

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 October 2015

Public Authority: University College London
Address: Gower Street
London
WC1 6BT

Decision (including any steps ordered)

1. The complainant has requested information from the University College London ("UCL") relating to the UCL institution in Australia.
2. The Commissioner's decision is that the UCL has correctly applied section 36(2)(b)(ii) to the request.
3. The Commissioner requires the UCL to take no steps.

Request and response

4. On 18 May 2015, the complainant wrote to the UCL and requested the following information:

"The review referred to in the following quote in The Australian newspaper on 11 February 2015: "UCL president Michael Arthur said following a review of the long-term sustainability of the institution in Australia"

The assessment and reports on academic and financial risk referred to in the following quote in The Australian newspaper on 11 February 2015: "This is based on issues of academic and financial risk and sustainability, as well as emerging changes in UCL's international strategic direction," Professor Arthur said."

5. The UCL responded on 15 June 2015. It stated that the requested information was exempt under section 36(2)(b)(ii) of the FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 16 June 2015 to complain about the way his request for information had been handled.
7. The complainant disputed the UCL's application of section 36(2)(b)(ii) to the requested information.
8. During the Commissioner's investigation, the UCL also sought to rely upon section 36(2)(b)(i) and section 36(2)(c). It also considered that some of the information requested was also covered by section 43(2).
9. The Commissioner will first consider the UCL's application of section 36. If he finds that this exemption does not apply, he will then go on to consider section 43(2).

Reasons for decision

Section 36(2) – prejudice to the effective conduct of public affairs

10. The UCL has applied sections 36(2)(b) and 36(2)(c) to withhold the requested information. These exemptions state that information is exempt if, in the reasonable opinion of a qualified person, disclosure under the legislation:
 - (b) would, or would be likely to, inhibit –
 - (i) the free and 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
11. Unlike other exemptions in FOIA, an exemption in section 36(2) can only be engaged where a public authority has consulted with a qualified person defined in the legislation and it is the qualified person's opinion that the harm stated in the exemption would, or would be likely to, arise through disclosure.
12. To find that an exemption in section 36(2) is engaged, the Commissioner must be satisfied not only that the qualified person gave an opinion on the likelihood of prejudice occurring but also that the opinion was reasonable in the circumstances. In other words, the qualified person must have reasonably concluded that there is a link

between disclosure and a real and significant risk of the prejudice that the relevant exemption is designed to protect against. A public authority may rely on more than one exemption in section 36(2) as long as the qualified person has offered a view on each of the exemptions cited and the arguments advanced correspond with the particular exemption. If a link is not made, the Commissioner will be unable to find that the opinion was reasonable with regard to that exemption.

13. The Commissioner's guidance on section 36¹ explains that information may be exempt under section 36(2)(b)(i) and section 36(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. The exemptions are therefore about the processes that may be inhibited rather than what is necessarily in the information itself.
14. Section 36(2)(c), on the other hand, refers to the prejudice that may *otherwise* arise from disclosure, although the legislation does not define what is meant by the use of the term *otherwise*. The Commissioner considers, however, that the prejudice envisaged must be different to that covered by any other exemption relied upon in section 36(2). Differently constituted Information Tribunals have previously found that the exemption may potentially apply to circumstances where disclosure could disrupt a public authority's ability to offer an effective public service.
15. Under section 36(4), a qualified person's opinion is not required if the information in question is statistical. The Commissioner's guidance² states that if a public authority is withholding information on this basis, they must still, in accordance with section 17(1), explain to the requester why section 36(2) applies but they can make this decision without seeking a qualified person's opinion.

¹ https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

² https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

16. After reviewing a copy of the withheld information, the Commissioner is of the view that some of the information requested is statistical information and some of it is non-statistical data. He will therefore consider the application of this exemption to the non-statistical and statistical data separately.

The qualified person – non-statistical data

17. The UCL has informed the Commissioner that the qualified person at the time of the request was the President and Provost of the UCL, Professor Michael Arthur. The opinion was sought on 12 June 2015 and provided on 14 June 2015. The qualified person's opinion was that section 36(2)(b)(ii) of the FOIA was applicable in this case. The UCL confirmed that the qualified person had access to all relevant material including the withheld information. A copy of the submissions to the qualified person and the qualified opinion was provided to the Commissioner.
18. The evidence put forward by the UCL to the Commissioner demonstrates that the qualified person's opinion was given on section 36(2)(b)(ii) and not sections 36(2)(b)(i) and 36(2)(c). The Commissioner therefore considers that 36(2)(b)(i) and 36(2)(c) are not engaged and will not be considered further in this decision notice.
19. When deciding on the reasonableness of the qualified person's opinion, the test to be applied is whether the opinion is one that a reasonable person *could* hold and not whether it is the *most* reasonable opinion. The critical issue is that the arguments being advanced by the qualified person not only correspond with the factors described in the exemption but also correspond with the information to which the exemption has been applied.
20. The qualified person's opinion is about whether the prejudice or inhibition would or would be likely to occur. 'Would' prejudice means it is more likely than not that the prejudice would occur. 'Would be likely' is a lower standard but nevertheless requires that there is a real and significant risk of the prejudice or inhibition occurring.
21. The qualified person's opinion was that disclosure of information relating to the future of the UCL Australia would be likely to '*inhibit candid and robust decisions being made and inhibit the ability of decision makers with UCL to deal with issues in an appropriate manner in the future*'.
22. After reviewing the withheld information, the Commissioner considers that the information contains detailed explanations of the UCL Australia's operational functions including details of its funding, consequences if the UCL Australia continues to operate in the way it is currently doing so and a number of actions that could be taken in the

future to prevent the perceived consequences. The UCL explained that the review of the UCL Australia and decisions that were taken as a result of this by the UCL are of a particularly sensitive nature and touch upon the future of significant commercial relationships which may have long term impacts upon the UCL.

23. The Commissioner considers that a reasonable person could form the view that disclosing information relating to the future state of the UCL campus in Australia and its decision to join partnership may have an inhibitive effect on the free and frank exchanges of views for the purposes of deliberation. The Commissioner finds that the qualified person's opinion is reasonable and that there is a real risk that disclosure could lead to the prejudice described by the exemption.
24. Upon reviewing the non-statistical withheld information, the submissions to the qualified person and the qualified person's opinion, the Commissioner considers that the opinion of the qualified person is a reasonable one.

Section 36(2)(b)(ii) – statistical data

25. As explained at paragraph 15, the qualified person's opinion does not need to be sought on statistical information. In this instance, the statistical data relates to detailed financial scenarios setting out how different situations could affect the UCL Australia. The UCL considers that the review of the UCL Australia and decisions that were taken as a result of this by the UCL are of a particularly sensitive nature and touch upon the future of significant commercial relationships which may have long term impacts upon the UCL.
26. The Commissioner considers that disclosing statistical information relating to the future state of the UCL campus in Australia may have an inhibitive effect on the free and frank exchanges of views for the purposes of deliberation.
27. For the reasons explained, the Commissioner has found that the exemption set out in section 36(2)(b)(ii) is engaged for both the statistical and non-statistical data. He must therefore go on to consider the public interest test. When assessing the public interest, the Commissioner acknowledges that the qualified person's opinion relating to the inhibitive and prejudice effect of disclosure should be afforded a degree of weight befitting his seniority. In deciding where the balance of the public interest lies, however, the Commissioner must make his own mind on the severity, extent and frequency of the inhibition and prejudice.

The Public Interest Test

28. The UCL's application of section 36(2)(b)(ii) is subject to a consideration of the public interest. The Commissioner is required to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the request information

29. The UCL acknowledged that there is a public interest in transparency concerning the future of the UCL Australia and the UCL's decision making process. The UCL argued that it satisfies this interest by regularly publishing information detailing its future strategy and minutes of meetings where decisions are taken.
30. The UCL accepted that the decision to close the UCL Australia and seek a partnership instead of standalone presence has implications which do have a public interest and information has been made available to explain this decision³.

Public interest arguments in favour of maintain the exemption

31. The UCL acknowledged that disclosure of the requested information would be likely to inhibit the ability of senior staff to exchange views and advice in a free and frank fashion both in relation to ongoing management of this particular issue and more widely on other issues that may affect the UCL.
32. The UCL also concluded that
- "the likely prejudice to the effective conduct of public affairs for example, by hindering its ability to deliberate effectively on the management of internal issues relating to commercial relationships would not be in the public interest because it would increase the risk that less well informed and less well considered decisions would be taken on issues affecting the UCL".*
33. Further to this, the UCL argued that there is a need for staff involved in the decision making process to be able to create documents which set

³ <http://www.ucl.ac.uk/australia/ucl-australia-news/the-future-of-ucl-australia>
<http://www.ucl.ac.uk/australia/ucl-australia-news/ucl-and-unisa-forge-new-partnership>

out arguments, offer frank views and include controversial or difficult information in order to stimulate discussion and reach a decision without fear that this information will be placed in the public domain. The UCL explained that if strategy documents for senior management were at risk of disclosure, this would have a potentially significant impact on UCL's ability to have free frank and effective deliberation and the benefit of detailed written reports.

34. On balance, the UCL believes that the public interest in favour of maintaining the exemption outweighs the public interest in favour of disclosure.

The Commissioner's decision

35. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding the basis on how public authorities make their decisions, and carry out their functions, and in turn fosters trust in public authorities. It may also allow greater participation by the public in the UCL's decision making process.
36. The Commissioner further considers that there is a public interest in decisions made by the UCL about the future state of its campus in Australia. The decision to close the campus in Australia and seek a partnership is a decision that would affect a number of people and these people would therefore have a strong interest as to how and why this decision has been reached.
37. The starting point as always should be the content of the disputed information itself including its sensitivity or otherwise. Factors such as the ages of the disputed information as well as the timing of the request are also relevant in determining where the balance of the public interest lies.
38. The Commissioner considers that one of the factors to consider is whether the decision for the UCL Australia to close and join a partnership was live at the time of the request. In this case, the decision to close the UCL Australia campus and join a partnership was confirmed in April 2015. The decision was therefore made before the time of the request. The impact of inhibition to the individuals that were involved in the decision making process is not as severe as it would have been if the decision had not been reached at the time of the request. However, although the complainant's request was made after the decision to close the UCL Australia campus and join a partnership, the Commissioner notes that it was only very shortly afterwards. This increases the likelihood of future inhibition, which is contrary to the

public interest. The Commissioner is aware that although a decision has been made with regards to the future of the UCL Australia campus, further discussions will need to be made regarding the new partnership, for example, the number of staff needed.

39. As to the extent and frequency of that inhibition, the Commissioner considers that it is only limited to the exchange of views and decisions made regarding the UCL Australia campus and the new partnership.
40. The Commissioner does however consider that such a decision requires free and frank discussions and the sharing of staff views. Disclosure of information which would be likely to inhibit the frankness and candour of this decision would not be in the public interest as in turn it would be likely to have a negative impact upon the efficiency of the process.
41. The public interest must be balanced in the circumstances of the case against the public interest in ensuring that the UCL has the necessary safe space to consider all of the options presented to it, free from the distraction of having to routinely explain why an option(s) might have been considered. The Commissioner has attached significant weight to this public interest because in order for the UCL to be able to consider the position of the UCL Australia campus thoroughly in relation to its future, it is vital that they are given the private thinking space to consider all options including those that might be uninviting to some. As explained in paragraph 38, although the decision to close the UCL Australian campus and join a partnership has been made, the process is still ongoing and other decisions regarding the new partnership will need to be made.
42. The Commissioner considers that there is a strong public interest in ensuring that whilst options are being considered, those acting on behalf of the UCL do not feel constrained from providing free and frank views on the possible options available to them in relation to the future state of the UCL Australia. If those providing the views feel inhibited from being as free and frank as possible, there is a real risk that the view they provide might be lacking and consequently limit the range of the UCL's consideration. This would clearly have a detrimental effect on any future discussions the UCL would have regarding the state of UCL Australia and its new partnership. It could also be argued that there may be some risk that it would be likely to affect any discussions the UCL has in relation to the state of any of its other campuses.
43. The Commissioner has reviewed the information in question and he considers that it shows a free, frank and robust exchange of views on a controversial issue. Further to this, the Commissioner has also recognised that the UCL has published information on its website

regarding its decision to close the UCL Australia campus and join a partnership and this largely satisfies the public interest.

44. In light of this and on the balance, the Commissioner considers that in this case, the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exemption. Section 36(2)(b)(ii) was therefore correctly applied to withhold all of the requested information. As section 36(2)(b)(ii) applies, the Commissioner has not gone on to consider the application of section 43(2).

Right of appeal

45. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

46. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
47. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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