

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

### **Decision notice**

**Date:** 24 March 2023

**Public Authority** The Council of the University of London  
**Address:** Senate House  
Malet Street  
London  
WC1E 7HU

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

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1. The complainant has requested a copy of an internal report. University College London ('the University') withheld the report in its entirety, citing section 36(2)(b)(ii) and 36(2)(c) (prejudice to the effective conduct of public affairs).
2. The Commissioner's decision is that the report engages section 36(2)(b)(ii) and the public interest lies in maintaining the exemption.
3. The Commissioner does not require further steps.

#### **Background information**

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4. The complainant raised concerns internally about the appointment of an individual to three separate posts within the University. The University employed an external law firm to investigate the concerns and the investigator produced a report which outlined their findings.
5. The Commissioner understands that the complainant raised their concern via the University's public interest disclosure policy. The complainant was informed of the outcome of the investigation, and provided with a summary of the investigator's findings, on 9 September 2022.

## Request and response

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6. On 12 September 2022, the complainant, as part of their complaint, asked the University:  
  
"Could you please send me the copy of the full report received from the investigator."
7. The University decided to treat this request under FOIA and responded on 10 October 2022. It refused to provide the requested information, citing sections 36(2)(b)(ii) and 36(2)(c) (prejudice to the effective conduct of public affairs) of FOIA.
8. Following this refusal, the complainant wrote to the University on 1 December 2022 with more concerns.
9. The University responded to the complainant on 6 and 19 December 2022, reiterating that the report would not be disclosed.
10. The University has explained to the Commissioner that 'our records indicate no internal review occurred, and there is no record of [complainant] requesting one nor correspondence that might have provided [complainant] an impression this occurred.' The University appears to have treated the aforementioned correspondence as an extension of the internal complaint, not a request for an internal review under FOIA.
11. It's not necessary for the University to have conducted a formal review under FOIA in this instance – it's not a statutory requirement and the University's position remains unchanged.
12. The Commissioner will consider whether the University is entitled to withhold the report under sections 36(2)(b)(ii) and 36(2)(c).
13. For the purpose of this investigation, the Commissioner has seen the entire report. It is 813 pages long; pages 1-12 are the actual investigation report and page 13 onwards contain the appendices of the report.

## Reasons for decision

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14. Section 36(2) of FOIA states:

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of this information under this Act –

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

(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.”

15. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised, qualified person (‘QP’) for that public authority. The QP’s opinion must also be a ‘reasonable’ opinion.

16. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the QP for the exemption to be applied appropriately. Furthermore, the opinion does not have to be the only reasonable opinion that could be held or the ‘most’ reasonable opinion. The Commissioner only needs to be satisfied that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.

### Who is the qualified person and how was their opinion sought?

17. Dr Michael Spence is the University’s President and Provost and also QP and his opinion was sought on 20 September 2022. In order for the QP to form a reasonable opinion on the case they were provided with arguments (which were recorded using the template provided on page 24 of the Commissioner’s guidance<sup>1</sup>) in support of the section 36 exemption and they were shown a copy of the report.

18. Whilst the Commissioner notes that no counter arguments in relation to section 36 were put forward, he is satisfied that public interest arguments in favour of disclosure were provided to the QP.

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<sup>1</sup> [section 36 prejudice to effective conduct of public affairs.pdf \(ico.org.uk\)](https://ico.org.uk/section-36-prejudice-to-effective-conduct-of-public-affairs.pdf)

19. The QP approved the application of section 36(2)(b)(ii) and 36(2)(c) on 23 September 2022.

### **Is the qualified person's opinion reasonable?**

20. The aim of section 36(2)(b)(ii) is to protect the 'safe space' that officials need to develop ideas, debate live issues, and reach decisions away from external interference and distraction. If this safe space is compromised it might lead to a 'chilling effect', in which future discussions are less robust and the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making.
21. In order for section 36(2)(c) to be engaged, disclosure must 'otherwise' prejudice the effective conduct of public affairs. The word 'otherwise' indicates that this prejudice must be separate and distinct from the safe space and chilling arguments discussed above.
22. The Commissioner notes that all of the arguments presented to the QP relate to section 36(2)(b)(ii); there are no arguments separate or distinct to the 'safe space' and 'chilling effect' arguments. Since the QP hasn't considered any arguments relevant to section 36(2)(c), it follows that the exemption can't be engaged.
23. The Commissioner acknowledges that in order to conduct public affairs effectively, members of staff within a public authority must be allowed to exchange views for the purposes of deliberation freely and frankly. The QP's opinion is therefore reasonable and the Commissioner finds that section 36(2)(b)(ii) is engaged on the basis that disclosure of the report would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.
24. Section 36(2)(b)(ii) is a qualified exemption, other than for information held by Parliament. Therefore, the Commissioner will go on to consider where the balance of the public interest lies.

### **Public interest test**

#### **Arguments in favour of maintaining the exemption**

25. The Upper Tribunal in Malnick<sup>2</sup> found (at paragraph 29) that the QP, being someone who holds a senior role within their organisation, should have the requisite knowledge of how their organisation works and the

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<sup>2</sup> [2018 AACR 29ws.pdf \(publishing.service.gov.uk\)](#)

consequences of disclosure. Therefore, their opinion should be given a measure of respect.

26. The Commissioner must consider the extent, frequency and severity of inhibition that would occur. The appendices of the report contain copies of the policies relevant to the investigation (the Public Interest Disclosure Policy, the University's Recruitment and Selection Procedure, Equal Opportunities Policy, Internal Secondment Guidance etc); disclosure of this information, which is already in the public domain, will not compromise the free and frank exchange of views for the purposes of deliberation.
27. However, the appendices also contain transcripts of interviews conducted as part of the investigation. These interviews contain frank and candid assessments, and the Commissioner is satisfied that disclosure would be likely to deter individuals from cooperating, freely and frankly, with any similar investigations in the future, particularly since the interviewees were informed their involvement would remain confidential.
28. The University has also explained:

'If individuals had thought that the report would be put in the public domain, there is a significant risk that the investigatory manager would have been much more circumspect in their investigation. This might have meant that relevant members of the University would not have been fully aware of the circumstances surrounding the concerns or provided with the information necessary to conclude a proper assessment of any errors and deficiencies in the university's processes. Withholding this information could therefore be seen as necessary for the integrity of the investigation.'
29. The Commissioner has taken into account the timing of the request. The report is dated 5 September 2022 and the request was made on 12 September 2022. The findings of the report, which were communicated to the complainant on 9 September 2022, had only just been passed to the University's audit committee. The Commissioner is satisfied that the matter was still 'live' and the need for a safe space to fully deliberate the issue had not yet diminished with the passage of time and it's not in the public interest to compromise the integrity of this, or any other future investigations the University might need to conduct.

## **Arguments in favour of disclosure**

30. The University has acknowledged there is a general public interest in transparency and accountability. There is also a specific public interest in how public authorities deal with sensitive issues and, more specifically, how they deal with allegations of inappropriate behaviour or instances in which its own policies are not followed.
31. The University has explained that 'due to the serious allegations being investigated, it might be considered that openness and candour is essential to inform the University's processes and to ensure that questions relating to the investigation were adequately assessed and addressed.'

## **The balance of the public interest**

32. The Commissioner must consider the extent to which the investigation goes in meeting the specific public interest surrounding this matter. The fact that the complaint has been considered by an independent investigator, whose findings have been relayed to the complainant, reduces the public interest in the information.
33. Revealing information about alleged wrongdoing may help the course of justice, but such investigations may need confidentiality to be effective. In each case, the Commissioner must consider the extent to which the withheld information meets the public interest that's been identified.
34. The Commissioner does not believe that the appendices meet the public interest factors identified. It's either information that is already accessible to the complainant, their own personal data or an individual's perception of events. It doesn't explain the investigator's rationale or the outcome of the investigation. For that reason, the Commissioner is satisfied that the public interest favours maintaining the exemption in relation to this information.
35. Turning to the first 12 pages of the report, which outline each allegation, summary of evidence and findings, the Commissioner considers this to be a much more finely balanced matter. Whilst he acknowledges that the complainant's concerns have been thoroughly investigated – and the findings passed onto the University's audit committee who has not requested any further action – there is transparency needed around the investigation. The University has articulated its findings to the complainant and disclosure would help contextualise the findings of the report; it would add to public understanding about the matter beyond what has been communicated to the complainant.
36. However, the Commissioner considers it is of a greater public interest for the investigation to have been carried out, and any lessons learnt from it, without external interference. The University has provided the

complainant with a summary of the report, alongside the action it has taken as a result and recommendations it has made. The Commissioner is not convinced that disclosure would further public understanding to the point, given that the matter has already been transferred to the audit committee, where it justifies compromising the safe space the University requires to conduct such investigations.

37. Therefore, the Commissioner considers that the balance of the public interest favours maintaining the exemption in this case, given the likely future impact on the University's ability to investigate such allegations.

## Right of appeal

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38. 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)

39. 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.
40. 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

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