

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 July 2020

Public Authority: University Council
Address: University College London
Gower Street
London
WC1E 6BT

Decision (including any steps ordered)

1. The complainant has requested University College London (UCL) to disclose email correspondence between Professor Birchall and the Lancet in relation to a case report that was published by the Professor in the the Lancet in 2008. UCL refused to disclose the requested information citing section 36(2)(b) of the FOIA.
2. The Commissioner's decision is that UCL is entitled to refuse to disclose the requested information in accordance with section 36(2)(b)(ii) and that the public interest rests in maintaining this exemption.
3. The Commissioner does not require any further action to be taken.

Request and response

4. On 27 July 2019, the complainant wrote to UCL and requested information in the following terms:

"My FOI request concerns email correspondence between UCL's Prof Martin Birchall and the 'Lancet' relating to the following case report that was published by Birchall in the Lancet in 2008:

Macchiarini et al (2008). Clinical transplantation of a tissue-engineered airway. Lancet 372(9655):2023-30. doi: 10.1016/S0140-6736(08)61598-6

I understand from the following letter that was sent from a senior Editor of the Lancet to the Chair of the Science and Technology Committee that the Lancet has contacted Birchall to seek his view on serious concerns relating to the above manuscript.

Please see here: <https://www.parliament.uk/documents/commons-committees/science-technology/Correspondence/190314-The-Lancet-to-the-Chair-re-tracheal-transplantation.pdf>

I am therefore requesting all relevant email correspondence that took place between Birchall and the Lancet between 26th February 2019 (the date of the 1st Newsnight programme referred to in the above letter), and the present day.”

5. UCL responded on 25 September 2019. It refused to disclose the information citing section 36(2)(b) of the FOIA.
6. The complainant requested an internal review on 27 September 2019.
7. UCL carried out an internal review and notified the complainant of its findings on 24 October 2019. It maintained its initial position and continued to withhold the requested information in accordance with section 36(2)(b) of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 23 December 2019 to complain about the way her request for information had been handled. The complainant believes the 2008 article should be retracted as she considers patients' lives are at risk. She feels it is in the public interest to disclose the withheld information and the consequences of withholding the information are much more serious.
9. The Commissioner considers the scope of her investigation to be to determine whether UCL is entitled to rely on section 36(2)(b) of the FOIA in this case.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

10. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, disclosure of the information –
 - (b) would, or would be likely to, prejudice–
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
11. UCL confirmed that the qualified person for the purposes of section 36 of the FOIA is Professor Michael Arthur, President and Provost at UCL. He approved the application of section 36(2)(b) of the FOIA on 12 September 2019.
12. The Commissioner must first consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy herself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.
13. UCL explained that the purpose of the correspondence between Professor Birchall and the Lancet was to answer criticisms of an academic paper of which Professor Birchall was a co-author. The paper was published in 2008, however it has come under recent scrutiny following accusations of improper conduct made against one of the co-authors. It stated that it provides a detailed rebuttal of a number of criticisms related to the medical procedure which was the subject of the paper. It explained that there was one criticism of the paper which was accepted – that there was a problem with the Figure 3 caption. It confirmed that this was corrected via a Lancet Erratum publication. All other criticisms of the paper were rebutted.
14. UCL advised that a fundamental aspect of UCL's core purpose is academic research. The way that academic research is verified and disseminated is primarily by way of peer reviewed publications in academic journals, of which the Lancet is a premier journal in the medical field. It confirmed that the article in question, which was published in 2008, contained reference to cutting edge medical treatments based on academic research, the outcome of which has become somewhat controversial.

15. UCL confirmed that it is the qualified person's opinion that disclosure would be likely to inhibit UCL staff (and others) from being able to express themselves openly, honestly and completely when giving their advice and views for the purposes of and part of the process of deliberation. Discussions between UCL academics and with external journals regarding corrections of journal articles are sensitive and confidential, as they involve a change to the formal academic record. It stated that the subject matter of this correction is and remains particularly sensitive owing to the controversial nature of the research. It is the qualified person's opinion that there is a need for discussions to be private ahead of and following any corrections of journal articles in order to allow a free and frank discussion of the issues at hand. The qualified person considers it is important that academics can be free and frank in their exchanges with journals in offering their opinions and views. The qualified person is of the view that if disclosure took place this would be likely to have a chilling effect on the ability and willingness of individuals to provide such input which would then inhibit both academics' advice and deliberation and ability to put forward robust arguments and journals' ability to make fully informed decisions.
16. It went on to say that it is fundamental for a renowned research university such as UCL to have a safe space in which to discuss, develop ideas and make decisions, particularly in circumstances where those issues are sensitive. It is the qualified person's opinion that disclosure would be likely to intrude on that space with the effect that it would be likely to constrain UCL's ability to investigate, advise on and provide details of appropriate corrections to research and research publications. Disclosure of such information is likely to restrict the candour of discussion involved in reviewing and producing corrections to journal articles, which would be likely to have an adverse effect on the ability of UCL to provide full and accurate input to the academic record.
17. In its submissions to the Commissioner, UCL also confirmed that it felt section 36(2)(c) of the FOIA is engaged.
18. Dealing with section 36(2)(c) first, it is not clear from the submissions received whether the application of this subsection has been authorised by the qualified person. For UCL to argue that it applies, it would need to demonstrate that it has the appropriate authorisation.
19. For this to apply, UCL also needs to present different arguments as to why disclosure would otherwise prejudice the effective conduct of public affairs ie arguments that are not covered by section 32(2)(b). The Commissioner considers the arguments mostly relate to section 32(2)(b). For this reason, and the Commissioner's concerns that UCL may not have obtained the necessary authorisation from the qualified

person to apply it, she will proceed to consider the application of section 36(2)(b) only.

20. The Commissioner considers it is a reasonable opinion to hold that disclosure would be likely to prejudice the ability of UCL staff (and others) to openly, honestly and completely give their advice and views for the purposes of and as part of the process of deliberation. She accepts that it is reasonable to say that the subject matter is sensitive and controversial and there is a need for safe space to discuss criticisms put forward and formulate a response. It is reasonable to hold the opinion that disclosure would be likely to inhibit academics' advice and deliberation and ability to put forward robust arguments and the journals' ability to make fully informed decisions. She accepts that it is reasonable to conclude that disclosure would be likely to restrict the candour of discussion involved in the reviewing and potential correcting of journal articles.
21. For these reasons she is satisfied that section 36(2)(b)(i) and (ii) is engaged.

Public interest test

22. UCL confirmed that it acknowledged the public interest in transparency and accountability. It accepted that disclosure of this information would contribute to a more open and knowledgeable debate concerning the corrections of academic publication. It also stated that there is a public interest in members of the public understanding more closely how criticisms and alleged errors are addressed and whether any corrections are required to the academic record.
23. However, UCL considers the public interest rests in maintaining the exemption in this case. It argued that the purpose of these communications was to manage the process of corrections to an academic journal article. For these corrections to be effective, it is important that those involved are able to be open, honest and frank in offering their opinions and exchanging views.
24. UCL stated that discussions between UCL academics and external journals regarding corrections of journal articles are sensitive. There is a need for the discussions regarding any corrections to be private and confidential in order to allow a free and frank discussion of the issues at hand. It stated that disclosure would be likely to jeopardise the ability of UCL academics, and other involved in the publication process, to be frank and honest in their views. If staff members are aware that the communications can be made public they may refrain from disclosing details which they consider would be detrimental to UCL's interests if published in the public domain. It argued that disclosure of such

information may restrict the candour of discussion involved in producing corrections to journal articles, which may be considered to have an effect on the ability of UCL to provide full and accurate input to the academic record. UCL does not consider these likely consequences of public disclosure are in the wider interests of the public.

25. UCL also considered the public interest is met by the publication of a final, corrected article.
26. The Commissioner considers the public interest test considerations under section 36 of the FOIA require her to consider the extent, severity and frequency of the inhibitions claimed by the public authority.
27. The Commissioner acknowledges there is a public interest in openness and transparency and in members of the public gaining access to information to enable them to understand more closely how the criticisms of an academic paper are addressed and if corrections are required, why. She accepts that there will be interested parties in the scientific community with or without the same views that consider disclosure will further debate on the subject matter.
28. However, in this instance she considers the public interest rests in maintaining the exemption. UCL has confirmed that deliberations took place up to 3 July 2019 and had only just come to an end by the time of the request on 27 July 2019. The correction to the paper was published on 20 July 2019. There was little likelihood of further debate from the main scientific community at this point but there were some ongoing discussions from a couple of interested individuals who do not represent the views of the main scientific community. Although deliberations had come to an end, this had only just occurred. UCL and the researcher considered the matter was therefore still live at the time of the request and very much fresh in their minds and those interested from the wider scientific community. Owing to the very minor passage of time (between the end of deliberations, the publication of the correction and the request) the Commissioner accepts that disclosure at the time of the request would have been likely to intrude on the safe space academics and UCL require in order to discuss and deliberate freely and frankly on such matters. She considers, given the close proximity of the request to the end of deliberations, such consequences would have been a real and significant prospect.
29. The Commissioner does not accept to the same extent as UCL that disclosure would be likely to weaken debate and deliberations of this nature going forward. She believes academics will continue to debate and challenge such criticisms or concerns over their published articles and in a free and frank manner. She does not consider academics would be as easily deterred from doing so as UCL has claimed. However, she

does consider the specific discussions the subject of this request were still live at the time of the request, the matter was still very much fresh and discussions were continuing with a few interested individuals who, as UCL allege, do not represent the views of the main scientific community.

30. She also agrees with UCL to some extent that the publication of the correction to the paper goes some way to meeting the public interest in favour of disclosure.

Right of appeal

31. 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

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

32. 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.
33. 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

Samantha Coward
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