

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 17 December 2019

**Public Authority:** Dudley College of Technology  
**Address:** The Broadway  
Dudley  
West Midlands  
DY1 4AS

#### Decision (including any steps ordered)

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1. The complainant has requested from Dudley College of Technology ("the college") a copy of an audit report, "*Funding Advisory Support, Final Report, 18 March 2019*" ("the Report") carried out by the auditors RSM into Dudley College and its tracking systems. The college refused to provide the requested information, citing section 36(2)(b)(ii), 36(2)(c) (prejudice to the effective conduct of public affairs) and section 43(2)(commercial prejudice). Later, the college also cited section 41(1)(information provided in confidence).
2. The Commissioner's decision is that the college correctly cited section 36(2)(b)(ii) to the requested information and was entitled to withhold it.
3. The Commissioner does not require the college to take any further steps.

## Request and response

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4. On 8 April 2019 the complainant made the following request for information from Dudley College of Technology (the "College") under the FOIA:

*"I am requesting, under the Freedom of Information Act, to get access to the "advisory audit", or a copy of that audit report, carried out by the auditors RSM into Dudley College and its tracking systems."*

5. The college responded on 7 May 2019 and refused to provide the requested information, citing the following exemptions – section 36(2)(b)(ii), 36(2)(c) and section 43(2).
6. The college provided an internal review on 5 June 2019 in which it maintained its original position.
7. After the Commissioner wrote to the college, it also cited section 41(1).

## Scope of the case

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8. The complainant contacted the Commissioner on 6 June 2019 to complain about the way her request for information had been handled.
9. The Commissioner considers that the scope of this complaint is whether the college was entitled to withhold the requested information under sections 36, 43 and 41.

## Reasons for decision

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### Section 36 – prejudice to the effective conduct of public affairs

10. The college has applied section 36(2)(b)(ii) and 36(2)(c) to the whole of the report.
11. Section 36 FOIA provides that,

*"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-*

*(2)(b) would, or would be likely to, inhibit-*

*i. the free and frank provision of advice, or*

*ii. the free and frank exchange of views for the purposes of*

*deliberation,*

*or (2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."*

12. Firstly, the Commissioner has looked at the application of section 36(2)(b)(ii).
13. The Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
  - Establish that an opinion was given;
  - Ascertain who was the qualified person or persons;
  - Ascertain when the opinion was given; and
  - Consider whether the opinion was reasonable.
14. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. The qualified person in respect of the college is the Chief Executive Officer, Lowell Williams. The Commissioner is satisfied that the Chief Executive Officer who gave his opinion was the appropriate qualified person. The opinion of the qualified person was provided on 3 May 2019 in direct response to this request.
15. The Commissioner next needs to establish whether his opinion was reasonable.

*Is the qualified person's opinion reasonable?*

16. The qualified person in relation to the exemption at section 36(2)(b)(ii) must give an opinion that the free and frank exchange of views for the purposes of deliberation would be inhibited by the release of this information.
17. The Commissioner's guidance<sup>1</sup> regarding the definition of "reasonable" is as follows:

*"In this context an opinion either is or is not reasonable. In deciding*

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

*whether an opinion is reasonable the ICO will consider the plain meaning of that word, rather than defining it in terms derived from other areas of law...The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is: "in accordance with reason; not irrational or absurd". If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable."*

18. The qualified person explained that he had been provided with a copy of the *Funding Advisory Support, Final Report* produced by RSM. The report was commissioned jointly by the college and the Education and Skills Funding Agency ("ESFA") in order to provide an independent review of the college's systems in response to concerns raised about the practice of late withdrawals of apprentices and work-based learners in the academic years 2015-16 and 2016-17. The report followed detailed scrutiny of the college's data processes and controls and the interaction and allocation of responsibility between records management and curriculum teams as well as interviews with key staff. The qualified person stated that the report provides a thorough assessment of the matters under scrutiny.
19. After consideration, the qualified person's view was that the report should not be put in the public domain because disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. The college had already disclosed a summary of the concerns that the report was intended to address and the conclusions reached by RSM. The qualified person's opinion is that in order to fulfil the purpose of the review, it is crucial that the college is entirely open with and accessible to the auditors in order that they could set out their views comprehensively and critically on the records of the college respecting withdrawals and work-based learning in relation to the relevant time period.
20. It was explained that openness and candour were essential to inform the college's processes in the future and to ensure that any overfunding was properly assessed and repaid. If the college had thought the report would be put in the public domain there was a real and significant risk that it would have been much more circumspect in its dealings with the auditors with the result that the auditors would not have been properly apprised of the circumstances surrounding the concerns or provided with the wide range of views necessary to conclude a proper assessment of any errors and deficiencies in the college's processes.
21. Within a context of diminishing resources for further education, the qualified person's opinion is that disclosure creates a real risk of inhibiting the free and open exchange of views with auditors and others for the purpose of those matters addressed in the report and diverting resources away from core activities that are already under pressure.

22. RSM who produced the audit report set out in its terms of business that the report should be kept confidential. The college also consulted with ESFA who had been kept informed and received a copy of the report. ESFA expressed its concern that disclosure was likely to have an inhibiting effect on college staff resulting in prejudice to its ability to conduct similar reviews and monitor compliance.
23. These considerations informed the qualified person's view and his comments indicate that he considers that inhibition would be likely to occur if the withheld information was disclosed rather than that it definitely would occur. This is the lower threshold of prejudice which requires a lower evidential burden. It means that the chance of prejudice must still be significant and weighty, and certainly more than hypothetical or remote, but it does not have to be more likely than not that it would occur.
24. The Commissioner is satisfied that the arguments presented are ones that relate to the free and frank exchange of views for the purposes of deliberation. At review it was pointed out that the timing of the request reinforced the reasonableness of the opinion as the audit had only recently been completed and the college was in the process of implementing the recommended remedial steps.
25. The college has argued that the qualified person's opinion was reached from a position of considerable knowledge and understanding of the review process itself, the content of the Audit Report and the likely consequences of its disclosure. The Commissioner accepts that the opinion that disclosure of the requested information would be likely to result in the prejudice being claimed is one that a reasonable person could hold. The exemption is therefore engaged.

### **Public interest**

26. Having established that the exemption is engaged, the Commissioner needs to consider the public interest in withholding or disclosing it. The Commissioner will give some weight to the opinion of the qualified person that it is likely that there would be some inhibition to the free and frank exchange of views when considering the public interest in favour of maintaining the exemption.

### **Public interest in disclosing the requested information**

#### **The college's view**

27. The college has acknowledged the public interest in transparency and accountability in the use of public funds. The public interest lies in the public being provided with an assurance that any errors or deficiencies are identified and rectified and that any overpayment has been accurately calculated and records amended accordingly.

### **The complainant's view**

28. The complainant has not put forward any arguments regarding the public interest in disclosure. However, her appeal to the Commissioner clearly indicates her view that this information should be released.

### **Public interest in maintaining the exemption**

#### **The college's view**

29. Having acknowledged the public interest in transparency, the college concluded that this had to be weighed against the inhibition that was likely to occur to the free and frank exchange of views with staff in respect of any similar process in the future, should the full report be disclosed.
30. The qualified person's opinion regarding the public interest in maintaining the exemption at section 36(2)(b)(ii)) stated that in order to fulfil the purpose of the review, it was crucial that the college was entirely open with and accessible to RSM, so that they could in turn set out their views comprehensively and critically on the college's records in respect of withdrawals and work-based learning in the relevant period.
31. Staff proceeded on the basis that they could be open and honest within RSM's confidential business terms. If staff had had any intimation that the audit report would be placed in the public domain they would have been much more circumspect when engaging with RSM. This could have resulted in the auditors not being properly apprised of any errors or deficiencies in college processes which would not be in the public interest.
32. Staff understood that they and the systems they operated needed to be entirely open to the assessment of the auditors. RSM's terms of business required that the "*deliverables*" (information, including the Audit Report itself) that was provided by any of the parties (including the college) in connection with RSM's review would be kept confidential. The college provided the relevant extract from the terms of business to the Commissioner. The college explained that RSM's terms of business required the consent of all of the parties to disclose the "*deliverables*".
33. Both RSM and ESFA were consulted prior to conducting the College's internal review of its original response and prior to drafting this response as bodies whose interests may be affected by disclosure of the audit report. It should be noted that on both occasions the ESFA did not consent to the release of the report and stressed the need for confidentiality in order to undertake effective oversight. An example was provided regarding the potential adverse effects on premature release of audit information which cannot be outlined here but it was stressed that

the impact on stakeholders would potentially be worse than confidentially working through a case and disclosing facts in due course.

34. The college argues that openness was fundamental to the kind of deliberation undertaken in the audit process and set out in the audit report. Colleges compete for diminishing funding and the public authority's view is that other colleges could use the information selectively to their competitive advantage which could limit the effectiveness of future similar deliberations. Without openness and candour ESFA cannot fulfil its role as regulator and provide proper oversight of matters of compliance or concern.
35. The college has provided links to the information about the audit that it has placed in the public domain.<sup>2</sup> The first link in the footnotes is a piece on the college's website outlining the basic facts surrounding the audit. The second link is to the college's 2017-18 annual report. The college has published in full a follow-up review report produced by RSM on 20 June 2019 and an action plan designed to implement the findings of the audit report.
36. The college concluded that, in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the requested information. It underpins its argument by stating that any legitimate public interest has been served by what the college has put into the public domain.

### **Balance of the public interest**

37. Having considered the college's arguments and the withheld information itself, the Commissioner has also concluded that the balance of the

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<sup>2</sup> <https://www.dudleycol.ac.uk/News/Post/6282/College-confirms-return-of-funds-following-audit>

<https://www.dudleycol.ac.uk/Portals/0/downloads/governance/dct-annual-report-and-consolidated-financial-statements-2017-18.pdf>

<https://www.dudleycol.ac.uk/News/Post/6356/College-addresses-audit-issues-and-shares-lessons-learnt-with-the-sector>

public interest lies in maintaining the exemption. Her view is that the public interest would not be served by the disclosure of the full report which is more granular than the published follow-up review. The request also came a very short time after the report. The report contains some sensitive information and would be likely to inhibit the level of frankness required in these circumstances. Disclosure could affect the integrity of future reports and the oversight of the regulator.

38. The Commissioner accepts that the public interest has been served by what has been placed in the public domain and that there has been an attempt to serve transparency without undermining the process of compliance.
39. As the Commissioner has decided that the college has applied section 36(2)(b)(ii) appropriately to the information at the time it was requested, she has not gone on to consider section 36(2)(c), section 43(2) or section 41.



## Right of appeal

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40. 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@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

41. 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.
42. 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 .....**

**Pamela Clements  
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