

Freedom of Information Act 2000

Decision notice

Date: 23 September 2022

Public Authority: Queen's University, Belfast
Address: University Road
Belfast
BT7 1NN

Decision (including any steps ordered)

1. The complainant requested mark schemes and answers to entrance examinations for the Institute of Professional Legal Studies, part of Queen's University, Belfast. The University initially refused the request under section 43(2) of FOIA (prejudice to commercial interests). It later sought to rely on section 36(2)(c) of FOIA (prejudice to the effective conduct of public affairs).
2. The Commissioner's decision is that the University was entitled to refuse to disclose the requested information under section 36(2)(c). The Commissioner does not require any steps to be taken.

Request and response

3. The two bodies that control the legal profession in Northern Ireland, the Law Society of Northern Ireland and the Honorable Society of the Inn of Court of Northern Ireland, are responsible for the training and admission of barristers and solicitors. They have delegated part of that responsibility to the University through the Institute for Professional Legal Studies (the IPLS). The IPLS provides a one-year postgraduate course for trainee solicitors and trainee barristers in Northern Ireland.¹
4. On 15 November 2020 the complainant submitted the following request to the University:

¹ <https://www.qub.ac.uk/schools/InstituteofProfessionalLegalStudies/>

"I request the mark schemes, answers or similar in relation to the 2019 IPLS entrance exam and all IPLS entrance exams in preceding years in your possession."

5. The University responded on 24 November 2020 refusing the request in reliance on the exemption at section 43(2) of FOIA.
6. Following an internal review the University maintained its reliance on the exemption at section 43(2) of FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 6 December 2020 to complain about the University's decision to refuse his request.
8. During the course of the Commissioner's investigation the University withdrew reliance on the exemption at section 43(2) of FOIA. It now sought to claim a late reliance on the exemption at section 36(2)(c) of FOIA (prejudice to the effective conduct of public affairs).
9. The Commissioner acknowledges that public authorities may at any stage seek to rely on an exemption or exclusion not previously claimed. This was confirmed by the Upper Tribunal in the case of *McInerney v IC and Department for Education* [2015] UKUT 0047 (AAC).²
10. Accordingly the scope of the Commissioner's investigation was to determine whether or not the University was entitled to refuse to disclose the requested information in reliance on the exemption at section 36(2) of FOIA.

Reasons for decision

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

11. Section 36(2)(c) of FOIA provides that information is exempt if, in the reasonable opinion of a qualified person, disclosure of the information would, or would be likely to, prejudice the effective conduct of public affairs.
12. In order to establish that the exemption has been applied correctly the Commissioner considers it necessary to:

- Ascertain who acted as the qualified person;

² <https://administrativeappeals.decisions.tribunals.gov.uk/Aspx/view.aspx?id=4420>

- Establish that an opinion was given by that person;
 - Ascertain when the opinion was given; and
 - Consider whether the opinion was reasonable.
13. The University advised the Commissioner that the Registrar was the University's qualified person. The Commissioner notes that in a previous decision notice³ involving the University and a request for similar information, he had accepted that the Registrar was authorised to act as the qualified person. Similarly in this case the Commissioner is satisfied that the Registrar is the qualified person for the purposes of section 36.
14. In determining whether the exemption at section 36(2)(c) is engaged, the Commissioner must consider whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:
- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection, the opinion is unlikely to be reasonable.
 - The nature of the requested information.
 - The qualified person's knowledge of, or involvement in, the issue.
15. The Commissioner takes the approach that 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. This is not the same as saying that it is the only reasonable opinion that could be held on the subject.
16. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
17. In this case the University advised the Commissioner that the qualified person's opinion had been sought and obtained verbally. The University was therefore unable to provide the Commissioner with a copy of the opinion, but it did provide a copy of an internal communication which was prepared by the Director of the IPLS in order to assist the qualified person's decision making. The University confirmed that the qualified person was also provided with a copy of the decision notice referred to

³ https://ico.org.uk/media/action-weve-taken/decision-notice/2008/454748/FS_50155365.pdf

at paragraph 13 above, as well as a verbal briefing from the University's Information Compliance Manager.

18. The University set out that the qualified person was of the opinion that disclosure of the requested information in this case would be likely to have a detrimental impact on the IPLS and the University as a whole.
19. The qualified person was of the opinion that disclosure of the mark schemes and answers would be likely to make it more difficult for the University to assess IPLS candidates "on their attributes and ability for the profession rather than to learn a technique to achieve a high score".
20. The qualified person further argued that disclosure of the requested information would have the potential to allow less suitable candidates to score well in the exam and then struggle on the course. This would be likely to lead to course withdrawals which would be detrimental to the interests of candidates and the University alike.
21. Finally, the qualified person was concerned that disclosure of marking schemes would diminish the question pool over time since it would prevent the reuse of questions and scenarios. The University would then need to spend time and other resources developing or amending the IPLS admissions process.
22. The Commissioner is disappointed that the University did not keep a full record of the qualified person's decision making process in this case. In addition to being a matter of general good practice, documenting the qualified person's opinion assists a public authority in demonstrating to the Commissioner that it has acted appropriately.
23. In any event the Commissioner has examined the internal communication and has taken account of the previous decision notice referred to at paragraph 13. The internal communication is fairly brief but summarises the concerns set out above in respect of the prejudice anticipated by disclosure. The Commissioner is mindful that this document formed part of a verbal briefing, during which additional information would have been provided.
24. The Commissioner also notes that the complainant in the previous case had requested marking schemes relating to the IPLS admissions test between 2000 and 2006. The University withheld that information under section 36(2)(c), and the Commissioner found that the University had been entitled to do so.
25. The Commissioner would emphasise that he has considered all the circumstances of this case in making a decision. He accepts that the prejudice identified by the qualified person does relate to the effective conduct of public affairs, ie the administration of the IPLS selection

process. He also accepts that the Registrar was sufficiently informed to be able to reach a reasonable opinion on the basis of the information provided.

26. Consequently the Commissioner accepts as reasonable the opinion that disclosure of the requested information in this case would be likely to have a prejudicial effect. He is satisfied that the exemption at section 36(2)(c) is engaged in respect of the requested information, and has therefore gone on to consider the balance of the public interest.

Public interest test

27. Section 36(2)(c) is a qualified exemption and is therefore subject to the public interest test as set out in section 2(2) of FOIA. Information that is subject to a qualified exemption must nonetheless be disclosed unless the public interest in maintaining that specific exemption outweighs the public interest in disclosing the information. If the public interest is evenly balanced then the information must be disclosed.

Public interest in disclosing the information

28. The University acknowledged the general public interest in openness and transparency. It further accepted the public interest in understanding how the IPLS admissions process is managed, and the type of exam used for admission.
29. The University argued that it met the public interest identified above via its proactive publication of information regarding the admissions test,⁴ albeit that this did not include mark schemes or answers as described in the request.
30. The complainant highlighted IPLS's unique position as set out at paragraph 3 above. He set out that the public interest in disclosure was strengthened by the fact that the bodies which control the legal profession had delegated part of their responsibilities to IPLS.
31. The complainant also argued that there was a strong public interest in informing the public how the IPLS admissions process was managed. He acknowledged that candidates may be separated by small margins, but also pointed out that the University operated a "bonus mark" element in

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<https://www.qub.ac.uk/schools/InstituteofProfessionalLegalStudies/Admissions/AdmissionsTest/>

the form of a weighting.⁵ This weighting was awarded according to the classification the candidate had achieved in their degree. This ranged from 75 points for third class honours to 300 points for first class honours.

32. The complainant estimated that two candidates could receive the same marks in three sections of the exam. He explained that each of the four parts of the exam carried a maximum of 250 points. A candidate with a first class honours degree could fail to answer any questions correctly in the fourth part of the exam and still receive a lower overall mark than a candidate who gained full marks in the fourth part but was not entitled to a bonus mark. The complainant concluded that the candidate's degree classification was more important than the exam mark when separating candidates.
33. The Commissioner put the complainant's arguments to the University. The University set out that the maximum possible score for an individual was 1300, with 1000 of the available marks coming from the admissions test. The University therefore maintained that the admissions test was the primary method of separating candidates. The University also reiterated that detailed information relating to scoring, including weighting, was already in the public domain as pointed out at paragraph 29 above.

Public interest in maintaining the exemption

34. The University sought to rely on the public interest arguments accepted by the Commissioner in the previous decision notice (see paragraph 22 of DN FS50155365). These included the following points:
 - Disclosure would undermine the University's ability to assess candidates objectively.
 - Candidates were already provided with sufficient information about the core skills assessed by the admissions test.
 - Disclosure would only benefit applicants to the Institute, there would be no wider public benefit.
 - Disclosure could lead to academic judgment being challenged unfairly.
35. The University set out that the public interest was best served by operating a robust and fair admission process. This was considered essential because applications to the IPLS far outnumbered the places available. It was therefore imperative that the University be able to

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<https://www.qub.ac.uk/schools/InstituteofProfessionalLegalStudies/FileStore/Filetoupload,1172176,en.pdf>, page 16

select candidates who were able to demonstrate that they had the required attributes and skill for the roles of barrister and solicitor.

36. The University argued that the disclosure of information that would be likely to prejudice the admissions process would not serve the public interest. In addition to making it more difficult for the University to select the best students, the University argued that prejudice to the admissions process could also undermine public trust in newly qualified barristers and solicitors.

Balance of the public interest

37. The Commissioner is mindful of his previous decision notice as referred to above. However he would emphasise that he has considered all of the circumstances of this particular case, including the content of the requested information and the time that has passed since the previous decision notice was issued.
38. The Commissioner has carefully considered the complainant's submissions. He accepts that there is a legitimate public interest in informing the public as to how IPLS selects candidates, given that they may go on to become solicitors or barristers in Northern Ireland. There is also a reasonable expectation that the selection process should be fair and transparent.
39. The Commissioner is also mindful that he has found that the qualified person's opinion was reasonable, and appropriate weight must be given to the prejudice identified in balancing the public interest. What is appropriate weight will depend on the severity, extent and frequency of the prejudice. The Commissioner accepted the University's argument that disclosure "would be likely" to cause prejudice, which is a lower bar than accepting that disclosure "would" cause prejudice. This means that the weight that the qualified opinion carries as a public interest factor in this case is less than would be the case were the likely severity, extent and frequency of the identified prejudice greater. It does nonetheless carry weight when balancing the public interest.
40. The Commissioner is mindful that the IPLS is heavily oversubscribed each year. Accordingly it is extremely competitive and candidates may be separated by a small number of marks in any particular year. The Commissioner accepts that there is a strong public interest in ensuring that the University's ability to select the best candidates is not unduly harmed.
41. The Commissioner has also had regard to the specific content of the requested information in this case, although he appreciates that the complainant is necessarily unable to have sight of it in order to make submissions. The Commissioner is satisfied that the requested

information is sufficiently detailed to provide any candidate with substantial insight into how marks are awarded. Consequently the Commissioner accepts that disclosure would be likely to make it difficult for the University to ascertain the extent to which candidates were assisted by knowledge of the marking scheme.

42. The Commissioner further accepts that there is a considerable public interest in protecting the ability of IPLS to identify and select the best candidates.
43. The Commissioner acknowledges that the University has sought to increase transparency by its proactive publication of relevant information, including past papers and an online trial of the test. The Commissioner accepts that this largely meets the public interest identified in favour of disclosure, ie informing the public as to the nature of the test and the kinds of questions asked.
44. For the reasons set out above the Commissioner is satisfied that the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information. The Commissioner is therefore satisfied that the balance of the public interest lies in maintaining the exemption at section 36(2)(c). The Commissioner finds that the University was entitled to refused the complainant's request on this basis.

Procedural requirements

Section 17: refusal notice

45. Section 17(1) of FOIA states that a public authority relying on an exemption must issue a refusal notice citing that exemption, within the 20 day time for compliance.
46. In this case the University cited the exemption at section 43(2) of FOIA in its refusal notice. However the University subsequently withdrew reliance on section 43(2) and instead sought to rely on section 36(2) instead.
47. Since the University claimed a late reliance on section 36(2), it follows that its original refusal notice did not cite this exemption. Therefore the Commissioner finds that the University failed to comply with section 17(1) of FOIA.

Right of appeal

48. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

49. 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.
50. 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

Sarah O’Cathain
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