

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 February 2023

Public Authority: The Governing Body of the University of Bristol
Address: Beacon House
Queen's Road
Clifton
Bristol
BS28 1QU

Decision (including any steps ordered)

1. The complainant has requested a copy of a report dated December 2020 ("first report") relating to a complaint made about an ex-employee of The University of Bristol ("the university"). The university confirmed that information relating to points 2 to 6 of the complainant's request was provided through subsequent correspondence with the complainant and their legal representative outside the provisions of the FOIA regime, but withheld the first report and its Terms of Reference under section 32(2) of FOIA (Court, inquiry or arbitration records), section 36(b) and (c) of FOIA (Record of a qualified person's opinion) and section 40 of FOIA (Personal information).
2. The Commissioner's decision is that the university has correctly relied on section 36 and section 40 of FOIA to withhold the information. He does not require the public authority to take any steps.

Request and response

3. On 30 November 2021, the complainant, through their legal representative wrote to the university and requested information in the following terms:

"Information required regarding the Reports and leaks of the same

The Article appears to clarify that two separate reports were commissioned; one to investigate [name redacted] complaint (the

First Report), the second being the report leaked in the Article (the **Second Report**).

Please now:

1. Provide a copy of the full version of the First Report which dealt with our client's complaint, and the Terms of References of the same. In circumstances where the content of the First Report has clearly been disseminated, it is only right and proper for our client to be provided with a copy of the same. We note the University intends to respond to our FOIA Request by 8 December but, in these sorry circumstances, there is every reason to expedite our request.
2. Confirm the identity of the QC commissioned to write the Second Report and their Chambers – our existing concerns that the author may have been [name redacted] QC are exacerbated by the fact the Article suggests the reports were "by the same lawyer [as the First Report]". If the author of the Second Report was indeed [name redacted] QC, please explain in full the measures taken to ensure the preparation of the Second Report was not impacted by her earlier involvement in the complaints process and how the University came to conclude that it would be appropriate to commission her to prepare the Second Report.
3. Clarify whether or not the Second Report is the report referred to in the University's statement of 1 October 2021.
4. Confirm the steps being taken to investigate the Second Leak and provide an urgent update on your investigation into the First Leak including:
 - a. The stage the investigation process has reached and any findings to date; and
 - b. The name and standing of the individual(s) leading the investigations into both leaks.

A failure to take proper steps in response to the leaks would speak to wider institutional failings. In this regard, we sincerely hope that your response will set out a thorough and robust investigation process and include commitments to identify the person responsible for the leak and to sanction them in line with the seriousness of this breach.

5. Confirm whether the University has self-reported to the Information Commissioner's Office given the data protection breaches as a result of the leaks.

6. Confirm whether the University intends to take any action in connection with [name redacted] statements quoted in our letter of 10 November.

[Name redacted] appeal

The Article states "[a] Bristol university spokesperson declined to comment substantively on the leaked document, citing the confidentiality of [name redacted] appeal against his dismissal". Please confirm whether [name redacted] has indeed lodged an appeal.

If so, please confirm how you intend to collate further evidence from the complainants for any Appeal Panel to consider in a manner that preserves their confidentiality."

4. The university responded on 23 December 2021. It refused to provide the information citing section 32(2) of FOIA, section 36(b)(i)(ii) and 36(c) of FOIA and section 40(2) of FOIA.
5. Following an internal review, the university wrote to the complainant's legal representatives on 9 March 2022 and upheld its original position.

Scope of the case

6. The complainant through their legal representative contacted the Commissioner on 30 May 2022 to complain about the way their request for information had been handled.
7. On 13 December 2022, the Commissioner wrote to both the complainant's legal representatives and the university. He requested further submissions of the university's reliance on the above-mentioned exemptions and advised the complainant of the scope of his investigation.
8. The complainant's representatives provided further submissions on 13 December 2022. On 27 January 2023, the university also provided its further submissions to the Commissioner.
9. In their submissions, the university advised the Commissioner that in relation to points 2 to 6 of the complainant's request, it has provided the information to the complainant outside the FOIA regime. In addition, the complainant's representatives have also advised the Commissioner that they do not seek personal data of third parties, other than that relating to the ex-employee about whom the complaint was made.
10. Therefore, the focus of the Commissioner's investigation is point 1 of the complainant's request, which relates to the first report of December

2020. The Commissioner considers that the scope of his investigation is to determine whether the university is entitled to withhold the requested information under section 32(2), section 36(b)(i)(ii) and 36(c) and section 40 of FOIA.

Reasons for decision

Section 32- court records

11. Section 32(2) states that information held by a public authority is exempt information if it is held only by virtue of being contained in:
 - (a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of arbitration, or
 - (b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.
12. In the Commissioner's guidance¹ on section 32, section 32(4) explicitly restricts the definition of the term 'inquiry' to those inquiries which are governed by statute.
13. The university has explained that it is relying on section 32(2)(b) to withhold the first report, and 32(2)(a) to withhold the Terms of Reference. It states that the university is a chartered corporation whose legal status derives from a Royal Charter, together with the Ordinances and Statutes which comprise the University's Constitution and are subject to Privy Council approval.
14. It says that the investigation which resulted in the issuing of the first report was conducted under University Ordinance 10.4 (previously Ordinance 28), with reference to the Conduct Procedure (Manager's Guidance). The university advised that "Ordinances" are defined by the University's Charter of Incorporation as "*Ordinances made by the Board of Trustees under the Charter and Statutes.*" "*Statutes*" are defined as "*statutes made by the Board of Trustees under the Charter.*" As such it argues that the investigation was conducted under statute as defined in the university's Charter of Incorporation.
15. It also contends that whilst the university's power to conduct an inquiry does not subsist in a provision in an act passed into law, the power to

¹ <https://ico.org.uk/media/for-organisations/documents/2021/2619028/s32-court-inquiry-and-arbitration-records.pdf>

conduct the investigation which led to the first report was nevertheless conducted under statute, as it says that the university's authority derives from devolved power under statute.

16. The Commissioner is not convinced by the university's arguments, and he does not consider that the inquiry was governed by statute. Although the statutes referred to in the university's Charter of Incorporation are approved by the Privy Council, this is not supported by an enactment produced by Parliament, or an Act passed into law.
17. Therefore, the Commissioner does not consider that section 32(2) of FOIA is engaged as the inquiry described by the university does not meet the criterion under section 32(4) of FOIA. He considers the inquiry to be a formal inquiry commissioned by the university for its own internal processes following the receipt of the complaint about its ex-employee.

Section 36- Prejudice to the effective conduct of public affairs

18. Section 36 of FOIA states that information is exempt where, in the reasonable opinion of a Qualified Person (QP), disclosure would, or would be likely to, prejudice the effective conduct of public affairs.
19. The university has applied section 36(2)(b)(i)(ii) and 36(2)(c) to withhold the first report and the terms of reference. Arguments under these sections are usually based on the concept of a 'chilling effect.' The chilling effect argument is that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making.
20. The Commissioner's guidance² on section 36 states that information may be exempt under sections 36(2)(b)(i)(ii) if its disclosure would, or would be likely to, inhibit the ability of public authority staff, and others, to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation.
21. The Commissioner's guidance states that the chilling effect arguments operate at various levels and are likely to be strongest if the issue in question is still live. However, the timing of the request and whether the issue is still live should not be the only factors considered, but also the

² <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/#chilling>

actual content and sensitivity of the information in question. Therefore, it is important to explain the stage that the relevant advice process or decision-making process has reached and how closely it relates to other ongoing or future processes that may also be inhibited.

22. The exception at section 36 can only be engaged based on the reasonable opinion of a Qualified Person ("QP"). The Commissioner is satisfied that the Vice-Chancellor is authorised as the qualified person under section 36(5) of FOIA. A reasonable opinion need not be the most reasonable opinion available. It need only be within the spectrum of opinions that a reasonable person might hold and must not be irrational or absurd.
23. In the opinion of the QP disclosing the information into the public domain would be likely to inhibit the free and frank provision of advice and exchange of views in the future when advice and opinions are sought from relevant parties for investigatory purposes. It contends that this could include future advice from KCs ("then QCs") and will also cover submissions by other relevant parties for the purpose of investigations, where protection from exposure to the public domain is necessary for specific reasons. The Commissioner accepts the QP's opinion was reasonable one and therefore the exemption is engaged.

Public interest test

24. The purpose of the public interest test is to decide whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

University's public interest arguments

25. The university recognises that there is public interest in being open and transparent about its procedures and processes in high-profile matters. It agrees that, in high profile cases, there is public interest in being assured that its investigation has been undertaken in a suitable manner, subject to appropriate advice from relevant parties. It also states that the university has made public reference to the KC's report and therefore it recognises a public interest in understanding its content and how it has affected the conclusions of the investigation.
26. It contends that the disclosure of the information would impact on future investigations as it could make obtaining external input from relevant parties, specialists or external experts in the future harder if they know that their advice or submissions could be released and subjected to vociferous public scrutiny. The university argues that the exchange of views and provision of advice needed to ensure fair, robust and comprehensive investigatory procedures could be made more difficult and subject to a chilling effect. It believes that as an organisation in receipt of public funds. It is in the public interest that the chilling effect

does not happen so that the university is able to conduct investigations appropriately in line with its protocols and reasonable expectations.

27. The university argues that because of the media attention that this case has gained and the reaction resulting from the dismissal, there is a risk that individuals may feel deterred from expressing opinions that may be considered as controversial or unpopular. It contends that the disclosure of the requested information will exacerbate this reluctance and significantly prejudice the university's ability to investigate matters adequately and to the appropriate standard.

Complainant's public interest arguments

28. In their internal review request and complaint to the Commissioner, the complainant stated that they dispute how the disclosure of information in relation to a complaint investigation which is fundamentally a matter of private law, could possibly prejudice or be likely to prejudice the effective conduct of public affairs. The complainant also argues that the first report was partially disclosed on Electronic Intifada website and discussed at length. They say that while the university claimed that the first report had only very limited circulation, the named individual against whom the complaint was made had not required the removal of the information from the Electronic Intifada website. The complainant argues that it is not likely that the named individual considered the publication to have infringed his data protection rights and urged the Commissioner to consider these arguments when making his decision on this case.

The Commissioner's view

29. In reaching his decision, the Commissioner has considered all the correspondence submitted by the complainant's legal representative together with the submissions provided by the university. It is important to reiterate that although there are extensive arguments surrounding this matter, the focus of the Commissioner's investigation is the first report.
30. The Commissioner agrees that the disclosure of the information would likely inhibit the provision of advice and the free and frank exchange of views in future when advice and opinions are sought from relevant parties for investigatory purposes. He also agrees that it is important that the university is able to obtain the appropriate input, investigatory recommendations and submissions whether that be from KC's or other relevant parties for the purposes of the investigations. The Commissioner recognises that, inherent in the section 36(2)(b) exemption is the argument that a public authority should be afforded private space, in which, issues can be considered and debated, advice

from external experts can be sought and freely given and ideas tested and explored to protect the integrity of the deliberation process.

31. The Commissioner accepts that the subject matter associated with the withheld information was live at the time of the request. The QP argued that, although the ex-employee had been dismissed, the appeal process had not concluded and was still ongoing. The Commissioner agrees that the KC's report would have played an important role in the appeal process. The Commissioner agrees that the release of the report would subject the parties to external pressure, scrutiny and speculation that could have a detrimental impact on the ability to execute them in a fair and judicious manner. The Commissioner considers that such external pressure and scrutiny would prejudice the effective conduct of public affairs.
32. In the university's submissions, it advised the Commissioner that the appeal process has since concluded. However, this case has attracted such significant attention that it strongly anticipates similar levels of interest in an upcoming related Employment Tribunal hearing. The Commissioner agrees with the university's arguments, in that, considering the level of attention this case has garnered, the release of the information is likely to inhibit the free and frank exchange of views in the future for the purpose of deliberations.
33. For the reasons set out above the Commissioner considers that in all of the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure. Therefore, the university was not obliged to disclose the requested information. He has therefore not gone on to consider section 36(2)(c).

Section 40 personal information

34. This reasoning covers whether the public authority was correct to apply section 40 of FOIA to the request.
35. Section 40(2) says that information is exempt information if it is the personal data of another individual and disclosure would contravene one of the data protection principles. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable. 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.
36. The withheld information consists entirely of details of the investigation conducted by the KC regarding the named individual's conduct and behaviour and contains information from third party individuals who produced documentation that was analysed as part of the investigation, as well as the personal data of the complainant.

37. The Commissioner is satisfied that the withheld information both relates to and identifies the third parties concerned and therefore the information falls within the definition of personal data.
38. In the case of a 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. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary and whether these interests override the rights and freedoms of the individuals whose personal information it is.
39. The university recognises that disclosing the first report would ensure that it acts with transparency and in accordance with its decision-making procedures. It also recognises its obligations under Condition E2 for registration with the Office for Students to have in place adequate and effective management and governance arrangements to operate in accordance with its governing documents. It says that the disclosure of the first report will fulfil the legitimate interest of ensuring credibility of the university's decision-making process.
40. The Commissioner recognises that the complainant is pursuing a legitimate interest as they recognise that there is legitimate interest in the disclosure of the first report. However, the Commissioner notes that the complainant was informed of the outcome of the investigation in the university's letter of 24 June 2022 in accordance with the Independent Adjudicator for Higher Education's Good Practice Framework. The Commissioner also considers the information already in the public domain goes some way to meeting the legitimate interest identified. But he considers the fullness of the first report would be required in order to offer complete transparency and accountability and enable members of the public to see exactly what was taken into account and how such information then led to the decisions that were taken.
41. The Commissioner has also considered the complainant's arguments in relation to the university's reliance on section 40. The Commissioner notes from the complainant's submissions in respect of personal information that they require only the personal information of the ex-employee that appears in the first report and not that of other third parties. However the Commissioner's view is that the withheld information is intrinsically linked to the personal information of those third parties that the redaction in any form is not possible. The Commissioner does not consider there is a less intrusive means available for achieving that.
42. The Commissioner has considered whether disclosure would be likely to result in unwarranted damage or distress to the individuals. The

Commissioner has noted the complainant's arguments regarding the ex-employee's conduct in relation to information published on Electronic Intifada or comments the ex-employee may have publicly made. He has also considered the university's submissions in adhering to Ordinance 10 which requires all parties involved in operation of this ordinance to ensure that they maintain appropriate confidentiality within and outside the university. As such participants in the disciplinary process have a legitimate expectation of confidentiality.

43. The Commissioner does not consider the actions of the ex-employee to imply that they have an expectation that the university would disclose their input. Whilst he acknowledges that they held a senior public role and should expect accountability, the Commissioner maintains that the ex-employee is still entitled to some privacy and right of confidentiality especially in terms of more detailed information that was analysed and put forward against them.
44. The Commissioner accepts that the disclosure of the information would cause the ex-employee considerable distress and upset when they have already been held publicly accountable. It will be a step too far and constitute an unjustified level of intrusion.
45. In relation to the third parties who produced documentation that was analysed as part of the investigation, the Commissioner maintains his position at paragraphs 39 and 40 in the decision notice [IC-154680-S3N6](#).
46. In respect of the complainant's own personal information, the Commissioner considers that this could be satisfied by requesting for their information through the subject access request route.
47. 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 the disclosure of the information would not be lawful.
48. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
49. The Commissioner has therefore decided that the university was entitled to withhold the information under section 40(2), by way of section 40(3A) (a).

Right of appeal

50. 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

51. 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.

52. 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

**Esi Mensah
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