authority has a right to be informed by the public authority in writing whether it holds the information (s.1(1)(a) FOIA) and to have that information communicated to him if the public authority holds it (s.1(1)(b) FOIA).

20. However, these rights are subject to certain exemptions. The relevant exemptions applicable here are s40(2) and s43(2) FOIA:

21. s40(2) – Personal data is:

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

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

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.

(3) The first condition is—:

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 as amended in 2018 ("the Act"), and UK GDPR that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Act (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Act the information is exempt from section 7(1)(c) of the Act (data subject's right of access to personal data).

22. Personal data is defined as *"data which relate to a living individual who can be identified (a) from those data, or (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."* (s.1(1) of the Act.

23. The effect of section 40(2) of FOIA is that a request for personal data of a third party may only be disclosed if such disclosure is compatible with the data

protection principles enshrined in the Act. Section 40(2) is an absolute exemption, so the public interest balancing test does not apply (FOIA, section 2(3)(f)(ii)). The term "*personal data*" is broadly defined by section 1 of the Act as "*data which relate to a living individual who can be identified*". The first data protection principle (as set out in Part 1 of Schedule 1 to the Act) is that personal data "*shall be processed fairly and lawfully*" and in particular shall not be processed unless at least one of the conditions in Schedule 2 is met. Aside from the individual's consent (Schedule 2, condition 1), the most significant condition in Schedule 2 is typically condition 6(1), which is in the following terms:
"*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.*"

24. Reliance on the data protection principles under s. 40(3)(a)(i) FOIA constitutes an absolute exemption (s. 2(3)(f) FOIA). The first data protection principle (Sch 1 Pt 1 §1 Act) is that:

"*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, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

25. Processing includes "*disclosure of the information or data by transmission, dissemination or otherwise making available*" (s. 1(1) Act), and therefore includes disclosure under FOIA.

26. s43(2) – commercial interests

(1) Information is exempt information if it constitutes a trade secret.

(2) 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).

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).

27. The Tribunal in Christopher Martin Hogan and Oxford City Council v the Information Commissioner (EA/2005/0026 and 0030) ("Hogan") set out the following useful steps to take when considering whether disclosure would be likely to prejudice commercial interest:

i. Identify the *"applicable interests"* within the relevant exemption,
ii. Identify the *"nature of the prejudice"*. This means:

i. Show that the prejudice claimed is *"real, actual or of substance";*

ii. Show that there is a *"causal link"* between the disclosure and the prejudice claimed.

iii. Decide on the *"likelihood of the occurrence of prejudice"* ([28] – [43]).

28. This exemption is subject to the public interest test.

Grounds of Appeal:

29. The Appellant challenges the Commissioner's DN. The Appellant does not object to or dispute the Commissioner's findings that the information pertaining to the Donor is their personal data, nor disputes the other information is commercial information. Her Grounds of Appeal ("GoA") are:

i. The legitimate interests of knowing the identity of the Donor and the reasoning behind accepting the donation were downplayed by the Commissioner;

ii. The public interest in disclosing the information pertaining to s43(2) outweighs the public interest in maintaining the exemption.

Commissioner's Response:

30. The Commissioner resists the Appeal and argues as follows:

31. The Commissioner maintains the data subjects' rights outweigh the legitimate interest in publishing the information for reasons comprehensively set out in his DN and in his written Response to the GoA.

32. This Ground does not dislodge the Commissioner's findings because:

i. Paragraph 10 of the GoA, that the donation is a large sum, was already considered by the Commissioner as amplifying the legitimate interest, but ultimately did not outweigh the data subjects' very real and reasonable expectations the information pertaining to them would not be disclosed;

ii. §§'s 11 to 19 of the GoA, which the Appellant offers as furthering the legitimate interest in disclosure, do not tip the balance in favour of disclosure. In any event, the Commissioner already addressed the Appellant's concerns re any impropriety in §§ 39 and 40 of the DN. The value of these Grounds is diluted by the fact that they are centred upon the Centre and linked individuals. The request was for the identity and P.A.'s deliberations for accepting the donation, not for further information about the Centre or these individuals.

iii. In §20 of the GoA, the Appellant attempts to lessen the importance of anonymity by including a quote from the public authority's competitor. The competitor states it tells anonymous donors that the case for keeping any information confidential may diminish over time and it may not be possible to keep information confidential indefinitely. The Commissioner argues this Ground does not disturb the DN: as the public authority's policy on anonymous donations is what is relevant here, not its' competitors. The Commissioner argues this Ground thus serves no purpose.

33. The Commissioner notes the Appellant's criticism that she found the s43(2) section of the DN difficult to decipher. The table at §§ 15 of the Commissioners' Response is meant to assist the parties and Tribunal. However, criticism of the way the Commissioner's DN is drafted in any event, he argues, is outside the scope of this appeal.

34. The Commissioner maintains the public interest in maintaining the s43(2) exemption outweighs disclosure, and none of the following GoA dislodge or overturn this conclusion:

35. In § 23 of the GoA the Appellant simply states the P.A. must open itself to scrutiny and reveal the name of the donor and associated documents. She adds that the disclosure is very much in the public interest but does not clearly explain why this disclosure will '*bring much needed transparency.*' This statement infers there is controversy surrounding this particular donation but from the Commissioner's research, and for the reasons outlined in the DN, he effectively argues no material controversy exists. In addition, the P.A. already stated the donor is not subject to international sanctions nor public facing.

36. In paragraph 24, the Appellant, the Commissioner argues, overstates the anonymity of this donation by stating *"by continuing to be secretive about the highly significant donation, then questions will remain."* The Commissioner notes this donation was not the only anonymous one made to the public authority nor was it the most sizeable in the public authority's history. There is already much published about the public authority's processes around accepting donations. This Ground thus doesn't tip the balance in favour of disclosure and can be dismissed.

Appellant's Reply:

37. During the course of the tribunal appeal, the Appellant indicated her expectation both parties will provide details on how due diligence was conducted over the £10 million donation, and what research was carried out on the donor. For instance, did parties:

I. Extensively Google the name of the donor, who is a highly successful businessperson, as well as all companies connected to that businessperson.

II. Conduct a thorough press clippings search among English and non-English language media outlets using the name of the donor, and the names of any connected companies to the donor.

III. Run the name of the donor, as well as their connected companies, through databases such as OCCRP's Aleph database, or the ICIJ's Offshore Leaks Database.

IV. Conduct thorough research on the businessperson's associates, including whether the businessperson has links to the Azerbaijan ruling family and government.

38. Universities she argues, serve a vital role in society – and have much influence - but the public should know how they are funded – and who exactly is providing those funds. She draws a comparison to politics and the think tank world.

39. At "OpenDemocracy", the publication the Appellant writes for, which specialises in the flow of *'dark money'* into society, dark money refers to money given to political parties, campaigns or politicians, whose sources are not disclosed, to influence the democratic process. She has also relaunched the Who Funds You? campaign, which uses think tanks' own income and disclosures to position them on a funding transparency scale.

40. Over the years the Appellant argues, there have been many calls for politics and the think tank world to be transparent over funding and there have also been calls for universities to really scrutinise the money it accepts and where it ultimately comes from. One she argues, can only do this when the names have been disclosed. If the name of the donor who provided the £10 million donation is not disclosed, then it stops the public from really scrutinising – and questioning – the source of funds.

41. Oxford University and Cambridge University are the UK's top universities and are also world-renowned (and often referred to as the same e.g. 'Oxbridge'). If Cambridge University recognises that it cannot keep information confidential indefinitely, nor, she argues, can Oxford University keep information confidential indefinitely.

Second Respondent's Response:

42. The P.A.'s position, as upheld by the Commissioner, is that public disclosure of this personal data otherwise than under FOIA at the time of this request would be unfair and unlawful, contrary to Article 5(1)(a) UKGDPR. This they argue is for the following reasons;

(1) The Donor expressly sought and was provided with assurances of anonymity. They thus had a reasonable expectation that the University would abide by their wishes.
(2) There is nothing wrong with a philanthropist making an anonymous donation – even a very sizeable one. As the Commissioner rightly recognised (§ 38 of the DN) there are perfectly legitimate reasons why a person may wish to make a philanthropic donation anonymously. Absent adequate grounds to suspect impropriety in relation to the philanthropist, their funds and/or the donation in question, it is right for the University to respect a donor's wish to remain anonymous.
(3) There were no such grounds for overriding the Donor's reasonable expectation of anonymity in this case. The University Committee to Review Donations and Research Funding ("CRDRF") assessed all relevant considerations as part of its scrutiny of this donation and was entitled to conclude that it was appropriate for the University to accept the donation. In addition, the P.A argue, the Tribunal will note paragraph §9 of the DN: *"Having viewed the withheld information and other information about the Donor that is in the public domain, the Commissioner has seen no evidence that the Donor has been accused of any improper activity".*
(4) Further, the P.A. reiterates that the Donor does not hold any governmental position and does not seek a high public profile. Nor are they able to exert

influence over the way in which Oxford Nizami Ganjavi Centre ("ONGC"), conducts its activities and spends its funds. The Tribunal in Montague v IC (EA/2011/0177) was right to conclude that such considerations diminished the case for the disclosure of a donor's identity. Further, given their desire for anonymity, the Donor self-evidently does not seek any reputational benefit from this donation.

(5) While there is a public interest in transparency about the P.A.'s acceptance of this donation, that interest is (and at the time of this request was) adequately served by: the information that has already been disclosed about this donation; transparency about the P.A.'s mechanisms for vetting donations and ensuring that donated funds are not spent inappropriately; transparency about ONGC. As the Commissioner found (§ 36 of the DN): *"the identity of the Donor is less important than the mechanisms the public authority has put in place to validate the source of the funds and to prevent the Donor from exerting undue influence over the use to which their donation is put".*

(6) In these circumstances, public disclosure of the Donor's identity otherwise than under FOIA at the time of this request would not have been necessary for or proportionate to the furtherance of any legitimate interests. Further or alternatively, any such legitimate interests were overridden by the interests of the Donor. The IC was therefore correct to conclude that the legitimate interests processing condition (Article 6(1)(f) UKGDPR) was not satisfied in this case. No other lawful processing condition could have been satisfied. Disclosure of the Donor's personal data would therefore have been unlawful, contrary to Article 5(1)(a) UKGDPR.

(7) That conclusion, the P.A. argue is fortified by the fact that the Donor's rights under Article of the European Convention on Human Rights ("ECHR") are engaged here, because they have a reasonable expectation of privacy in respect of this information. This means that ECHR principles of proportionality apply; disclosure can only take place if it would be reasonably necessary for the purposes of a *"pressing social need"* and it must be the least intrusive way of achieving that aim. See for example South Lanarkshire Council v Scottish IC [2013] UKSC 55 at §6, as well as the discussion in Goldsmith v IC and Home Office [2014] UKUT 0563 (AAC). Those tests, it is argued are not met in this case. See Upper Tribunal Judge Wikeley at § 53 therein. *"We have considerable sympathy with the College, and with the difficulties that it has faced. But we are not persuaded that Condition 6 is satisfied. Our factual finding is that the College has legitimate reasons, both for its own purposes, and for the public purposes of supporting the integrity of the sponsorship and immigration system, for wishing to see the contents of immigration decisions issued to its prospective students. Based on this finding, we can see the desirability, even the strong desirability, that the College should have been given access to the notices of immigration decisions in response to its request. But desirability is not necessity".*

(8) Disclosure of the Donor's personal data otherwise than under FOIA at the time of this request would also have contravened the lawfulness requirement of Article 5(1)(a) UKGDPR in that it would have been a breach of confidence and a misuse of private information at common law.
(9) Disclosure of the Donor's personal data otherwise than under FOIA would also have contravened Article 5(1)(a) UKGDPR in that it would have been unfair, for essentially the same reasons as outlined above.
(10) The Donor's personal data is therefore exempt from disclosure under section 40(2) FOIA.

43. The withheld information also includes the identities of the members of the CRDRF who considered this donation. That information is clearly the personal data of those members. The Commissioner was right to conclude that this personal data is also exempt from disclosure under section 40(2) FOIA, for these reasons: § *"42 "In relation to the membership of the Committee, the public authority argued that the individuals had a reasonable expectation that their membership of the Committee would not be revealed. Membership of the Committee was kept anonymous so that the individuals involved could reach an independent view on each donation or funding proposal, free from external influence."*

44. Given the information already in the public domain about the Committee's remit, the guidelines it must follow, and the criteria for judging proposals, the Commissioner was satisfied that this largely meets any legitimate interest in understanding how the Committee works. Publication would therefore be contrary to the reasonable expectations of the Committee's membership and would be likely to cause them a certain amount of damage and distress.

45. Public disclosure of the withheld information in response to this FOIA request would, the P.A. argue, also have created a very significant and weighty risk of substantial prejudice to the University's commercial interests. This is because;
(1) Fundraising is a vital aspect of the University's commercial interests.
Approximately 90% of the funds it raises annually come from major donors (those donating more than £100,000).
(2) Anonymous donors comprise a significant minority of donations to the University's fund-raising. For example, in the five years preceding the Commissioner's decision, the University received approximately £86.3 million in anonymous donations. Any material prejudice to the University's ability to secure anonymous donations would be highly prejudicial to its commercial interests and contrary to the public interest.
(3) The University's fundraising activities take place in a highly competitive market. The University competes not only against other universities (both

nationally and internationally) but also other charitable institutions involved in research and similar activities. Some of the University's competitors are not subject to the FOIA or similar legislation.

(4) If the University contravenes a significant donor's reasonable expectation of privacy and anonymity (which would be the outcome if Ms Corderoy's appeal succeeds), this would have a significant adverse impact on how the University is perceived in that competitive market. Specifically, the University would be seen as less reliable and thus less attractive, in terms of its ability to abide by assurances of anonymity. This would deter anonymous investors, which would be strongly contrary to the University's commercial interests and the public interest.

(5) Similar consequences would be likely to flow from the public disclosure of information relating to potential or prospective donors.

(6) The Commissioner was therefore right to conclude that, in addition to s40(2) FOIA, s43(2) is also engaged.

(7) Further, the public interest favours maintaining that exemption. As outlined above, the public disclosure of the withheld information would be likely to cause substantial prejudice to the University's fundraising, in particular from donors who wish to remain anonymous. That prejudicial impact on the University would be strongly contrary to the public interest. In contrast, the public interest in the disclosure of the withheld information is much more limited, for the reasons summarised at paragraph § 15 above.

(8) Moreover, although decisions of this Tribunal do not set binding legal precedents, a decision in Ms Corderoy's favour is likely to have prejudicial practical consequences not only for the University, but for others in other institutions and sectors who rely to a material extent on philanthropy from donors who do not wish their identities to be disclosed publicly. A decision in this case is likely in practice to undermine such donors' confidence that recipients of their philanthropy would be able to maintain their anonymity, which would make them more hesitant to pursue such philanthropy. That would strongly be contrary to the public interest.

46. Ms Corderoy's grounds of appeal contain nothing that undermines that conclusion. Ms Corderoy understandably emphasises the importance of transparency and scrutiny, but those points have been addressed above. Transparency and scrutiny have already been adequately served; any incremental benefit from further transparency (specifically, public disclosure of information relating to the Donor, contrary to their desire for anonymity) is firmly outweighed by the harm that these disclosures would cause to the University's fundraising efforts.

Reply of the Appellant:

47. The P.A. writes in its Response to the GoA how the public interest in transparency about the acceptance of the donation was *"adequately served by the information that has already been disclosed about this donation; transparency about the University's mechanisms for vetting donations and ensuring that donated funds are not spent inappropriately; transparency about ONGC."* However, the Appellant reminded the Tribunal that the information originally published on the P.A's website was not clear and had to be amended after she sent her FOI request.

48. The P.A. writes in its response: *"As is apparent from the disclosures it has made, the University did carefully consider matters relating to BFSAC, given that this donation was made in recognition of BFSAC."*

49. The Appellant believes it is very important to examine the timeline in detail. If she is not mistaken, she argues, the BFSAC was established sometime in late 2016 according to the Charity Commission website. The inauguration of the BFSAC occurred on 1st February 2017. 3 4 Oxford University announced the £10 million donation in May 2018. In October 2018, Professor Nargiz Pashayeva was accepted as a member of the Chancellor's Court of Benefactors. For an organisation that is so new (and ceased to operate shortly after), what exactly had the BFSAC done from late 2016 to May 2018 for it to be deserved to be recognised? I expect Oxford University to provide some explanation.

50. Furthermore, at the inauguration, Professor Nargiz Pashayeva said: *"I would like to thank Mr Iskandar Khalilov for his first financial support of the Oxford Nizami Ganjavi Centre."*. The Appellant asks whether Mr Khalilov, or any other individuals named in the Azer News newspaper article, was the source of the £10 million donation.

51. Over the years, the Appellant argues, the P.A. has attracted much controversy over who it takes money from. For instance, it has taken money from Vladimir Potanin, one of Russia's richest men. It was criticised for accepting oligarch Len Blavatnik's £75 million donation. It has taken millions from an oligarch's son. It has taken money from the Sackler family. It has taken millions from fossil fuel companies.

Second Respondents Skeleton Argument:

52. Focusing on the specific facts of this case, it is categorically clear that (i) this Donor has given an assurance, confirmed in a legally binding Deed of Gift, about anonymity (i.e. the Donor has a legally enforceable right to remain anonymous), (ii) the Donor expressly seeks the maintenance of their anonymity, for reasons that

have been openly summarised and which make sense, and (iii) as the Tribunal will see from the withheld information in the CRDRF documents, the University has carefully scrutinised the suitability of this donation.

53. It should also be borne in mind that the heart of this appeal is the personal data rights of the Donor (the University's concerns about its commercial interests flow from the interference with those rights that Ms Corderoy seeks to achieve). Other than speculative generalised propositions about Azerbaijan (addressed above), there is no basis for concluding that this Donor deserves to have their anonymity flouted and their personal data rights contravened. The Donor has made a very generous gift, for the specific objectives of ONGC's work. It is worth repeating that the Donor holds no government position, has been subject to no financial sanctions, and does not cultivate a high profile. It is also obvious that, as the IC has rightly noted, the Donor is not seeking any reputational advantage via this (expressly anonymous) donation. In summary, it would be unfair to subject this Donor to the public disclosures Ms Corderoy urges this Tribunal to order. That would be the wrong thing to do. The Donor does not deserve that outcome.

54. Nor is there anything in the Appellant's case that justifies such an outcome for the Donor. Aside from generalised points about anonymous donations and about the Azerbaijani regime.

Witness Statement George Greenwood:

55. George Greenwood is a journalist employed by Times Media Ltd ("TML") of the above address. He writes for *The Times*, a newspaper published by TML.

56. He wrote a statement in support of Jenna Corderoy's appeal against the decision notice of the Information Commissioner's Decision Notice IC-217933-T3T1, covering the identify of a major Azeri donor to the University arguing as follows;

a. The University of Oxford has refused the request, for the identity of Azeri donors to the university, in the same manner as the Appellant. It cited section 40 relation to personal information, and section 43 under commercial sensitivity.

b. Azerbaijan is ruled by an authoritarian regime, and is accused of widespread human rights abuses, having among the lowest freedom ratings according to independent charity Freedom House. It also scores very poorly on Transparency International's corruption perceptions index.

c. Official UK government guidance warns that: *"Reports by a number of respected international human rights groups have highlighted areas of concern such as the lack of independence of the judiciary; government control/influence over large sections of the media; and deficits in the electoral environment"* And that: "*In recent years several wealthy Azerbaijani nationals have been subject to legal action by the National Crime Agency.*" It is not a rule of law state, and that means considerable due diligence must be applied to any funds sourced from this jurisdiction, given the elevated risks those funds pose.

d. There have been also widespread concerns about the use of partnerships with prestigious academic institutes as a means of *"reputation laundering"* for countries which have poor human rights record. In this context, where a university has accepted donations derived from a jurisdiction such as Azerbaijan, there is an overwhelmingly clear public interest in transparency, either to reassure the public that these concerns have been addressed in full during the donation process, or to hold the university accountable for any shortcomings in this process.

e. It is a relevant consideration that the sister-in-law of the Azeri dictator, Ilham Aliyev, works at the centre the money was received by. In response to an FOI communication, I sent to the university on this matter, it said it completed no due diligence on her appointment. I allege no wrongdoing against her. However, given her clear status as a politically exposed person due to her brother-in-law, it would already appear to be an oversight that no due diligence process was completed by the university on her appointment.

f. Should the donor be related to this academic, or Aliyev, this would raise further concerns. However, this cannot be assessed externally due to the lack of transparency in this case about who the donor is. In terms of the balance on interests, this legitimate interest, weighs strongly in favour of transparency, in comparison to the Azeri donor's interests in privacy. Given the sums involved, it is hard to see how disclosure would not be fair. Disclosure is also clearly necessary to achieve this outcome of proper due diligence of the university.

g. The University of Oxford argues in its response to me that;

"I would draw your attention to the University's regulations that govern the operation of the Committee to Review Donations and Research Funding (CRDRF), as well as the criteria that they apply when reviewing individual cases."

"These criteria make specific reference to illegal or unethical activity in order to ensure that the University does not accept funds which have been derived from corruption. CRDRF includes independent, external representatives and has a rigorous due diligence process for donations and research grants. The donations referred to in the University's response underwent such a process and were found to be acceptable."

h. The issue at stake here is to explore whether this is a donation that the university should not have accepted, and to assess whether the due diligence processes in place to screen donations is adequate, or if in this case they failed.

57. On the question of public interest arguments in favour of disclosure he points to the fact there was a due diligence process and therefore we should be reassured, does not address the issue that a key reason for disclosure is to check whether that very process is working as it should, as the circumstances of this case raise serious questions about its effectiveness. This is ably demonstrated, he argued in the lack of due diligence completed on Aliyev's sister-in-law. This argument therefore he suggests holds little weight.

The Hearing of the Appeal:

58. At the oral hearing the Tribunal heard the Appellant provide a concise but comprehensive summary of her Grounds of appeal and expressed her genuine concerns and legitimate interest in such a significant anonymous donation, the lack of transparency in the donor's identity and background and about the potential for *"reputational laundering"*. The Appellant conceded she had little added to her GoA but wished to present Professor Heathershaw and thereby substantiate her arguments and challenge the P.A assertions including the witness evidence of Professor Herzig who had provided a witness statement for the hearing to facilitate the Tribunal by way of response in clarification on the issues (mostly of the concerns) raised by Professor Heathershaw on behalf of the Appellants case.

59. The Tribunal heard from Professor Heathershaw, Professor Herzig and from Mr Greenwood on behalf of the Appellant and Professor Herzig on behalf of the P.A. The evidence left the Tribunal in no doubt that everyone involved is well aware of the importance of transparency and accountability on the part of this renowned and influential P.A. and particularly on the acceptance of significant and anonymous donations and in the robust scrutiny in the acceptance of donations to the P.A. Much was suggested about particular causes of concern about the identity of the donor of the significant sum of £10M and of those who sanctioned

the formal agreement leading to the Deed of Gift for the donation referred to in the request for the withheld information.

60. Of note, Professor Heathershaw's evidence was that he had no reason to believe the due diligence process for accepting donations at the University of Oxford was not robust, although he raised concerns that financial pressures could pose risks to that process.

61. The Appellant referred to confusion over the circumstance of the donation, which had initially been described on the website as being '*from*' BFSAC and later changed to being *"in recognition of' BFSAC"*. Professor Herzig's statement described the donation as being made *"on behalf of' BFSAC"*. In his evidence Professor Herzig explained that it was clearly a regrettable slip that the website had initially said from BFSAC. He clarified that, as set out in the Deed of Gift, the donor had made the gift "*in honour of the BFSAC"* and any other descriptions had been down to paraphrasing. The Tribunal had sight of the Deed of Gift in the closed bundle and notes that it is recorded as being in honour of the BFSAC.

62. Professor Herzig confirmed that the donor had not been in direct contact with the ONGC since the time of the gift and had not involved themselves in its work. He explained that Professor Pashayeva, who is a board member appointed by BFSAC, inputs in a way that is usual for a board member.

The Closed Hearing:

63. The closed session began at 12:15 and concluded at 12:28 and occurred so that the Tribunal could interrogate the Second Respondent on issues arising from and about the withheld information without risking its disclosure thereby defeating the purpose of the exemptions applied. The Gist of that short-Closed session has been summarised by Counsel for the P.A. and covers the points he raised briefly beforehand in Open session prior to the Closed session. He made three points that he thought necessary.

64. The First point is about scope: this is to ensure that, if the Tribunal were to order disclosure, it is clear that this would not extend to information that does not fall within the parameters of this request, but instead appears in the closed bundle because it is bound up in the in-scope information or is material that was shared with the ICO. That material is not relevant to the donation at which this FOIA request is aimed.

65. Second, he raised two points by reference to the withheld material in order to support his submission that the CRDRF's scrutiny process for this donation was rigorous. One of those points involves showing the Tribunal what the CRDRF took into account. The other is a point about the CRDF's decision-making.

66. Third, a short point about this donor, in light of what the Appellant says in her submissions. None of this can be done in open – these are all short but necessary points that will assist the Tribunal.

67. A final supplemental point that arose in closed session in relation to a query by the Tribunal was that the P.A. demonstrated to the Tribunal a specific example of a sizeable donation that had previously been proposed in relation to this subject area – and which the University had considered but rejected.

Closing Submissions on the evidence:

68. The Appellant submits after the evidence and in addition to her GoA the following;

"I would like to emphasise is that there are significant legitimate interests in the information sought, and that there are important public interest arguments in favour of disclosure as I have raised throughout this appeal. These are the following:

a. In general, the University of Oxford ('the University') must fully open itself to scrutiny. Universities serve a vital role in society and have much influence, but the public must know how exactly they are funded. It is ethical for the University to say how they're funded, considering how academics must declare their funders when they produce publications. There are also issues around reputation laundering, which have been raised during this appeal. The donation in this case is a very significant gift from an unknown donor.

(1) Anonymous donations of this kind are lawful in the UK. Parliament has recently considered a proposed legislative amendment prohibiting such anonymity but rejected that amendment.

(2) The Charity Commission also permits anonymous donations, subject to due diligence (see open bundle page D150).

b. There is nothing wrong with a philanthropist making an anonymous donation – even a very sizeable one. As the IC rightly recognised (paragraph 38 of his decision) there are perfectly legitimate reasons why a

person may wish to make a philanthropic donation anonymously. Absent adequate grounds to suspect impropriety in relation to the philanthropist, their funds and/or the donation in question, it is right for the University to respect a donor's wish to remain anonymous source ('the Donor'), and that there is a certain amount of power attached to such a large donation. It is vital to know who the Donor is, and how such a sum is funded by the Donor. There is also a legitimate interest in scrutinising who authorised such sum to be accepted, as well as scrutinising the quality of the due diligence that was undertaken.

c. The donation is linked to Professor Nargiz Pashayeva, chair of the trustees of the British Foundation for the Study of Azerbaijan and the Caucasus (BFSAC), and the sister-in-law of the President of Azerbaijan. Soon after the £10 million donation was announced, she was accepted as a member of the Chancellor's Court of Benefactors. She is a member of the powerful Azerbaijani elite and that her brother-in-law is the President of Azerbaijan, a president that has presided over human rights abuses. The information sought must be disclosed as it is essential to know, what, if any, links the Donor has with the Azerbaijani elite.

d. We now know that the donation was made 'in honour' of the BFSAC, but there is very little information about the BFSAC in the public domain. Research conducted indicates that the BFSAC is connected to the Anglo-Azerbaijani Society, and I have raised media coverage of this Society throughout the appeal. It is vital to know what links, if any, the Donor has with these organisations, and it is also essential to understand to what extent these organisations were researched into at the donations review committee.

69. If the information I seek is continued to be withheld, then we cannot scrutinise the source of that funding and the trail goes cold. Questions of legitimacy of the donation, as well as the Oxford Nizami Ganjavi Centre, will continue. We cannot assess the quality of that due diligence undertaken by the University over the £10 million donation and assess whether those policies and guidance are robust enough.

70. Counsel on behalf of the P.A. made the following closing submissions;

71. Ms Corderoy seeks the public disclosure of (i) the identity of the Donor who made an anonymous donation of £10m that the University had received in 2018 for the work of the Oxford Nizami Ganjavi Centre ("ONGC"), and (ii) correspondence of

the University Committee to Review Donations and Research Funding ("CRDRF") relating to that donation.

72. The latter cannot be disclosed without disclosing the former. The crucial issue in this appeal is thus whether the Donor should be named. The University's case is that the identity of the Donor is exempt under section 40(2) FOIA (personal data) because the public disclosure of their identity would contravene their rights under the UK GDPR – specifically, it would be unfair to them, and their interests outweigh any legitimate interest in transparency (particularly by application of the principles of proportionality and the "pressing social need" test, which is a high bar). Based on the evidence, the crucial point is this: it would be unfair to subject this Donor to the public disclosures Ms Corderoy urges this Tribunal to order. That would be the wrong thing to do. The Donor does not deserve that outcome. That disclosure would not meet the "pressing social need" test; it would be disproportionate and otherwise contrary to the Donor's data protection rights under Article 5(1)(a) UK GDPR. By application of *South Lanarkshire Council v Scottish IC* [2013] UKSC 55 at [6], as well as the discussion in *Goldsmith v IC and Home Office* [2014] UKUT 0563 (AAC) at [35]-[42], section 40(2) FOIA applies in this case.

73. The University's case is further that, if the Donor's identity were to be revealed, there would be substantial adverse impact on the University's commercial interests – most particularly, its ability to raise funds from donors who wish to remain anonymous. The University makes these key points, alongside those made in its skeleton argument:

(i) This Donor has consistently wished to remain anonymous with respect to this donation. They have explained that (i) they wish to remain anonymous for reasons of privacy and their commercial interests, (ii) they seek to avoid publicity and involvement in politics, (iii) they support other charitable causes, also with a preference for anonymity.

(ii) The Donor was given a specific assurance that the University would not disclose their identity publicly: that assurance took binding legal form via the Deed of Gift governing this donation, in particular clause 5.1 (see closed bundle A41).

(iii) The Donor is a business person who does not hold any governmental position and who does not seek a high public profile; the Donor has not been subject to any international financial sanctions, whether in the wake of Russia's invasion of Ukraine or otherwise. Also note paragraph 39 of the IC's decision: "*Having viewed the withheld information and other*

information about the Donor that is in the public domain, the Commissioner has seen no evidence that the Donor has been accused of any improper activity".

(iv) As Professor Herzig confirmed in evidence, the Donor has never sought any involvement with the work of the ONGC, and they have not taken the opportunity to be included in the Chancellor's Court of Benefactors.

(v) The University's CRDRF carefully considered the suitability of this donation, applying rigorous and detailed scrutiny. It is worth noting that the University has previously considered and rejected a proposed large donation in relation to this same subject area (i.e. the subject area in which the ONGC works).

(vi) Aside from those key case-specific points, it is important to emphasise that this Tribunal cannot and should not be drawn into adjudicating on whether, in general terms, anonymous donations to universities should or should not be allowed. Nor should it trespass into generalised judgments to the effect that any donation associated with or relating to Azerbaijan is tainted by corruption. There is no basis for concluding that the Azerbaijani regime has used this donation, or any donations to UK universities, to further its agenda. The Tribunal should not be drawn into accepting Ms Corderoy's argument that any significant philanthropic money geared towards the promotion of anything to do with Azerbaijan is tainted. This appeal is also not an audit of whether the University's CRDRF scrutiny process is sufficiently robust (though the University firmly maintains that it is). This appeal is narrowly concerned with the right outcome of a single, focused FOIA request.

74. That unfair disclosure would in turn cause real, actual and substantial prejudice to the University's commercial interests; section 43(2) FOIA is thus engaged and the public interest favours maintaining that exemption. In a nutshell: the University's fundraising activities take place in a highly competitive market; it competes not only against other universities (both nationally and internationally) but also other charitable institutions involved in research and similar activities (some of whom are not subject to the FOIA or similar legislation); if the University contravenes a significant donor's reasonable expectation of privacy and anonymity, this would have a significant adverse impact on how the University

is perceived in that competitive market and thus on prospective donors' willingness to make substantial donations to the University.

75. Ms Corderoy's arguments and evidence do not undermine those conclusions. She understandably focuses on public interests in ensuring that donations such as this are appropriate and have been subject to appropriate scrutiny, but the disclosures she seeks would be disproportionate to those ends. She has also made numerous points about Professor Nargiz Pashayeva's role with ONGC, but there is already ample transparency about Professor Pashayeva's involvement. Further, to the extent that Ms Corderoy's case focuses on academic freedom, the evidence shows that this donation has not impinged on academic freedom at the University in any way.

76. The withheld information also includes the identities of the members of the CRDRF who considered this donation. That information is clearly the personal data of those members. The IC was right to conclude that this personal data is also exempt from disclosure under section 40(2) FOIA, for the reasons given at paragraphs 42-43 of the IC's decision. In short, confidentiality about the CRDRF's membership enables free and frank deliberation and decision-making, free from potential external pressures.

77. Finally, Counsel for the P.A submitted the Tribunal should therefore uphold the University's reliance on section 40(2) and also section 43(2) FOIA. The IC reached the right decision in this case.

The Tribunals Powers:

78. These have been set up out clearly in other decisions of the Tribunal. The Tribunal's general powers in relation to appeals are set out in section 58 of the Act. They are in wide terms. Section 58 provides as follows. *(1) If on an appeal under section 57 the Tribunal considers (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 is 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 question whether the exemptions under s40(2) and s43(2) apply is a question of law or alternatively of mixed fact and law. The Tribunal may consider the merits of the Commissioner's decision as to whether the exemption applies and may substitute its own view if it considers that the Commissioner's decision was*

erroneous. The Tribunal is not required to adopt the more limited approach that would be followed by the Administrative Court in carrying out a judicial review of a decision by a public authority. Our task is essentially one of fact finding and interpretation of the Law to apply on our determination of those facts."

Discussion:

79. On hearing this appeal afresh, the Tribunal have considered all the documents, evidence and submissions before us, and referred to above, and we unanimously find that in relation to the request for the withheld information herein to be processed at the time of the review of the refusal of the request, the section 40(2) exemption was properly applied (by the P.A.) to all the Data subjects concerned (and referred to above). We can find no lawful basis under data protection legislation that would allow for their personal data to be published.

80. This is because on all the evidence before us (including in closed session which provided an opportunity of the Panel to carefully study the detail and scrutiny of the P.A. in their rigorous analysis, inter-alia the sources of the donation and the reputation of the donor). The Tribunal note that this was regarded by the P.A. as a High-Risk case, and we also noted an earlier similar proposed donation from another source had been rejected. We are satisfied that there was detailed and careful scrutiny by the P.A. It is not the role of the Tribunal to decide whether Universities per se should be allowed to accept anonymous donations, nor to consider the merits of any particular donation. The P.A. has a committee and a process in place for just this purpose and in this case after careful scrutiny it found no issues that would render the donation unwelcome. We find the legitimate interests in disclosing the withheld information do not outweigh the Data subject's privacy rights and in all the circumstances before us and as referred to above it would be disproportionate to do so. We are satisfied that the criteria as set out herein at § 23 above have been met in that regard.

81. Further on consideration of all the evidence before us and in all the circumstances as outlined above (including in closed session) we find s43(2)(2) was properly relied upon by the P.A. in relation to the withheld information because of the clear prejudice to the P.A.' s commercial interests (see § 26 above).

82. We accept and adopt the comprehensive and compelling submissions by Counsel on behalf of the P.A. (referred to above) and without rehearsing the detailed evidence and submissions thereon we accept and adopt his substantive submissions on the material issues before us.

Conclusion:

83. The Tribunal having heard this appeal afresh and considered all the factual background and legal submissions we accordingly can find no error, either in law or in the exercise of his discretion by the Commissioner in the DN and we must dismiss the appeal.

84. The Tribunal wish to thank the parties and all the above-named witnesses for giving evidence and for their conscientious and thorough presentation of their respective cases. The Appellant presented her appeal with thorough and sincere design. However as UT Judge Wikeley said: (cited at § 42(7) above) *"-- desirability is not necessity"*.

85. Accordingly, we dismiss the appeal as we can find no error of Law in the DN nor in the exercise of his discretion by the Commissioner therein. We effectively accept and adopt his reasoning as so clearly set out throughout his comprehensive DN and his compelling Response to the GoA as summarised at §§ 30 – 36 above.

Brian Kennedy KC 25 April 2024.

Promulgated 07 June 2024.