

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 27 October 2022

**Public Authority:** The Governing Body of the University of Essex  
**Address:** Colchester Campus  
Wivenhoe Park  
Colchester  
CO4 3SQ

#### **Decision (including any steps ordered)**

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1. The complainant has requested an unredacted version of a published report on the cancellation of external speakers associated with a Centre for Criminology seminar and a Holocaust Memorial Week – the 'Reindorf Review'. The University of Essex ('the University') disclosed some of the previously redacted information but has continued to withhold the remaining redacted information under sections 36(2), 40(2) and 41(1) of FOIA. These concern prejudice to effective conduct of public affairs, personal data and information provided in confidence respectively.
2. The Commissioner's decision is as follows:
  - The University correctly applied section 36(2)(c) and/or section 40(2) and/or section 41(1) of FOIA to the information it is withholding and, where relevant, the public interest favoured withholding this information.
  - The University's handling of the request did not comply with section 10(1) of FOIA, and its refusal did not comply with section 17(1).
3. The Commissioner does not require the University to take any corrective steps.

## Request and response

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4. The background and context to this request are discussed in the Reindorf Review report<sup>1</sup> referred to in the request ('the report'), the redacted version of which the University has published. As such, the Commissioner does not intend to reproduce that background here.
5. On 26 May 2021 the complainant wrote to the University and requested information in the following terms:

"Pursuant to the Freedom of Information Act 2000, to which the University of Essex is subject under item 53 of Schedule 1, I am requesting an unredacted (except for the deletion of individuals' names) copy of the report entitled

Review of the circumstances resulting in and arising from the cancellation of the Centre for Criminology seminar on Trans Rights, Imprisonment and the Criminal Justice System, scheduled to take place on 5 December 2019, and the arrangements for speaker invitations to the Holocaust Memorial Week event on the State of Antisemitism Today, scheduled for 30 January 2020 and dated 21 December 2020,

which was published with extreme redactions on the University of Essex website at [https://www.essex.ac.uk/-/media/documents/review/public\\_version\\_-\\_events\\_review\\_report\\_-\\_university\\_of\\_essex---17-may-2021.pdf?la=en...](https://www.essex.ac.uk/-/media/documents/review/public_version_-_events_review_report_-_university_of_essex---17-may-2021.pdf?la=en...)"

6. In correspondence to the complainant dated 23 June 2021, the University first confirmed that it held the requested information. The University then advised that it considered that section 36 of FOIA "may" be engaged and that, in line with section 10(3) of FOIA, it needed additional time to consider the balance of the public interest. It advised that the complainant could expect a further refusal by 23 July 2021.

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<sup>1</sup> The 'Reindorf Review' report can be found through the following link:

<https://www.essex.ac.uk/staff/event/update-on-the-review-of-the-two-events-involving-external-speakers>

7. The complainant wrote to the University on 9 August 2021, discussing timeliness and the University's refusal.
8. The University provided a substantive response to the request on 14 September 2021. It disclosed some information it had previously redacted from the published report but continued to withhold other information under sections 36(2) and also sections 40(2) and 41 of FOIA.
9. The complainant wrote to the University again on 17 September 2021, requesting an internal review. They put forward lengthy arguments to support their view that the University was incorrectly withholding the remaining information that they have requested.
10. The University provided an internal review on 12 November 2021. It addressed the complainant's concerns in detail and maintained its reliance on sections 36(2)(b)(ii), 36(2)(c), 40(2) and 41(1) of FOIA to continue to withhold information redacted from the report.

### **Scope of the case**

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11. The complainant contacted the Commissioner on 6 January 2022 to complain about the way their request for information had been handled.
12. The Commissioner's investigation has focussed on the University's application of section 36(2)(c), section 40(2) and section 41(1) to the information it is withholding, and the balance of the public interest where relevant. Finally, the Commissioner has considered the timeliness of the University's compliance and refusal.

### **Reasons for decision**

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

13. Section 36 of FOIA is an exemption that differs from all other prejudice-based exemptions in that, in most cases, the judgement about prejudice must be made by the legally authorised, qualified person for that public authority.
14. Other than for information held by Parliament, section 36 is a qualified exemption. This means that even if the qualified person (QP) considers that disclosure would cause harm, or would be likely to cause harm, the public interest must still be considered.

15. The University has provided the Commissioner with an unredacted version of the report in question.
16. Section 36(2)(c) of FOIA says that information is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
17. To determine, first, whether the University correctly applied the exemption under section 36(2)(c), the Commissioner must consider the QP's opinion as well as the reasoning that informed the opinion.
18. Therefore, in order to establish that the exemption has been applied correctly the Commissioner must:
  - ascertain who was the qualified person or persons
  - establish that an opinion was given by the qualified person
  - ascertain when the opinion was given; and
  - consider whether the opinion was reasonable.
19. In this case, the QP was the University's Vice-Chancellor, Professor Anthony Forster. The Commissioner is satisfied that, under sub-section 36(5)(o) of FOIA, Professor Forster was the appropriate QP.
20. The University has provided the Commissioner with the submission it sent to Professor Forster, seeking his opinion with regard to its proposed approach to the complainant's request. The part of the form that discusses the QP's opinion is then signed by Professor Forster. In effect he confirmed that disclosing the withheld information would be likely to have the effects set out under section 36(2)(b)(ii) and section 36(2)(c). The Commissioner is therefore satisfied that an opinion about section 36(2)(c) was given by the QP.
21. The request was submitted on 26 May 2021. The QP's opinion is dated 23 June 2021, the same date of the University's initial response to the request. As such, the Commissioner is satisfied that the opinion was given at an appropriate time. The QP submission form records that the date of the opinion was "updated" on 27 July 2021 and 8 September 2021. However, both these dates pre-date the University's correspondence to the complainant of 14 September 2021 and 12 November 2021 and so the Commissioner has no concerns about that.
22. The Commissioner has gone on to consider whether the QP's opinion is reasonable.
23. In their request for an internal review, the complainant discusses, at length, why section 36(2)(c) is not engaged. Their arguments can be summarised as follows:

- The harm envisioned under section 36(2)(c) of FOIA must be different from that claimed under section 40(2) or 41. [This is not correct. In his published guidance on section 36 the Commissioner confirms what the wording of the exemption indicates; that the harm envisioned under section 36(2)(c) must be different from that envisioned under section 36(2)(b)(i) or section 36(2)(b)(ii).]
  - The University has not put forward evidence to support its safeguarding concerns or to support its position that disclosing the information would or would be likely to cause harm by breaching confidentiality and trust.
  - Universities are tasked with providing a space within which contentious issues can be debated.
  - People on both sides of the substantive argument “are distressed” by the University’s lack of transparency and paternalistic approach.
24. In addition to their initial complaint, the complainant also provided the Commissioner with two further submissions. Broadly, these elaborate on the arguments they presented to the University in their request for a review and discuss the Commissioner’s decisions in previous cases that involved the application of section 36.
25. It is important to note that, in the context of section 36 of FOIA, ‘reasonableness’ is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it is a reasonable opinion, and not necessarily the most reasonable opinion.
26. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, he must find that the exemption is engaged.
27. The QP’s opinion in this case is that the prejudice envisioned under section 36(2)(c) would be likely to occur if the University disclosed the withheld information. ‘Would be likely’ imposes a less strong evidential burden than the higher threshold of ‘would occur’.
28. In order for the QP’s opinion to be reasonable, it must be clear as to precisely how the inhibition may arise. In his published guidance on section 36 the Commissioner notes that it is in public authority’s interests to provide him with all the evidence and arguments that led to the opinion, in order to show that it was reasonable. If this is not done, then there is a greater risk that the Commissioner may find that the opinion is not reasonable.

29. The submission the University provided to Professor Forster included: a description of the requested information; confirmation that the withheld information was shown to the QP along with a very detailed 'exemptions grid' which explained the proposed exemptions and the rationale for applying them; and comprehensive arguments as to why the envisioned prejudice would or would be likely to occur if the withheld information were to be disclosed. With regard to section 36(2)(c), these arguments were that:

- When invited to take part in the review participants were assured that their contribution to the review would remain confidential and disclosure of input from/about review participants without their consent may trigger a wave of complaints and disruption for the University, which it would have to manage.
- The report covered matters of extreme sensitivity which, in the wider world, are highly contested. The University took care to create an environment of trust where all views could be heard in relation to the associated review. This trust would be severely impacted should the redacted parts of the report be released.
- Disclosing additional text may bring safeguarding concerns.
- Disclosure would hinder the provision of a safe space for the University community to take forward the actions that followed the report. [The Commissioner considers this argument is of more relevance to the exemptions under section 36(2)(b).]

30. The Commissioner is satisfied that the QP had sufficient appropriate information about the request and the section 36(2)(c) exemption in order to form an opinion on the matter of whether reliance on that exemption with regard to the requested information was appropriate.

31. He has noted the evidence at paragraph 29 and he is satisfied that the remaining points at paragraph 18 have been addressed. Having also taken into account the subject and circumstances of the requested report, the Commissioner is entirely satisfied that the QP's opinion on the likely effects of disclosing the withheld information is one a reasonable person might hold.

32. The Commissioner therefore finds that the University was correct to rely on section 36(2)(c) to withhold certain information in the report. He will go on to consider the public interest test associated with the exemption.

## **Public interest test**

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

33. The complainant's arguments in their request for an internal review and in their correspondence to the Commissioner can be summarised as follows:
- It is not possible "to form any coherent idea of the events that transpired, or their chronology" from the redacted report on the University's website.
  - It is in the public interest to see the evidence and reasoning that led to the report's conclusions and recommendations.
  - The report is concerned with issues of academic freedom and freedom of expression – the incidents at the University that are the subject of the report "egregiously violated" those core academic freedoms.
  - These matters, academic freedom and freedom of expression, are being hotly debated in the public and political arena.
34. For its part, the University has acknowledged the public interest in promoting transparency and accountability. This improves public understanding and awareness and, as a result, the public's ability to engage in debate and decision making, on significant issues.
35. The University also notes the specific public interest in the issues considered in the report, which concern issues of academic freedom and freedom of expression.

### **Public interest in withholding the information**

36. The University has presented the following arguments of relevance to section 36(2)(c):
- The University must be able to continue to function, and to continue to teach, research and engage with its communities and stakeholders, both within the University and beyond, as well as the local community through knowledge exchange and outreach.
  - Students expect tuition fees to be spent in the main on these important activities. Disruption to the University community would instead mean resources being spent on activities to curtail, mitigate and manage this (for example claims and complaints), rather than being directed towards education and/or research.



- Reputational damage arising from events would be likely to affect the ability of the University to attract and retain both the best staff and the right numbers of students to allow it to maintain its growth and its contribution to the local community and wider society.
- Disclosing the redacted information would likely lead to the numerous time and cost consuming consequences that are explained in the submission provided to the QP. These are avoidable and not in the public interest. They would be damaging not just to the University but also to all those affected by such complaints, claims and disruptive action. Those impacted by the diversion of resource, budget, and management and staff time – and/or postponed University activities and/or plans would also be harmed.

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

37. The Commissioner has noted the complainant's arguments but agrees with the University that the public interest favours maintaining the section 36(2)(c) exemption. First, he understands that, in the current case, the matter associated with the request was 'live' at the time of the request. He understands that the report had been published on 17 May 2021, shortly before the complainant's request. As such the University was likely still to have been in the process of processing and managing its findings. It would then have to agree and implement the report's associated recommendations. Second, the Commissioner has taken account of the nature of the information being withheld and the circumstances in which the University obtained the information. In the Commissioner's view, at the time of the request there was greater public interest in the University being able to action the report's recommendations effectively and efficiently, without the distraction likely to be generated through disclosing the information. In addition, the public interest in contributors to this report being willing to work with the University to implement the report, and in potential contributors to future reviews being prepared to assist the University, is greater than the public interest in the University being fully transparent and disclosing the withheld information in this case.
38. To summarise, the Commissioner has decided that the University has correctly applied section 36(2)(c) to much of the withheld information, and that the balance of the public interest favours maintaining this exemption.



## **Section 40 - personal information**

39. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
40. In this case the relevant condition is contained in section 40(3A)(a)<sup>2</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
41. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
42. Second, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

### **Is the information personal data?**

43. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

44. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
45. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
46. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

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<sup>2</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

47. In this case, some of the information the University has redacted under section 40(2) is the names and roles of specific individuals. A name and role is clearly an individual's personal data, particularly in the context of this report. The University has also redacted information that is less obviously personal data. This is information such as: interactions with particular people that the report's author may or may not have had; descriptions of individuals; summaries of what certain individuals may have said or done; other communications individuals made; individuals' experiences and individuals' opinions.
48. While those individuals may not be named in the report, it is the Commissioner's view that taking account of the context of this report, the events that generated the report, the contained world of the University and information that may already be in the public domain or known to individuals at or associated with the University, by piecing together the withheld information with other information it would be possible to identify specific individuals. As such, the Commissioner considers that that information can also be categorised as personal data.
49. To summarise, in the circumstances of this case, the Commissioner is satisfied that information to which the University has applied section 40(2) relates to individuals associated with the events discussed in the report. He is satisfied that this information both relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
50. The fact that information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
51. The most relevant DP principle in this case is principle (a).

**Would disclosure contravene principle (a)?**

52. Article 5(1)(a) of the UK GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

53. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
54. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

55. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

**Is the information special category data?**

56. Information relating to special category data is given special status in the UK GDPR.
57. Article 9 of the UK GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
58. Having viewed the withheld information, the Commissioner finds that at least some of that information could be categorised as special category data. He has reached this conclusion on the basis that it broadly concerns a person's/people's religious or philosophical belief, sex life or sexual orientation. He has also noted that in, its submission, the University has said that input and discussions in the report could naturally extend into political and philosophical belief, sexual life or health, whether directly stated or simply inferred.
59. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
60. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
61. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the request or that they have deliberately made this data public.
62. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.
63. The Commissioner has gone on to consider the remaining information to which the University has applied section 40(2).

## **Lawful processing: Article 6(1)(f) of the UK GDPR**

64. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful **only** if and to the extent that at least one of the" lawful bases for processing listed in the Article applies.

65. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"<sup>3</sup>.

66. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

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<sup>3</sup> Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

67. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

### **Legitimate interests**

68. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
69. The complainant has an interest in academic freedom and freedom of expression. That is an entirely legitimate interest for them to have and is also of wider, societal interest.
70. In its submission, the University suggests that it considers that there is a legitimate interest in transparency around the review that the University commissioned into the issues and incidents that the review discusses. There is also a public interest in public authorities demonstrating transparency, more generally.

### **Is disclosure necessary?**

71. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
72. The complainant is seeking the redacted information because, they say, without that information it is not possible to understand fully the events that triggered the review and resulting report.
73. To a large extent, the Commissioner considers that the complainant's legitimate interest, and the wider legitimate interest, in academic freedom and freedom of expression are met through the University having commissioned an independent report into particular events, and in having published a good deal of that 108 page report including the majority of the 'Observations and Assessment', and 'Recommendations' sections of the report. Despite the redactions, the Commissioner

considers that a reader not directly involved in the events would still be able to get a sense of what had happened. And the University has noted that agreed actions in the report, and associated discussions, are being taken forward by groups of staff and students across the University. However, in the interests of completeness the Commissioner has gone on to consider the third part of the test.

### **Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms**

74. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
75. In considering this balancing test, the Commissioner has taken into account the following factors:
  - the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
76. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
77. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
78. In this case, the majority of the report is in the public domain, but not all of it. Similarly, some of the withheld information may be known by some individuals - those involved in the events discussed in the report - but it would not be known more widely. The Commissioner considers that the events of the report were febrile, contentious and sensitive in nature. Individuals were advised that their contribution to the report would be treated confidentially. Those individuals who contributed to the report would therefore have the reasonable expectation that their personal data would not be disclosed to the world at large in response to a FOIA request. And, given nature of the events discussed in the report,

the Commissioner is further satisfied that disclosing their personal data would cause those individuals a good deal of distress.

79. As has been discussed, in the Commissioner's view the information that the University has published has met the public interest in transparency about the report and the events that generated it to a satisfactory degree.
80. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so disclosing the information would not be lawful.
81. The Commissioner has therefore decided that the University was entitled to withhold information under section 40(2), by way of section 40(3A)(a).

#### **Section 41 – information provided in confidence**

82. Section 41(1) provides that information is exempt if, under subsection (a) the public authority obtained it from any other person and, under subsection (b), disclosure would constitute a breach of confidence actionable by that person or any other person. This exemption is absolute and therefore not subject to a public interest test, as such.
83. The University has withheld some of the information in the report under this exemption.

##### **a) Did the University obtain the information from another person?**

84. The University has confirmed in its submission to the Commissioner that the information in question was obtained from other people, namely those interviewed in the course of the review. The Commissioner has reviewed the information and is satisfied the University obtained this information from other people and, as the University has explained, some of it was augmented through the report's author's additional explanation or opinion.

##### **b) Would disclosure constitute a breach of confidence actionable by that person or another person?**

85. In considering whether disclosing the information constitutes an actionable breach of confidence the Commissioner considers the following:
  - whether the information has the necessary quality of confidence;



- whether the information was imparted in circumstances importing an obligation of confidence; and
  - whether disclosure would be an unauthorised use of the information to the detriment of the confider.
86. **Necessary quality of confidence:** The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial. He is satisfied that the information in this case has that quality. The matters that were the subject to review and which generated the report were serious. In addition the withheld information is not otherwise accessible.
87. **Circumstances imparting an obligation of confidence:** This limb is concerned with the circumstances in which the confider of information passed the information on. The confider may have attached specific conditions to any subsequent use or disclosure of the information (for example in the form a contractual term or the wording of a letter). Alternatively, the confider may not have set any explicit conditions but the restrictions on use are obvious or implicit from the circumstances (for example information a client confides to their counsellor).
88. The University has noted that the Registrar and Secretary's blog of 28 August 2020, where contributions to the investigation were invited, states clearly and explicitly that "All feedback will be kept confidentially, and the names of identifiable contributors or others named not disclosed, unless required to do so by law".
89. In view of this, and the sensitive nature of the matters that are the review's focus, the Commissioner considers that the individuals who were interviewed as part of the independent review would have had the reasonable expectation that the information they were providing would not be disclosed to the world at large in response to a request under FOIA. In the Commissioner's view it would have been reasonable for those individuals to assume that the University would treat the information confidentially. As such, the Commissioner is satisfied that, through engaging with the report's author, individuals provided the University with the information in circumstances importing an obligation of confidence.
90. **Detriment to the confider:** The First-tier Tribunal (Information Rights) in *Bluck v ICO and Epsom and St Helier University Hospital Trust* refers to the fact that "...if disclosure would be contrary to an individual's reasonable expectation of maintaining confidentiality in respect of his or her private information...", this exemption can apply. The Commissioner has accepted that disclosing the information in question in this case would be contrary to the reasonable expectations of the individuals who

were interviewed. Disclosure would therefore cause detriment to those individuals.

**Is there a public interest defence for disclosure?**

91. As noted, section 41 is an absolute exemption and not subject to the public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under FOIA). British courts have historically recognised the importance of maintaining a duty of confidence so it follows that strong public interest grounds would be required to outweigh such a duty.
92. The University says that, in this case, it has been entirely open about mistakes it made and the actions it has taken “to make amends”. The University says it made a voluntary report to the regulator of Higher Education, the Office for Students, and published not only the Report, containing all arguments and findings, but also a public statement and a series of public apologies. The University does not consider that providing the confidential material would add to this. In this context, the University considers that there is no public interest defence in exposing confidential material contained in the full report.
93. The Commissioner has again considered the arguments the complainant presented in their request for a review and in their submissions to him. In their submissions the complainant has directed the Commissioner to other decisions he has made which they consider support their view that section 41 is not engaged in this case. The Commissioner has noted those decisions but makes the point that he considers complaints on a case by case bases and all case have a different set of circumstances.
94. To summarise the arguments in their review request, the complainant considered that there cannot be a breach of confidence because those who provided the information cannot be identified. Disclosing the information could not therefore cause a detriment to those confiders. The complainant also argued that, if the University’s position was correct, it had already breached the confiders’ confidence by publishing any of the report at all.
95. The Commissioner has taken account of the complainant’s views and his previous decisions but he is not persuaded. In considering whether section 41 is engaged, he considers the criteria at paragraph 85 and these do not include whether or not the confider is identifiable. What the Commissioner also considers is the wider public interest in preserving the principle of confidentiality and the need to protect the relationship of

trust between confider and confidant. In this case, he considers there is stronger public interest in people feeling confident to participate in a review such as the review in this case, so that the review is thorough, balanced and fair. Individuals will be more prepared to do this if they are satisfied that the University will treat the information they provide confidentially. A report is more likely to be viewed as credible, and its recommendations acted on, if it is perceived as having fully reflected and taken account of the views and experiences of all those involved, or as many as possible.

96. The Commissioner recognises that there is a general public interest in public authorities being open and transparent. He acknowledges too that there is also significant public interest in the events discussed in the review in this case, specifically, and the associated wider matters both parties have noted: academic freedom and freedom of expression.
97. As the Commissioner has noted, the University has published a redacted version of the report on its website. The Report's 'Observations and Assessment', and 'Recommendations' sections are largely not redacted. The Commissioner considers that the public interest in the subject of the report is met through that publication and the other steps the University has taken.
98. The Commissioner has considered all the circumstances of this case and the nature of the information being withheld under section 41(1). He has concluded that there is stronger public interest in maintaining the obligation of confidence than in disclosing the information being withheld under this exemption. Therefore, the Commissioner finds that the condition under section 41(1)(b) is also met and that the University is entitled to withhold information in the report under section 41(1) of FOIA.

### **Section 10 / Section 17 – time for compliance and refusing a request**

99. Under section 1(1) of FOIA anyone who requests information from a public authority is entitled to be told if the authority holds the information and to have the information communicated to them if it is held and is not exempt information.
100. Under section 10(1) a public authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of a request.
101. Section 10(3) enables an authority to extend the 20 working day limit up to a 'reasonable' time in any case where it requires more time to consider the public interest test.

102. FOIA does not define what might constitute a 'reasonable' extension of time. However, the Commissioner's view is that an authority should normally take no more than an additional 20 working days to consider the public interest, meaning that the total time spent dealing with the request should not exceed 40 working days.
103. Under section 17(1) a public authority which, in relation to any request for information, is to any extent relying on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a refusal notice.
104. However, there is also provision under section 17(2) for a public authority to claim an extension to the statutory 20 working day limit to consider the public interest test. As with section 10(3), FOIA does not set a specific limit on the amount of additional time the public authority can take to consider the test. It states only that the notice communicating its final decision must be provided within 'such time as is reasonable in the circumstances'.
105. Again, the Commissioner's position is that a public authority should take no more than an additional 20 working days to consider the public interest, which again means that the total time spent dealing with the request should not exceed 40 working days.
106. A public authority claiming an extension under section 17(2) will still be obliged to issue a refusal notice explaining which exemption applies, and why, within 20 working days. This notice must explain that the authority requires more time to consider the public interest test and provide an estimate of the date on which a final decision is likely to be made.
107. In this case, the complainant submitted their request on 26 May 2021. On 23 June 2021, the University wrote to the complainant, confirming that it held the requested information. The University advised that it considered section 36 "may" be engaged, that it needed further time to consider the public interest test and that the complainant could expect a substantive refusal by 23 July 2021.
108. The Commissioner's published guidance on section 17 discusses 'initial' refusal notices, and the correspondence of 23 June 2021 in this case is an example of an initial refusal notice. However, the University's initial refusal is somewhat unclear as the response did not categorically confirm, as it should, that it considered that section 36 was definitely engaged.
109. The University did not provide a substantive response to the request including a further refusal until 14 September 2021. It disclosed some previously withheld information and continued to withhold the remainder

under the exemptions discussed in this notice. That refusal discussed the public interest considerations associated with section 36.

110. Having considered its correspondence with the complainant, the Commissioner finds that the University breached section 10(1) of FOIA as it did not communicate the non-exempt information to the complainant within 20 working days of their request.
111. Regarding its refusal, the Commissioner finds that, since it subsequently did confirm that it considered section 36 was engaged, the University's initial refusal was satisfactory – it indicated to the complainant that section 36 would be engaged, did so within 20 working days of their request and indicated when the complainant could expect a further refusal. However, the University did not then provide its further refusal including the public interest considerations until 14 September 2021, well in excess of the 40 working day total the Commissioner recommends for dealing with a request. On balance, the Commissioner therefore finds that the University did not comply with section 17(1) of FOIA.

## Right of appeal

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112. 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: 0203 936 8963

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)

113. 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.

114. 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

**Cressida Woodall**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**