



Neutral citation number: [2024] UKFTT 00503 (GRC)

Case Reference: EA/2023/0172

**First-tier Tribunal
General Regulatory Chamber [Information
Rights]**

Heard: GRC Remote Hearing Rooms

Heard on 05 June 2024.

Decision given on 13 June 2024.

Before Panel: Brian Kennedy KC with Specialist Members, Dr. Phebe Mann and Daniel Palmer-Dunk.

Between:

NINA FREEDMAN

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

UNIVERSITY OF BRISTOL

Second Respondent

Representation:

For the Appellant: Adam Rose, Solicitor.

For the Respondent: Oliver Mills of Counsel.

For the Second Respondent: Eric Metcalfe of Counsel.

Decision: The appeal is dismissed.

REASONS

Introduction:

1. The Appellant appeals under section 57 of the Freedom of Information Act 2000 (“FOIA”), against the Commissioner’s Decision Notice dated 27 February 2023 with the reference number IC-173041-J2Z1 (“the DN”) which concerned her FOIA request to the Second Respondent (“the University”) for a copy of a report about its investigation of a former member of its academic staff. The Commissioner upheld the University’s refusal to disclose the requested information on the basis that it was exempt under sections 36 (record of a qualified person’s opinion) and 40 (personal information) FOIA.
2. As required by rule 23(3) of the 2009 Rules, the Commissioner states that he opposes the Appellant’s appeal and invites the Tribunal to dismiss it.

Factual Background to this Appeal and Decision Notice:

3. On 4 April 2019, the Appellant - who was at that time a student at the University - sent a letter to its Vice-Chancellor complaining about various statements made by a member of its academic staff (“the Academic”).
4. In July 2020, the University instructed external counsel (“the KC”) to carry out an investigation of the Academic’s statements and conduct under Regulation 4 of its Ordinance 28.
5. On 4 December 2020, the KC delivered the report (“the First Report”) to the University.
6. On or around 23 March 2021, the University instructed the KC to carry out an investigation of additional statements made by the Academic subsequent to the First Report. Again, the investigation was conducted under Regulation 4 of the University’s Ordinance 28 (subsequently renumbered as Ordinance 10).
7. On 28 May 2021, the KC delivered the second report (“the Second Report”) to the University.
8. On 1 October 2021, the Academic was dismissed from his position at the University on the basis that he had not met the standards of behaviour it expected from its staff.

9. On 22 October 2021, a website named Electronic Intifada published an article, containing leaked extracts from the First Report.
10. On 3 November 2021, the University wrote to the Appellant’s solicitor, expressing its dismay that *“your client saw extracts of the report which was commissioned to investigate her complaint put into the public domain without consent and in breach of strict confidentiality requirements. The report had a very limited circulation.”*
11. On 8 November 2021, Politics Today published an article containing an interview with the Academic. Among other things, he complained that the findings of the KC’s report were confidential.
12. On 26 November 2021, Electronic Intifada published a second article about the Academic. On this occasion, the article published a *“second University of Bristol report”* from May 2021.
13. On 30 November 2021, the Appellant sent a letter to the University via her solicitors, referring to the second Electronic Intifada article and asking it to provide the following:
*“Information required regarding the Reports and leaks of the same:
The Article appears to clarify that two separate reports were commissioned; one to investigate [the Appellant’s] 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 (the Tribunal’s emphasis)** 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 [KC] commissioned to write the Second Report and their Chambers – our existing concerns that the author may have been [name redacted] [KC] 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] [KC], please explain in full the measures taken to ensure the preparation of the Second Report was not impacted by [their] earlier involvement in the complaints process and how the University came to conclude that it would be appropriate to commission [them] 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 [the Academic's] statements quoted in our letter of 10 November.

[The Academic's] appeal

The Article states "[a] Bristol university spokesperson declined to comment substantively on the leaked document, citing the confidentiality of [the Academic's] appeal against his dismissal". Please confirm whether [the Academic] 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."

14. On 23 December 2021, the University responded to the Appellant's request, confirming that it held information in the scope of her request, namely: "*the report dated January 2021 which was commissioned to investigate your client's complaint and the terms of reference in relation to this report*". The University, however, refused to disclose the requested information on the basis that it was exempt under s32(2) (court records, etc), s36 (prejudice to effective conduct of public affairs), and s40 (personal information) FOIA.
15. On 13 January 2022, the Appellant asked the University to undertake an internal review of its refusal to disclose the requested information.

16. On 9 March 2022, the University notified the Appellant that it had completed its internal review and concluded that it was appropriate to maintain its previous refusal.
17. On 30 May 2022, the Appellant complained to the Commissioner concerning the University's handling of her request.
18. On 24 June 2022, the University notified the Appellant of the outcome of its investigation into the Academic.
19. In the course of the Commissioner's investigation, the University advised the Commissioner that it had provided the Appellant with information in relation to items 2 to 6 of her request outside the FOIA regime. The Appellant also confirmed to the Commissioner that she did not seek personal data of any third party, other than that of the Academic, the subject of the reports.
20. On 27 February 2023, the Commissioner issued the DN, in which he concluded materially as follows:
 - (i) the requested information did not engage the exemption under s32(2) FOIA because the inquiry, although made pursuant to the University's statutes, was not governed by an Act of Parliament (DN, § 16-17).
 - (ii) the Vice-Chancellor of the University was properly authorised as a qualified person under s36(5) FOIA and his opinion was a reasonable one that engaged the exemption under that section (DN, §§ 22-23);
 - (iii) 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, including the input of external counsel. The subject matter associated with the requested information was live at the time of the request and although the Academic had been dismissed by that time, the appeal process had not yet concluded. Disclosure of the KC's report would subject the parties to external pressure and scrutiny that would prejudice the effective conduct of public affairs. Even though the appeal process had since been concluded, moreover, the University anticipated similar levels of interest in relation to upcoming proceedings in the Employment Tribunal. In all the circumstances, therefore, the public interest in maintaining the exemption under s36(2)(b) outweighed the public interest in the disclosure of the requested information (DN, §§ 30-33);
 - (iv) in relation to the exemption for personal information under s40(2) FOIA by way of s40(3A) (a), the University had withheld details of the KC's investigation into the Academic's conduct, including information from third party individuals who produced documentation which was analysed

as part of the investigation, as well as the Appellant's own personal data. The withheld information both related to and identified the third parties concerned and therefore constituted their personal data. While the Appellant's request for the disclosure of the First Report pursued a legitimate interest, the information already in the public domain, including as the result of the University's letter of 24 June 2022, went some way to meeting this interest (DN, §§ 35-40); and

- (v) the withheld information was also intrinsically linked to the personal information of the third parties in a manner which prevented redaction in any form. Having regard to the University's Ordinance 10 which requires all parties to maintain appropriate confidentiality, moreover, the participants in the disciplinary process also had a legitimate expectation of confidentiality. The Academic also had an expectation of privacy and a right to confidentiality, particularly in relation to the more detail information that was analysed and put forward against him. The disclosure of the information would cause the Academic considerable distress and upset when they have already been held publicly accountable, giving rise to an unjustified level of intrusion. The Appellant's interest in her own personal data could be satisfied by way of a subject access request. In all the circumstances, the legitimate interest pursued by the Appellant was not sufficient to outweigh the data subjects' fundamental rights and the disclosure of the requested information would not meet the lawfulness requirement of Art 6 GDPR (DN §§ 40-48).

21. On 27 March 2023, the Appellant appealed to the First-tier Tribunal ('the Tribunal') against the Commissioner's DN.
22. On 17 April 2023, the Tribunal joined the University to the appeal as Second Respondent.

Grounds of Appeal:

23. The Appellant advances 5 Grounds of Appeal;

Ground 1: The Commissioner, when considering whether the disclosure would contravene the first data protection principle, erred by failing to take into account the circumstances under which extracts from the First Report came to be published on Electronic Intifada.

Ground 2: The Commissioner, when considering whether the disclosure would contravene the first data protection principle, erred by failing to take into account

that the Academic had publicly bemoaned that the University would not publish the first report.

Ground 3: The Commissioner erred by not indicating who the third parties referred to in the DN were and in what way disclosure of their personal data would contravene the first data protection principle.

Ground 4: The Commissioner erred by conflating section 36(2)(b)(i) and (ii) FOIA and treating them as one exemption.

Ground 5: In relation to the public interest balance, the Commissioner erred by failing to give any weight to the public interest mitigating in favour of disclosure.

The Commissioners' Response:

24. Ground 1 and 2: failure to take into account relevant factors: - By Ground 1 and 2, the Appellant contends the Commissioner, when considering whether disclosing the information would contravene the data protection principle in Article 5(1)(a) UK GDPR, erred by not taking into account relevant factors.
25. In relation to Ground 1, the complaint is that the Commissioner failed to take into account the fact that extracts from the First Report had been published on the website Electronic Intifada and, in particular, that (i) the First Report had a very limited circulation, (ii) the University had not disclosed the report to Electronic Intifada and (iii) the Academic is a regular contributor to Electronic Intifada.
26. In relation to Ground 2, the complaint is that the commissioner failed to take into account the fact that the Academic had “publicly bemoaned” that the University would not publish the First Report. These Grounds of Appeal are not understood. The Commissioner clearly took into account these arguments when considering whether disclosing the information would contravene the data protection principle in Article 5(1) (a) UK GDPR. The Commissioner responds as follows:
 - (1) At §40 of the DN, the Commissioner took into account the fact that extracts of the First Report were published online when deciding whether disclosure was necessary to achieve the legitimate aim in processing the data: *“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.”
(emphasis added).

(2) At §42 of the DN the Commissioner noted the Appellant’s arguments made in relation to the Academic’s conduct (these arguments are essentially the ones advanced under Grounds 1 and 2 of the Appeal):

“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 [Academic’s] conduct in relation to information published on Electronic Intifada [Ground 1] or comments the [Academic] may have publicly made [Ground 2]....”

(3) The Commissioner considered these arguments; however, he was not persuaded by them. At §43 of the DN he stated: *“The Commissioner does not consider the actions of the [Academic] imply that they have an expectation that the university would disclose their input...the [Academic] 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.”*

27. Accordingly, (the Commissioner argues) it is clear he did take into account the fact that extracts. of the First Report had been published on Electronic Intifada and the comments the Academic had made when deciding whether or not the section 40 exemption was engaged. Accordingly, the Tribunal is respectfully invited to dismiss Grounds 1 and 2.

28. The Commissioner notes that no challenge is brought to his finding of fact that the Academic had a reasonable expectation that the reports would not be published. In any event, the Commissioner submits no such challenge could succeed:

(1) The Appellant has not presented any materially new evidence. It is submitted the Tribunal should, therefore, proceed on the basis of the facts found by the Commissioner: Guardian Newspapers Ltd and Heather Brooke at [14(6)].

(2) The Commissioner’s finding was plainly correct:

(a) The published extracts were partial and did not undermine the Academic’s expectation that the full details of the First Report would remain confidential.

(b) The fact that the University would not publish the reports because the process was confidential does not detract but supports the Academic’s expectation that the full details of the First Report would remain confidential.

(3) In any event, even if the Academic did not have a reasonable expectation of privacy and would not be distressed if his data were disclosed there was still no

lawful basis for processing the third parties' data, which was inextricably linked to that of the Academic's.

29. Ground 3: the third-party data

By Ground 3, the Appellant complains the Commissioner did not identify the third parties and did not explain in what way disclosing their data would contravene Article 5(1)(a) UK GDPR. The Commissioner submits:

(1) He was not required to identify the third parties. Doing so would have constituted the processing of their data and would have undermined the protection offered by section 40 of FOIA.

(2) The Commissioner did explain the way in which disclosing the third parties' data would contravene Article 5(1)(a) of the UK GDPR. At §45 he referred to the analysis in his Previous DN in which he found that the third parties had a reasonable expectation that information disclosed during the investigation would be confidential and that given the sensitivities the investigation addressed it was reasonable to say that disclosure would cause those individuals considerable distress and upset.

30. Accordingly, the Commissioner submits that Ground 3 is without merit and invites the Tribunal to dismiss it.

31. Ground 4: conflating Section 36(2)(i) and (ii)

By Ground 4 the Appellant claims the Commissioner impermissibly conflated section 36(i) and (ii) and treated them as one exemption.

32. This Ground, the Commissioner submits, has no merit. The Commissioner's s.36 Guidance notes public authorities can rely on both exemptions. The opinion of the University's qualified person stated that the disclosure of the information requested would inhibit (i) the free and frank provision of advice and (ii) the free and frank exchange of views for the purpose of deliberation. It was not, therefore, an error to consider that both of these exceptions were engaged. In considering the public interest balance the Commissioner and the Tribunal often consider section 36(i) and (ii) together: see for example, *Murphy v Information Commission* (EA/2020/0265) at [27].

33. Accordingly, the Commissioner respectfully invited the Tribunal to dismiss Ground 4.

34. Ground 5: failure to give any weight to the public interest in favour of disclosure. By Ground 5 the Appellant submits that the Commissioner gave no weight to the public interest factors in favour of disclosure. This is incorrect.
35. At §25 of the DN, the Commissioner set out the public interest the University had identified in favour of disclosure, including the interest in transparency, the interest in ensuring that the investigation had been undertaken in a suitable manner, and the interest in understanding the content of the report and its impact on the conclusion of the investigation.
36. At §28 of the DN, the Commissioner set out the Appellant's arguments concerning public interest noting that parts of the First Report had been published online and the Academic had not requested that this information be removed.
37. The Commissioner made clear at §29 of the DN, that in making his decision, he had: *"considered all the correspondence submitted by the complainant's legal representative together with the submissions provided by the university"*. This included the public interest arguments in favour of disclosure, which he had set out at §§25 and §28 of the DN.
38. The Commissioner submits he gave weight to these factors but at §33 of the DN concluded these factors were outweighed by the public interest in maintaining the exemption, which he set out at §§26,27, and 30-32 of the DN.
39. Accordingly, the Commissioner has respectfully invited to dismiss Ground 5.

The Commissioner on The University's Response:

40. The University renews its submissions that the requested information is exempt under section 32(2) FOIA on the basis that "(i) the terms of reference were a document 'placed in the custody of a person conducting an inquiry ... for the purposes of the inquiry'; and (ii) the First Report was a document 'created by a person conducting an inquiry ... for the purposes of the inquiry' under s32(2)(b)".
41. The University contends that KC's investigation was an inquiry made under an enactment as its ultimate basis derives from an Order in Council. The Commissioner submits, consistently with his section 32(2) Guidance, that the section only applies to statutory inquiries.
42. Section 32(4)(c) defines inquiry as "any inquiry...held under any provision contained in, or made under, an enactment...". It is submitted the word

‘enactment’ concerns legislation and not provisions made in exercise of His Majesty’s Royal Prerogative, such as the Orders in Council the University rely upon.

43. The word ‘enactment’ appears multiple times in FOIA. A number of provisions in FOIA distinguish between enactments and His Majesty’s prerogative: see section 4(2)(a), 30(2)(a)(iii), 31(1)(h) and 31(1)(i). This suggests that the word enactment does not include provisions made in the exercise of His Majesty’s prerogative. Otherwise distinguishing between the two would be unnecessary.
44. There is a presumption that where the same words are used more than once in an Act, they have the same meaning: Bennion, Bailey and Norbury on Statutory Interpretation (8th Ed, LexisNexis, 2020) at [21.13] judicially approved by Lord Wilson in *Webb v Webb* [2020] UKPC 22; [2021] 1 FLR 448 at [119]. Accordingly, the word enactment in section 32(4)(c) should be construed as excluding Orders in Council made in exercise of His Majesty’s Royal Prerogative.
45. Further, the Explanatory Notes accompanying FOIA supports an interpretation of section 34(2)(c) limiting ‘inquiries’ to statutory inquiries. Paragraph 119 of the Explanatory Notes state: “Subsection (2) of this section extends the exemption to information recorded or obtained by a public authority for the purposes of its functions relating to statutory inquiries (including those to which the Tribunals of Inquiry (Evidence) Act 1921 applies) and to arbitrations.” (emphasis added).
46. The Commissioner was, therefore, correct at §16 of his DN that the KC’s investigation was not an inquiry held under any provision contained in, or made under, an enactment and, therefore, the exemption in section 32(2) is not engaged.
47. The University also relies on the exemption in 41 FOIA. This exemption was not relied upon when the Commissioner issued his DN, and he does not comment on its application.
48. For the reasons given above the Tribunal is respectfully invited by the Commissioner to dismiss the appeal, and uphold the DN.

The Hearing:

49. On 5 June 2024, the Commissioner relied upon his DN and reasoning therein and in the written Response as set out above [§§ 24 -48 above]. The Appellant and the University were legally represented (see above) and their submissions echoed and expanded upon their written submissions in a comprehensive and competent manner.

50. The Tribunal noted and expressed the view that any reported opinion of the academic member of staff does not amount to credible evidence on which we could rely. Further and importantly, we note from the withheld information, there are a minimum of 22 Third Parties who could be identified, either directly or indirectly by disclosure of the withheld information.
51. The Tribunal carried out a Closed session within the hearing and the following Gist was recorded as follows: -

The Gist:

52. The Tribunal held a closed session in this matter. Counsel for the University made submissions on the following matters:

“1. The nature of the information passed by the University to Professor McColgan in relation to her inquiry.

2. The number of the third parties whose personal data was contained in the report, their names and (in most cases) their positions. This did not include, for instance, statements made by public figures in the media.

3. The extent to which the personal data of those third parties (not including the Appellant or Dr Miller) permeated the report.

4. The nature of some of the findings made by Professor McColgan and the extent to which the disclosure of those findings might cause upset or distress to third parties.

5. The expectations that the third parties had in the confidentiality of the inquiry under Ordinance 28 (now 10) of the University.

6. The Tribunal asked a question about the application of s40(1) FOIA. Counsel for the University replied that, although s40(1) FOIA was engaged, it was not strictly necessary to decide the point given the number of other exemptions engaged.

7. The Tribunal asked whether it was necessary for it to determine all the exemptions raised. The University replied that the key exemptions in this case were those under ss 36 and 40(2) but that the other exemptions were also maintained.”

Discussion:

53. Without prejudice to the breadth of the appeal the Tribunal note the following:

- (i) Although it has not been challenged, for the avoidance of doubt the Tribunal accept that the exception at section 36 can only be engaged based on the reasonable opinion of a Qualified Person (“QP”). We accept that the

Commissioner was properly satisfied that the Vice-Chancellor is authorised as the qualified person under section 36(5) of FOIA and that 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.

- (ii) Again, for the avoidance of doubt, the Tribunal accepted the opinion of the QP in relation to disclosing the information to the public, including the 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 the KC 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. Disclosure to the world at large would be likely to inhibit the free and frank provision of advice as do the Tribunal. The Tribunal unreservedly accept and adopt this finding.
- (iii) Considering disclosure is to the world at large, the Tribunal carried out its investigatory function of reviewing and testing the closed or withheld material and find there is no evidence that the Academic or indeed any of the Third Parties named, identified or identifiable in the withheld information, who would or would be likely to be affected by disclosure, have waived their rights to confidentiality.
- (iv) There is evidence of at least 22 third parties whose data rights would be affected by disclosure, and we are satisfied that a significant number of those could be identified even with redaction of their names. We are satisfied that a significant number of university staff would be inextricably linked in one way or another with the academic so that redaction would not be a practical option. They do not need to be identified as to do so, in our view would defeat the point of the material or relevant exemptions relied upon.
- (v) The Tribunal considered the nature of some of the findings made by the KC and the extent to which the disclosure of those findings might cause upset or distress to third parties and are satisfied it is of a sensitive and confidential nature.
- (vi) The Tribunal find that reasonable expectations that the third parties had in the confidentiality of the inquiry under Ordinance rule 28 (now rule 10) of the University, is significant for the purposes of the measure of the degree of expectation that such information would not be made available to the world at large without their consent.

The Material Legal Issue for the Tribunal:

Section 36- Prejudice to the effective conduct of public affairs.

54. 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.
55. 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.
56. The Commissioner’s guidance 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.

Conclusions:

57. The principal issue in our view is the reliance on the exemption under ss36(1)(b)(i) and (ii).
58. The Tribunal find there is no error of law in the way the DN dealt with s36(b) (i) and (ii). We concede it could have been clearer, but this does not amount to an error of Law. Paragraphs 30 – 33 of the DN distinctly cover both the provision of advice (i) and expressions of views for deliberation (ii). We agree with but do not rely upon the view supported by the decision in Montague in the Court of Appeal, that a combination of points in the balance of the public interest test to be reached allows for the combined or aggregate public interest to be assessed and in any event, we find that §§ 30 – 33 of the DN individually identify the engagement of both ss36(1)(b)(i) and (ii) of FOIA.
59. The Tribunal do not agree that applying s36 would be stretching the chilling effect argument, nor that publication would have no effect. The fact that the report was made available to the public for a discrete time and for a discrete purpose (the Employment Tribunal post DN) does not mean that it is therefore in the public domain (in the sense of available to the whole world), nor that safe spaces should not generally be maintained. Nor does the fact that the part of the 1st and the entirety of the 2nd report being ‘leaked’ weaken the argument for the public authority maintaining the exemption for the remainder.

The Public Interest:

- 60.** The purpose of the public interest test is to decide whether the public interest in maintaining the exemption outweighs the public interest in disclosure.
- 61.** On the University's public interest arguments: The University recognises that there is a 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.
- 62.** The University 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. These are compelling arguments in favour of non-disclosure, and indeed the purpose of the material FOIA exemption under consideration.
- 63.** The University further 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. Again, compelling arguments in favour of non-disclosure.
- 64.** 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. There is no credible evidence on the issues put forward on behalf of the Appellant to support these submissions even if they were accepted as being material to the issues before the Tribunal, which they are not.

65. The Tribunal have no hesitation in agreeing that the Commissioner was correct to conclude that the balance of the public interest under s2(2)(b) favoured the maintenance of the exemption under ss36(1)(b)(i) and (ii) for the reasons set out at Paragraph 20 (iii) above. The Tribunal accept the genuine and significant interest the Appellant and the public has in transparency and accountability for the obvious reasons claimed and the wider interest of the example cited on behalf of the Appellant, the actual benefits of disclosure would or would be likely to confer or promote as suggested through APPGER v IC and FCO [2013] UKUT 0560 (AAC) etc.
66. However, each case must be decided on its merits. As has often been said of public interest in these cases; substantial public interest in a topic or political issues does not equate with what is best in the public interest when it comes to the disclosure of sensitive personal data. In all the circumstances as set out above in this case, the Tribunal accept that the purpose for the exemption under s32 the public interest under s2(2)(b) favoured the maintenance of the exemption under ss36(1)(b)(i) and (ii) and non-disclosure of the withheld information.
67. The Tribunal find that the Commissioner was right to conclude that the disclosure of the personal data of third parties contained in the report would contravene the data protection principles contrary to s40(2) FOIA and we accept and adopt the reasoning as set out in §§ 34 – 49 of the DN.
68. That is sufficient for us to dismiss the Appellant's appeal and therefore it is not necessary for us to determine the other exemptions discussed herein.

Obiter:

69. Obiter and without prejudice we are of the view that the Commissioner was probably right to conclude that the requested information was not also exempt under s32(2). We are the view that applying s32 to this investigation may be to draw too wide an interpretation of the exemption. It seems to us that the scope of

s32 is intended to apply to inquiries with a clear statutory basis however Mr Metcalfe on behalf of the University raises some compelling arguments beyond this narrow interpretation, it does not affect the principal issue in Appellant's appeal herein which we make our finding upon.

70. Accordingly, we must dismiss the appeal.

Brian Kennedy KC

6 June 2024.