NCN: [2024] UKFTT 00795 (GRC)

Case Reference: EA/2022/0385

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard on: 4 March 2024
Further consideration on: 20 May 2024
Decision given on: 4 September 2024

Before

TRIBUNAL JUDGE HEALD
TRIBUNAL MEMBER SAUNDERS
TRIBUNAL MEMBER PEPPERELL

Between

ALAN DAVID SOKAL

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) THE UNIVERSITY OF ESSEX

Respondents

The Appeal was decided without a hearing as agreed by the parties and allowed by the Tribunal by rule 32(1) of the Tribunal Procedure (First -Tier Tribunal) (General Regulatory Chamber) Rules 2009.

Decision: The Appeal is dismissed.

REASONS

Introduction

1. This Decision relates to an Appeal brought by the Appellant pursuant to section 57 Freedom of Information Act 2000. It is in respect of a decision notice issued by the Information Commissioner and concerns a request for information made to the University of Essex.

2. References to page numbers in this Decision are to an open bundle provided for the Appeal of 1,669 pages. If a reference is to one of the many documents provided but not included in that bundle the reference is to the internal numbering of that document itself.

3. We recognise that notwithstanding the Senior President of Tribunals Practice Direction of the 4 June 2024 this Decision is lengthy. This is because we considered the amount of content necessary to deal with the Appeal and the many points raised. However what follows is a summary of the submissions, evidence and our view of the law. It does not seek to provide every step of our reasoning. The absence of a reference by us to any specific submission or evidence does not mean it has not been considered.

4. The Appeal was first considered by the Tribunal on 4 March 2024. Due to the number of issues raised and the amount of material provided we considered it necessary and appropriate and in compliance with the overriding objective (in particular rule 2(2)(a) 2009 Rules) to reconvene on 20 May 2024 to continue our consideration of this matter.

5. In this Decision we have adopted the following definitions.

Freedom of Information Act 2000	FOIA
Data Protection Act 2018	DPA
United Kingdom General Data Protection Regulation	GDPR
The Tribunal Procedure (First -Tier Tribunal) (General Regulatory Chamber) Rules 2009	2009 Rules
Alan David Sokal	the Appellant
The Information Commissioner	the IC
University of Essex	UoE
Decision Notice	the DN
The Grounds of Appeal	the GoA
Report commissioned by UoE and prepared by Akua Reindorf KC	the Report

The Qualified Person	the QP
The Qualified Person's Opinion	the QPO
The Vice Chancellor of UoE	the VC
Public Interest Balance Test in section 2(2)(b)FOIA	the PIBT
The Upper Tribunal	the UT
The First-tier Tribunal	the FtT
Mr Bryn Morris the Registrar and Secretary of UoE	Mr Morris
The open bundle of papers prepared for the Appeal	the Bundle
A table prepared by UoE setting out its rationale for each redaction	the Table
Guidance provided by the Information Commissioner's Office	the Guidance

Background

6. This Appeal relates to the Report which is entitled:-

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

7. The events surrounding the subject matter of this Appeal have been widely reported. In summary (see for example H1656 and the Report E489):-

- Professor Joanna Phoenix was invited to take part in a criminology seminar at UoE on 5 December 2019. Her talk was entitled *"Trans rights and justice: complicated contours in contemporary sex, gender and sexualities politics when thinking about issues of justice and punishment".* On the day of the event it was cancelled.

- On 9 December 2019 the VC published a blog reporting that a review of the cancellation was being commissioned.

- Professor Rosa Freedman's invitation to take part in an event scheduled for 30 January 2020 at UoE on "the state of antisemitism today" for Holocaust Memorial week was initially rescinded. We understand (see E525) that Professor Freedman did subsequently attend that event.

- Akua Reindorf KC was appointed by UoE to carry out a review and report. The Report was published in a redacted form by UoE in May 2021 (487-594).

8. The Appellant, in the GoA (A101), set out his view of the public importance of the Report. He said:-

"Finally, and above all, the importance of the Reindorf Report goes far beyond the University of Essex, and therefore far beyond the specific recommendations that are contained in the Report. The Report is concerned with issues of academic freedom and the freedom of expression; it analyses in detail two recent incidents at the University of Essex where those core academic values were egregiously violated. These are obviously vital matters to all those of us who work at universities. But not just: they are currently being hotly debated in the public and political arena, including a Higher Education (Freedom of Speech) Bill that has been proposed by the Government and is currently before Parliament and an ongoing inquiry into Freedom of Expression that is being conducted by the parliamentary Joint Committee on Human Rights. In introducing its Bill, the Government drew attention to what it called "unlawful 'silencing'" and "the chilling effect of censorship on campus", asserting that this chilling effect is "growing". In order to evaluate whether the Government's analysis is accurate and whether its proposed remedies would be helpful, harmful or mixed, legislators and citizens need to have as much hard information as possible concerning the actual situation of freedom of expression on UK campuses today. The Events at the University of Essex that are recounted in detail in the (unredacted) Reindorf Report are a prime example of the situation that the Government's Bill purports to address. How are we supposed to evaluate the Government's proposed remedies, if we know nothing of the facts that are claimed to motivate those remedies? In particular, by having some hard facts about the dynamics that led to these egregious violations of academic freedom and the freedom of expression — i.e., which actors (students, academic staff, academic departments department heads, University administrators, the Registrar, the Vice-Chancellor) did what, when, and with what consequences — we can learn something about the incentives motivating the various actors, and how those incentives might be modified were the Government's Bill to become law. Only in this way can we rationally judge whether the Government's proposed remedies would be helpful, harmful or mixed. It is manifestly in the public interest that the Facts and Evidence section of this Report be made publicly available.

Furthermore, the issues at stake here go far beyond this one Bill, and indeed concern some of the most contentious social and political issues being debated today both in the UK and abroad:

- *tensions between the freedom of expression and the rights of racial and sexual minorities to be free from an "intimidating, hostile, degrading, humiliating or offensive environment*
- *the positive and negative aspects of so-called "cancel culture" and "woke" ideology;*
- *debates over subjective vs. objective notions of "harm" and "safety";*

- *debates over workplace and university trainings in "equality, diversity and inclusion";*

- *debates over the proper role of schools and universities in a democratic society."*

9. In the GoA (A110) the Appellant provided his submissions as to *"why all this matters"*. He referred for example to freedom of expression, academic freedom, UoE's charter, the Education (No 2) Act 1986, the role of the Office for Students and the Higher Education and Research Act 2017. He said (from A110):-

   "*But having these laws on the books in no way guarantees that the freedom of expression and academic freedom will be preserved in real life. Powerful forces, on both extremes of the political spectrum, today militate against free debate; and the unfortunate Events at the University of Essex show incontrovertibly that those illiberal forces can be successful in attaining their goals of shutting down speakers that they dislike, even (or especially) at universities. Parliament is now debating whether new laws are needed to strengthen the protection of free speech at universities and elsewhere, and many people around the country are involved in this debate…But one key input to this debate is missing: hard evidence concerning the dynamics of violations of freedom of expression. The Facts and Evidence section of the Reindorf Report would provide crucial information of this kind. There is a* ***very powerful public interest*** *in making the Facts and Evidence section of the Reindorf Report available to Parliament and to the public*"

10. We accept that the Appellant was raising issues of considerable interest for many. However it is important to record that the role of the FtT, when considering an Appeal against the IC's conclusions in a DN, is limited to the jurisdiction provided in section 58 FOIA. This is to consider whether the DN is not in accordance with the law or to the extent that the DN involved an exercise of discretion by the IC if he should have exercised his discretion differently.

<u>Evidence and matters considered</u>

11. A considerable amount of attention has been given to this Appeal by the parties and there was a considerable amount of material provided to us across a broad range of legal and factual issues. A summary of the open information provided to and considered by the Tribunal is in the appendix to this Decision.

Open Bundle

12. For the Appeal the Tribunal had the Bundle and a substantial number of additional items provided but not included in the Bundle. The Tribunal was

provided with correspondence and documents setting out the parties' positions. We also had a number of submissions from the parties on law and evidence including:-

- a partially redacted witness statement of Mr Morris itself with a bundle of exhibits (H978- H1669) which we found to contain a useful insight into the way in which UoE had dealt with these issues and the reaction amongst staff, students and others to the issues and the Report.
- the Appellant's comments on the statement.
- the redacted form of the Report(487-594) and the Table (H1022-H1150).
- submissions by the parties on sections 41 and 36 in particular.
- the Appellant's skeleton argument.
- paperwork provided by UoE including concerning the QPO (G919-G934) and on the PIBT (G935-G941).

Closed material

13. Closed documents were provided pursuant to rule 14(1) 2009 Rules and reviewed by us. In considering them we remained alert to our obligations set out in the decision of the Court of Appeal in *Browning -v- Information Commissioner [2014] EWCA civ 1050.* Having reviewed the material we were satisfied that the rule 14 Direction had been appropriate.

Gist of the closed material

14. Most of the material in the closed folder is a redacted version of material in the Bundle seen by the Appellant. The form of redaction allows the reader to see the full extent of the non disclosed elements. Therefore the provision of a gist of the closed material to the Appellant might have been unnecessary. However (at page A151) the Appellant asked for a gist and not every item in the closed material is simply a redacted version of that provided in the Bundle. Additionally we had regard to the decision of the UT in *Barrett v The Information Commissioner & Financial Ombudsman Service [2024] UKUT 107 (AAC) (20 April 2024)* (see para 104 for example).

15. As a result of the combination of these factors Directions were given dated 30 May 2024, after our further deliberations, requiring UoE to prepare a gist of the closed material to the Tribunal and parties. Further time to prepare the Gist was given to UoE by Directions dated 19 June 2024. On 9 July 2024 the

Gist was provided by UoE and the Appellant commented on the Gist on 12 July 2024.

16. The Appellant however also made an application (dated 12 July 2024) in which he sought a number of Directions in respect of the Gist. In summary he asserted that the Gist was inadequate and asked that UoE be required to provide more information. However for the reasons set out in the relevant Decision dated 19 August 2024 (and having considered his submissions, *Barrett* and *Browning* and rule 2 2009 Rules) the Appellant's Application was refused.

The Request, Response and Internal Review

17. On 26 May 2021 the Appellant made a request to UoE for information pursuant to FOIA as follows *"....I am requesting an unredacted (except for the deletion of individuals' names) copy of the [the Report] ....."* He says:-

"This report bears on issues of academic freedom and the freedom of expression, which are currently being hotly debated in the public arena (including a Bill now before Parliament) and which are of particular relevance to those of us who work at universities in the UK. It is manifestly in the public interest that this report be made publicly available.

I praise the University of Essex for making part of this report publicly available. But in the version posted on the University website, the entire Facts and Evidence section (pages 4–38) is blacked out. How on earth are we supposed to evaluate the recommendations, if we know nothing about the events that gave rise to those recommendations?"

18. On 23 June 2021 UoE confirmed it held the information requested (C267). On 14 September 2021 UoE provided its Response to the Request (from C 296). In it, in summary, UoE said that, while since first publication the Report had been published with fewer redactions, some parts would remain redacted in reliance on the exemptions provided in sections 41(1), 40(2), 36(2)(b)(ii) and 36(2)(c) FOIA.

19. The Appellant requested a review of the Response on 9 August 2021 (273-287). The detailed outcome of UoE's review was notified to the Appellant on 12 November 2021 with appendices (C342 to C415). No change of position emerged from the review but UoE did conclude that certain aspects of its Response could have been better and issued an apology (C350).

20. The Appellant said of this review *"It is clear that Professor Woollard expended considerably effort in carrying out this review. Please express to him my gratitude."*

He went on to add *"on the other hand you will not be surprised to learn that I consider the content of his review to be seriously defective….."*

Complaint (from D418)

21. On 6 January 2022 the Appellant complained to the IC by section 50 FOIA. In answer to the question *"what could the public body do to resolve your complaint"* he wrote:-

"Disclose the entire Reindorf Report except for "very" limited redactions to remove the names and identifying information of individuals other than senior staff, etc."

22. The Complaint was supported by submissions and supplemented by a letter dated 6 September 2022 (D431-D444) and then again on 7 September 2022 (D445 -D449). UoE provided information to the IC by letter dated 11 October 2022 (D455 -D471).

The DN (A1-A21)

23. On 27 October 2022 the IC issued the DN. The conclusion of the IC was as follows:-

1. The complainant has requested an unredacted version of a published report on the cancellation of external speakers associated with a Centre for Criminology seminar and a Holocaust Memorial Week – the 'Reindorf Review'. The University of Essex ('the University') disclosed some of the previously redacted information but has continued to withhold the remaining redacted information under sections 36(2), 40(2) and 41(1) of FOIA. These concern prejudice to effective conduct of public affairs, personal data and information provided in confidence respectively.

2. The Commissioner's decision is as follows:

The University correctly applied section 36(2)(c) and/or section 40(2) and/or section 41(1) of FOIA to the information it is withholding and, where relevant, the public interest favoured withholding this information.

The University's handling of the request did not comply with section 10(1) of FOIA, and its refusal did not comply with section 17(1).

3. The Commissioner does not require the University to take any corrective steps."

24. Section 10(1) FOIA relates to timescales for a public authority to respond to a FOIA request and section 17(1) deals with the information a public authority is required to give to a requester in the event that a request is refused. We were not required to consider these matters as part of the Appeal.

The Appeal

25. The Appellant issued the Appeal on 23 November 2022 (A22- 29). In it the outcome sought is:-

"I request from the Tribunal a substituted decision notice in which the University of Essex is ordered to disclose the entire Reindorf Report subject to the (hopefully small) redactions specified by the Tribunal in a confidential annex."

26. The Appeal is supported by a letter dated 23 November 2022 (A30-A34) as part of the GoA from A35- A127. Since the Appeal was lodged, in summary (but see the Appendix for a fuller version) on:-

16 December 2022 the IC provided a Response
28 December 2022 the Appellant Replied
27 January 2023 UoE was added as a party
14 March 2023 UoE provided a Response
20 March 2023 the Appellant Replied

Role of the Tribunal

27. The Tribunal's role in an Appeal by section 57 FOIA relates to the IC's DN and is set out in section 58. This provides that:-

(1) If on an appeal under section 57 the Tribunal considers—

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

28. In *Information Commissioner v Malnick and Advisory Committee On Business Appointments [2018] UKUT 72 (AAC)* (see para 90) the UT said:-

"As is clear from section 58(2) and Birkett…the F-tF exercises a full merits appellate jurisdiction and so stands in the shoes of the Commissioner and decides which (if any) exemptions apply. If it disagrees with the Commissioner's decision, the

Commissioner's decision was "not in accordance with the law" even though it was not vitiated by public law error."

29. Additionally as regards the Tribunal's role we noted (para 30) *Peter Wilson -v- The Information Commissioner [2022] UKFTT 0149:-*

"...the Tribunal's statutory role is to consider whether there is an error of law or inappropriate exercise of discretion in the Decision Notice. The Tribunal may not allow an *appeal simply because it disagrees with the Information Commissioner's Decision. It is also not the Tribunal's role to conduct a procedural review of the Information Commissioner's decision making process or to correct the drafting of the Decision Notice."*

Entitlement to information

30. FOIA provides that any person making a request for information to a public authority is entitled to be informed in writing if that information is held (section 1(1) (a) FOIA) and if that is the case to be provided with that information (section 1 (1) (b) FOIA).

31. These entitlements are subject to a number of exemptions some of which are absolute and others are subject to the PIBT in section 2(2)(b) FOIA which is that:-

"In all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

32. UoE relies on 4 exemptions for the redactions it has made namely those found at sections 41(1) and 40(2) and sections 36(2)(b)(ii) and 36(2)(c) of FOIA.

Section 41(1)

33. Section 41(1) provides that information is exempt if:-

(a)it was obtained by the public authority from any other person (including another public authority), and
(b)the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

34. This exemption is an absolute exemption by section 2(3)(g) FOIA and thus the PIBT does not apply. However it is a defence to a claim of breach of confidence to assert that disclosure was in the public interest. In effect this means that if the public authority (in this case UoE) would itself have had a public interest

defence in an action for breach of confidence then the exemption is not maintained.

35. In *Coco -v- A N Clark (Engineers) Limited [1968] F.S.R.415* Megarry J identified a three part test to determine if the obligation of confidence is brought into being. These parts are first that the information must have the necessary quality of confidence. Secondly the information must have been imparted in circumstances importing an obligation of confidence. The third element is that there must be unauthorised use of the information.

36. *Coco* also referred to whether a claimant would need to show detriment resulting from the unauthorised use. Meggary J (at 48) recognised that it might in some situations not apply and in *Bluck v ICO & Epsom and St Helier University Hospital NHS Trust, EA/2006/0090* the Tribunal in dealing with a request for the medical records of a deceased child by her parent held:-

"... the principle to be drawn from this is that, if disclosure would be contrary to an individual's reasonable expectation of maintaining confidentiality in respect of his or her private information, then the absence of detriment in the sense apparently contemplated in the argument presented on behalf of the Appellant, is not a necessary ingredient of the cause of action. ..."

37. In *Derry City Council -v- the Information Commissioner (EA/2006/0014)* the Tribunal set out the following list of issues to be determined when considering section 41:-

(a) was the information obtained by the Council from a third party, for the purposes of section 41(1)(a) and, if so

(b) would its disclosure constitute an actionable breach of confidence, that is:

(i) did the information have the necessary quality of confidence to justify the imposition of a contractual or equitable obligation of confidence?; if so
(ii) was the information communicated in circumstances that created such an obligation?; and, if so
(iii) would disclosure be a breach of that obligation?;
and, if this part of the test was satisfied:

(c) would the Council nevertheless have had a defence to a claim for breach of confidence based on the public interest in disclosure of the information?

38. In *Evans v Information Commissioner [2012] UKUT 313 (AAC)* the UT held (at 38):-

"*As mentioned earlier, section 41 is an absolute exemption. It is common ground that where section 41 arises there will nevertheless be a public interest balance. That balance does not arise under section 2. Instead, it arises because breach of confidence (which for these purposes includes a breach of privacy) will not be actionable if the defendant shows that the breach was justified in the public interest. There is a distinction here from qualified exemptions, for the burden lies on Mr Evans to show that the necessary breach is in the public interest.*"

39. The parties have provided a number of additional submissions and referred to various cases on section 41(1) FOIA. From these we noted and accepted these statements of principle that:-

- If the confidential information under consideration is about individuals then if the person with the potential cause of action is unidentifiable or can be rendered unidentifiable by suitable redaction then there may be no actionable breach of confidence.

- If part of a document is covered by the duty of confidentiality a public authority should seek to apply the smallest amount of redactions it can to ensure the confidentiality is maintained with the material left unredacted to be disclosed unless another exemption applies.

- In *Mckennitt V Ash [2006] EWCA Civ 1714* Buxton LJ Held (at 11)

  'in order to find the rules of the English law of breach of confidence we now have to look in the jurisprudence of articles 8 and 10. Those articles are now not merely of persuasive or parallel effect but…are the very content of the domestic tort that the English court has to enforce…' (Para 11)

- Article 8 ECHR provides that

  1. Everyone has the right to respect for his private and family life, his home and his correspondence

  2 there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

- Article 10 ECHR states that:-

  "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

40. The Appellant in the GoA (page A73) also makes submissions about "*The dangerous public-policy implications were the University's claims to be accepted.* He says:-

"…The University's claims, if accepted, would set a precedent that any public authority could suppress the disclosure of the Facts and Evidence section of any investigative report, whenever those facts might be embarrassing to the public authority, simply by purporting to defend the confidentiality rights of witnesses. This would be a dreadful public policy, and wholly contrary to the principles of FOIA."

41. We do not accept this submission. The statutory basis of FOIA in providing an entitlement to information is set out in section 1(1) FOIA. This is subject to the statutory exemptions also set out in FOIA including by section 41. While not itself directly subject to the PIBT the test is subject to a consideration of the public interest. These provisions (and relevant legal authorities) are the basis upon which our decisions are to be made by section 58 FOIA.

42. In carrying out a consideration of the PIBT to determine if a public authority would have a public interest defence to a claim brought for breach of confidentiality the IC suggests the Tribunal should (A133):-

".. carry out an exercise similar to the public interest test under FOIA, except that (i) the balancing exercise starts from the presumption that confidentiality should be maintained; and (ii) purely private interests in maintaining confidentiality can weigh against disclosure (Derry City Council v Information Commissioner, IT, 8 January 2006)."

43. We are not bound by the Guidance but we found its overview useful. It refers to the Judgment of the Court of Appeal in *Associated Newspapers Limited 00 HRH Prince of Wales [2006] EWCA Civ 1776 at para 67*

"There is an important public interest in the observance of duties of confidence. Those who engage employees, or who enter into other relationships that carry with them a duty of confidence, ought to be able to be confident that they can disclose, without risk of wider publication, information that it is legitimate for them to wish to keep confidential. Before the Human Rights Act came into force the circumstances in which the public interest in publication overrode a duty of confidence were very limited. The issue was whether exceptional circumstances justified disregarding the confidentiality that would otherwise prevail. Today the test is different. It is whether a fetter of the right of freedom of expression is, in the particular circumstances, 'necessary in a democratic society'. It is a test of proportionality. But a significant element to be weighed in the balance is the importance in a democratic society of upholding duties of confidence that are

created between individuals. It is not enough to justify publication that the information in question is a matter of public interest. To take an extreme example, the content of a budget speech is a matter of great public interest. But if a disloyal typist were to seek to sell a copy to a newspaper in advance of the delivery of the speech in Parliament, there can surely be no doubt that the newspaper would be in breach of duty if it purchased and published the speech."

44. The Guidance also states, on the question of public interest for section 41(1), that:-

"The test now, therefore, is whether there is a public interest in disclosure which overrides the competing public interest in maintaining the duty of confidence.

This test doesn't function in the same way as the public interest test for qualified exemptions, where the public interest operates in favour of disclosure unless outweighed by the public interest in maintaining the exemption. Rather, the reverse is the case. The test assumes that the public interest in maintaining confidentiality will prevail unless the public interest in disclosure outweighs the public interest in maintaining the confidence."

Section 40(2)

45. Recitals 1 and 26 to the GDPR provide that:-

"The protection of natural persons in relation to the processing of personal data is a fundamental right ……everyone has the right to the protection of personal data concerning him or her."

"The principles of data protection should apply to any information concerning an identified or identifiable natural person. Personal data which have undergone pseudonymisation, which could be attributed to a natural person by the use of additional information should be considered to be information on an identifiable natural person. To determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly. To ascertain whether means are reasonably likely to be used to identify the natural person, account should be taken of all objective factors, such as the costs of and the amount of time required for identification, taking into consideration the available technology at the time of the processing and technological developments. The principles of data protection should therefore not apply to anonymous information, namely information which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is not or no longer identifiable. This

Regulation does not therefore concern the processing of such anonymous information, including for statistical or research purposes."

46. Section 40(2) FOIA provides that:-

"*Any information to which a request for information relates is also exempt information if*
(a) it constitutes personal data which not fall within subsection (1), and
(b)the first, second or third condition below is satisfied."

47. Section 40(3A)(a) FOIA is the first of these three conditions by which personal data is exempt if *"disclosure of this information to a member of the public otherwise than under this Act (a) would contravene any of the data protection principles…"*

48. By Section 2(3)(fa) FOIA if the exemption used is in relation to this first condition it is an absolute exemption.

49. Section 3(4)(d) DPA defines processing as "*disclosure by transmission, dissemination or otherwise making available."* It includes publication pursuant to a FOIA request.

50. Personal data is defined in section 2 DPA as *"any information relating to an identified or identifiable living individual…"* Section 3(3) defines *"Identifiable living individual"* as

"*…a living individual who can be identified, directly or indirectly, in particular by reference to (a)an identifier such as a name, an identification number, location data or an online identifier, or (b) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual."*

51. The Appellant makes a number of submissions on this aspect of section 40(2) (see GoA from A39) for example that:-

"*If the relevant individual in question is unidentifiable or can be rendered unidentifiable by suitable redaction then the information in question (after such redaction) is not personal data.*

52. He also said that:-

"When part of a document constitutes the personal data of a living individual, the public authority is obliged to apply the minimal redaction that suffices to render

the individual unidentifiable, whenever this can be done. The information, thus redacted, must be disclosed unless another exemption applies"

about which we agree provided what is left has value.

53. In *Information Commissioner v Magherafelt District Council [2012] UKUT 263 (ACC)* the UT referred to the "motivated intruder" test which is a person:-

"….who starts without any prior knowledge but who wishes to identify the individual or individuals referred to in the purportedly anonymised information and will take all reasonable steps to do so.'. The question was then one of assessment by a public authority as to '… whether, taking account of the nature of the information, there would be likely to be a motivated intruder within the public at large who would be able to identify the individuals to whom the disclosed information relates."

54. The data protection principles are those set out in section 34(1) DPA. They include Article 5(1) GDPR which provides that personal data shall be processed "*lawfully, fairly and in a transparent manner as regards the data subject*"

55. Article 6(1) provides that the processing of personal data shall only be lawful if at least one of the following applies:-

(a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;

(c) processing is necessary for compliance with a legal obligation to which the controller is subject;

(d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;

(*e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller*;

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

56. As regards Article 6(1)(f) the Supreme Court in *South Lanarkshire Council v Scottish Information Commissioner [2013] UKSC 55 (29 July 2013)* set out these three questions at para 18:-

(i) Is the data controller or third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?

(ii) Is the processing involved necessary for the purposes of those interests?

(iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?"

57. Interests to be legitimate have to be interests of more than just the requester (see the UT Decision in *Rodriquez Noza-v- the Information Commissioner & Nursing and Midwifery Council [2015]UKUT 0499 (ACC)* at para 24)

58. In *Corporate officer of the House of Commons -v Information Commissioner [2008]EWHC 1084* the Divisional Court said at para 43:-

"*....*"necessary*" within schedule 2 para 6 of the DPA should reflect the meaning attributed to it by the European Court of Human Rights when justifying an interference with a recognised right, namely that there should be a pressing social need and that the interference was both proportionate as to means and fairly balanced as to ends...*"*

59. Reference was also made to the explanation given in *The Sunday Times v United Kingdom (1979) 2 EHRR 245(paragraph 59):*

"*The court has noted that, while the adjective "necessary", within the meaning of article 10(2) is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable" and that it implies the existence of a "pressing social need."*

60. The UT in *Goldsmith International Business School -v- The Information Commissioner and the Home Office [2014] UKUT 0563 (ACC)* provided a number of relevant propositions including:-

- the test for reasonable necessity comes before the consideration of the data subjects interests.
- reasonable necessity means *"more than desirable but less than indispensable or absolute necessity."*
- *"The test of reasonable necessity itself involves the consideration of alternative measures, and so "a measure would not be necessary if the legitimate aim*

could be achieved by something less"; accordingly, the measure must be the "least restrictive" means of achieving the legitimate aim in question."

61. The Appellant in the GoA (A49) in his submission on these provisions says:-

"According to the case law, a disclosure of personal data is considered "necessary" in case (a) there is a pressing social need, and (b) the interference is both proportionate as to means and fairly balanced as to ends."

"Proportionate means the least intrusive method of attaining the legitimate aim"

62. If disclosure of personal data is necessary to further a legitimate interest it will not be lawful to process it (by Article 6(1)(f)) where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data.

63. In addition to being lawful processing must also be carried out in a fair and transparent manner as regards the data subject.

Special Category Data

64. Article 9(1) GDPR relates to the processing of special categorises of personal data. It says:-

"Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited."

65. The processing of this data is permitted only in the limited circumstances listed in Article 9(2) GDPR such as where the data subject has given explicit consent.

<u>Sections 36(2)(b)(ii) and 36(2)(c)</u>

66. The exemptions at sections 36(2)(b)(ii) and 36(2)(c) are both subject to the PIBT. The relevant part of section 36 states:-

(2)Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the 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.

67. A concise process for both elements of section 36 is to ask as follows:-

1) was the QP the appropriate person?

2) was it the QPO that the relevant exemption was engaged?

3) was the QPO reasonable?

4) if it was a reasonable opinion then in all the circumstances of the case does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

68. The appropriate QP is defined in section 36(5) FOIA.

69. As regards the question as to whether the QPO was reasonable we noted the UT Decision in *Information Commissioner v Malnick & ACOBA [2018] UKUT 72 (AAC)* at para 31-33 where the UT said:-

"…Section 36 (for present purposes – see section 2(3)(e)) confers a qualified exemption and so a decision whether information is exempt under that section involves two stages: first, there is the threshold in section 36 of whether there is a reasonable opinion of the QP that any of the listed prejudice or inhibition ("prejudice") would or would be likely to occur; second, which only arises if the threshold is passed, whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing it.

"The QP is not called on to consider the public interest for and against disclosure. Regardless of the strength of the public interest in disclosure, the QP is concerned only with the occurrence or likely occurrence of prejudice. The threshold question under section 36(2) does not require the Commissioner or the F-tT to determine whether prejudice will or is likely to occur, that being a matter for the QP. The threshold question is concerned only with whether the opinion of the QP as to prejudice is reasonable. The public interest is only relevant at the second stage, once the threshold has been crossed. That matter is decided by the public authority (and, following a complaint, by the Commissioner and on appeal thereafter by the tribunal)."

"Given the clear structural separation of the two stages, it would be an error for a tribunal to consider matters of public interest at the threshold stage….."

70. In *Guardian Newspapers Ltd & Brooke v IC & BBC (EA/2006/0011) (Judgment of 8 January 2007)* at para 62 – 64 the UT said at para 64 that *"…in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at."*

71. The relevant date for considering the PIBT was considered in *Montague v ICO and Department for Business and Trade* [*2022] UKUT 104 (AAC*). At para 58 -60 the UT concluded that the correct time for determining the PIBT is the date the public authority makes its decision on the request which has been made to it and that this does not include any later decision made by the public authority reviewing the refusal decision

72. The UT in *All Party Group on Extraordinary Rendition v IC [2013] UKUT 560* (para 149) said:-

"*...that when assessing competing public interests under FOIA the correct approach is to identify the actual harm or prejudice that the proposed disclosure would (or would be likely to or may) cause and the actual benefits its disclosure would (or would be likely to or may) confer or promote. This...requires an appropriately detailed identification, proof, explanation and examination of both (a) the harm or prejudice, and (b) benefits that the proposed disclosure would (or would be likely to or may) cause or promote.*

73. In *Department for Work and Pensions v Information Commissioner [2016] EWCA Civ 758* at para 55 Lloyd Jones J held:-

"It is clearly important that appropriate consideration should be given to the opinion of the qualified person at some point in the process of balancing competing public interests under section 36. No doubt the weight which is given to this consideration will reflect the Tribunal's own assessment of the matters to which the opinion relates. Provided this is done, it does not seem to me to matter greatly whether it is taken into account at the outset or at a later stage. Between paragraphs [207] and [222] of its determination the First-tier Tribunal set out what it considered to be the relevant considerations but these did not include the opinion of the qualified person. There is, therefore, nothing in its determination which indicates that any weight was given to the opinion of the qualified person in this case."

74. The UT in *All Party Group on Extraordinary Rendition v IC [2013] UKUT 560* (para 149) said:-

"*...that when assessing competing public interests under FOIA the correct approach is to identify the actual harm or prejudice that the proposed disclosure would (or would be likely to or may) cause and the actual benefits its disclosure would (or would be likely to or may) confer or promote. This ... requires an appropriately detailed identification, proof, explanation and examination of both (a) the harm or*

prejudice, and (b) benefits that the proposed disclosure would (or would be likely to or may) cause or promote.

75. *Christopher Martin Hogan and Oxford City Council v the Information Commissioner EA/2005/0026&0030* provides authority for the consideration of the PIBT. In *Hogan* the following guidance was set out (from 29):-

"29 First, there is a need to identify the applicable interest(s) within the relevant exemption…"

"30 Second, the nature of the 'prejudice' being claimed must be considered. An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is…"real, actual or of substance"…

"34 A third step for the decision-maker concerns the likelihood of occurrence of prejudice…the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk.

76. *Hogan* also notes that in considering prejudice a public authority needs to consider the issue in the context that any disclosure will be to the world (para 31), that the FOIA jurisdiction is "motive blind" and that a public authority is required to give consideration to the possibility of *"removing exempt information, while disclosing all non-exempt information."*

77. The parties in this Appeal made a number of submissions about *Hogan.* In our view *Hogan* does apply for the purposes of the consideration of the PIBT but not prior to that when considering the reasonableness of the QPO.

78. We noted additional submissions made by the Appellant relating to section 36 for example of 16 May 2023 and 23 June 2023.

79. The Appellant says that section 36(2)(c) FOIA cannot be engaged if UoE also seeks to rely on sections 40(2) and/or 41. The Appellant concludes (A238):-

"There is thus an extremely long line of case law, confirmed in numerous branches of the law, in support of the principle that a general clause cannot be employed to extend the ambit of a specific clause in the same statute, or (what is essentially the same thing in different words) to circumvent the mandatory conditions attached to that specific clause. The Central Lancashire decision is simply an application of that principle to FOIA: generalia specialibus non derogant.

All this shows that the University's attempt to use Section 36(2)(c) to extend the ambit of Section 40(2) and/or 41, circumventing the mandatory conditions imposed

by Parliament in those sections, is impermissible as a matter of law. Section 36(2)(c) cannot be engaged on this basis."

80. We agree with the submissions of UoE on this point. For the Appellant to be right there would need to have been a specific provision in FOIA outlawing this overlap such as exists in relation to the interplay between other exemptions. However there is no such provision.

81. A further point raised by the Appellant is that he says that only the QPO at the time of the request can be considered. We agree with the IC in its response to this in its submission on 2 October 2023 (para 14) where the IC differentiates between:-

(a) the timing of the deployment of an exemption which it asserts (subject to the Tribunal's case management powers) can be for the first time during an appeal (and similarly during the Commissioner's Investigation); and

(b) the timing of the facts and matters that can be relied upon in the QPO (whenever in the process a relevant exception is deployed) which it says must be as at the date the original request is refused as in *Montague*

82. As regards the issue of when an exemption can be raised we noted the Decision of the Court of Appeal in *Birkett-v- Department for the Environment, Food and Rural Affairs [2011] EWCA Civ 1606 (para 28)* where it was held:-

"*Thus, whether the public authority is the appellant or the respondent in an appeal to the Tribunal, the Rules ensure that any new exception, if it is to be relied upon, is identified at the outset of the appeal, and within a relatively short time. Any application by the public authority to rely upon a new exception made after the time limit for its grounds of appeal/response would be subject to the Tribunal's case management powers under rule 5*.."

<u>Tribunal review-section 41</u>

83. The DN supports the use by UoE of this exemption. A summary of the DN (from A15) is that:-

- (para 84) the IC was satisfied that UoE obtained the information from other people and, as UoE has explained, *"some of it was augmented through the report's author's additional explanation or opinion."*

- (para 86) there was the necessary quality of confidence because *"The matters that were the subject to review and which generated the report were serious. In addition the withheld information is not otherwise accessible."*

- (para 87) the circumstances did impart an obligation of confidence noting for example the IC's view that:-

    a. the subject of the Report was sensitive

    b. a blog dated 28 August 2020 stated *"All feedback will be kept confidentially, and the names of identifiable contributors or others named not disclosed, unless required to do so by law".*

    c. that "*the individuals who were interviewed as part of the independent review would have had the reasonable expectation that the information they were providing would not be disclosed to the world at large in response to a request under FOIA."*

    d. that "*it would have been reasonable for those individuals to assume that the University would treat the information confidentially*".

    e. that "*through engaging with the report's author, individuals provided the University with the information in circumstances importing an obligation of confidence*."

- (para 89) disclosure would be contrary to the confiders reasonable expectations of confidentiality being maintained as regards their private information and that therefore disclosure would cause detriment.

84. The IC (A17) set out in the DN its review and conclusion on whether UoE would have had a public interest defence. Arguments for included:-

- the general public interest in public authorities being open and transparent
- the significant public interest in the relevant events and the wider context
- the public interest in academic freedom and freedom of expression

85. Arguments against cited by the IC included that:-

- a redacted version had been published and the public interest could be satisfied by that publication and the steps UoE had taken
- UoE had been open about the issues, had made a self report to the Office for Students, had issued statements and given apologies and that UoE took the view that providing the withheld material would not add anything

86. The IC said (A18):-

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

87. The IC's conclusion (para 98) was:-

"*The Commissioner has considered all the circumstances of this case and the nature of the information being withheld under section 41(1). He has concluded that there is stronger public interest in maintaining the obligation of confidence than in disclosing the information being withheld under this exemption. Therefore, the Commissioner finds that the condition under section 41(1)(b) is also met and that the University is entitled to withhold information in the report under section 41(1) of FOIA."*

88. Our conclusion from all the evidence and submissions is that UoE did obtain the information from another person/persons.

89. As regards whether disclosure would constitute an action for breach of confidence by the confider by reference to *Derry* we reviewed in particular the Appellant's submissions in the GoA from page A61 to A76. We noted his submissions on the necessary quality of confidence and obligation of confidence (A72). We considered the conclusion from page A73. We noted in his final observations (A74) his view that:-

"Last but not least, there is a strong reason to doubt that Section 41 could validly apply to anything in this Report. Indeed, were the public disclosure of any part of this Report to constitute an actionable breach of confidence, then that confidence would already have been breached (and actionably so) by the disclosure of this Report to an unknown number of people inside the University of Essex."

90. We also had regard to the witness statement of Mr Morris. His evidence (H1018) is as follows from paragraph 83:-

"The information provided to Akua Reindorf by individuals interviewed in the course of the Review was given under explicit assurances of confidentiality. As noted above, this assurance was first given when contributions to the Review were invited in my Blog, and the confidential nature of submissions was reflected throughout.

Akua Reindorf also shared with witnesses that she had been asked to preserve their anonymity where required (see further details in the Review Feedback Mechanisms and Process document exhibited at page 1652 of the open bundle and page 644 of the closed bundle). The published version of the Report seeks carefully to respect the confidentiality assurances provided for, as one would expect. Therefore, it is clear to me that any individuals who were interviewed as part of the Review would have had the reasonable expectation that the information they were providing would not be disclosed outside of the Review process or as part of the Report.

84.Given the polarising nature of the public debate surrounding the Events, it is likely that many of the individuals who contributed to the Review would be extremely concerned if their views were ultimately made public. I consider this would be the case whether or not the individual could be identified: given how strongly views are held on both sides of the argument and the potential for attacks to become very personalised, individuals who contributed to the Review may become distressed at the very thought that their views were in the public domain. It should be noted that confidentiality assurances were provided to individuals who contributed to the Review not just in respect of their identities but in respect of the content of their contributions."

91. From the document referred to by Mr Morris starting at page 1652 of the Bundle we noted for example that:-

- 33 people were interviewed of which 2 were anonymous (1653)
- there were 12 written submission of which 5 were anonymous (1653)
- in a template of an email used to invite potential witnesses to be interviewed they were told (1667):-

  "I have been asked to take evidence anonymously from anybody who requests that I do so. If you would like to participate anonymously, please let me know and I will ensure that you are not named in the report and that your identity is not disclosed to the University. However I may ultimately have to disclose the identities of people who have given evidence anonymously if I am required by law to do so (for example if any litigation arises from the review and a court orders me to disclose the identities).

  If you wish to maintain your anonymity completely, the only way to do so is to ensure that I do not know your identity. In that case, you should send me written representations in a hard copy document which contains no identifying material. You can place this into a blank envelope within a second, outer envelope addressed to 'External event reviewer, c/o the Office of the Vice-

Chancellor'. If you deliver this to the Office of the Vice Chancellor, the staff there will send me the sealed, internal envelope by special delivery

- care was taken to inform interviewees that once notes had been agreed the recording of the zoom calls and transcripts would be deleted (page 1659)

- in a blog of 28 August 2020 staff and students of UoE were told about the review to be undertaken and that:-

"*The University Community is invited to to contribute comment, insight and testimony into the circumstances surrounding these events using confidential communication mechanisms. This feedback may be submitted antonymously*"

"All feedback will be kept confidentially and the names of identifiable contributions or others named not disclosed unless required to do so by law"

- in a blog dated 15 October 2020 by the VC he reported on the progress of the Report and also referred to the mechanisms in place to enable anonymous feedback (1664)

92. We reviewed the Report together with the Table showing the rationale for the redactions from page 1022 of the Bundle. We also reviewed this material in its unredacted form in the Closed Bundle. In our view the approach taken by UoE was reasonable to ensure that in the context of the background to the Report and to protect the identity of the contributors clues were not left for a motivated intruder.

Tribunal's Conclusion – section 41

93. We considered the submissions of the parties on section 41. We have seen the evidence including the context of and the way in which the evidence for the Report was taken. We have seen what contributors knew, were told and will have reasonably assumed. In our view:-

- the relevant information was information obtained by UoE from third parties for the purposes of section 41(1)(a)

- it does have the necessary quality of confidence

- it was communicated in circumstances of confidence

- its unauthorised disclosure would be a breach of the duty of confidence that would be actionable by the confider

94. We have considered the competing arguments regarding whether UoE would have a public interest defence to any such action.

95. Firstly, in our view, the evidence shows that UoE and then the IC considered this question carefully, seriously and in detail and having regard to the appropriate legal authorities and the Guidance.

96. We also had regard to the authorities relating to Articles 8 and 10 ECHR and noted that the section 41 test has a presumption that the public interest in maintaining confidentiality will prevail unless the public interest in disclosure outweighs it.

97. We agree that there would be public interest defences available to UoE if challenged after making an unauthorised disclosure of this information. For example we agree that there is a public interest in openness and transparency generally. We also accept that there is considerable interest in the issues that form the background to this Appeal. We agree that the events were widely debated in the public arena. We agree that the issues impacted important issues of freedom of speech and expression on campus and more widely. We also agree that there is public interest in protecting academic freedom.

98. However in our view these public interests are reduced in weight because for example:-

- a considerable amount of the Report has been published.

- the Report, whilst commissioned by a university, was not academic research in the usual sense. It was the outcome of an investigation for UoE into how UoE had dealt with and should have dealt with the situation it faced to enable it to be in a better position if such issues arose in the future and to respond to concerns raised in some quarters in its own community and more widely.

- the 28 recommendations are a vital part of the Report. Here (from E568) we saw no redactions which reduced the advice being given or rendered it less comprehensible (and in any event we consider one of the redactions to have been special category material).

- releasing more of or all the closed information would result in people having more information but in this case it would not in our view add enough extra knowledge to override the obligation of confidence.

- a redacted version had been published and the public interest could be satisfied by that publication and the steps UoE had taken.

- there is a public interest in ensuring that when people are asked to take part in such investigations in the future by UoE or more widely they have the necessary trust in the confidential nature of the process (as explained to them or expected by them) that they decide to be involved. This is especially so

when the issues under review have such a high profile and raise passionate responses.

- it will invariably be the case that the more people that take part in such investigations (at UoE, other universities or elsewhere) by providing their views and sharing at times personal thoughts with confidence the more instructive and beneficial is the outcome and the recommendations- which is clearly in the public interest.

99. On this basis we are satisfied that UoE, if it disclosed the material obtained in confidence, would fail in a public interest defence if it chose to disclose such information without the permission of the confider.

100. In our view the Respondents have shown that the section 41 FOIA exemption was properly engaged and that UoE would not have had a defence to any action against them for breach of confidence.

101. As regards section 41 FOIA and this element of the Appeal it is therefore our Decision that that DN was in accordance with the law and the IC exercised its discretion properly.

Tribunal Review -section 40(2) Special Category of Personal Data

102. Not all redactions in the Report relied upon section 41 and so we have gone on also to consider section 40 and the question of the processing of personal data.

103. We considered first any special category data as defined by Article 9 GDPR. As set out above (and to summarise) an absolute exemption applies where disclosure of personal data would contravene any of the data protection principles. Article 5(1)(a) GDPR requires processing to be lawful. Where personal data is special category data its disclosure is prohibited unless permitted by one of the grounds set out in Article 9(2) such as there being explicit consent.

104. The IC in the DN (A11) says that:-

"Having viewed the withheld information, the Commissioner finds that at least some of that information could be categorised as special category data. He has reached this conclusion on the basis that it broadly concerns a person's/people's religious or philosophical belief, sex life or sexual orientation. He has also noted that in, its submission, the University has said that input and discussions in the report could naturally extend into political and philosophical belief, sexual life or health, whether directly stated or simply inferred."

105. The DN concludes (para 61 A11) that having seen no evidence of consent or any other Article 9(2) ground the processing of any special category data would breach the data protection principles.

106. We found no specific argument against this from the Appellant save as might relate to Professors Phoenix and Freedman which we deal with below.

107. We have reviewed the Report in the Closed Bundle. We are satisfied that the Report does contain special category material. In places that material is not directly connected to the name of a person. However in our view there will be times where redaction of a name alone would not protect the identity of the data subject from the "motivated intruder" to a high enough degree especially in the context of the numbers involved and the university setting.

Tribunal's Conclusion – Special category data

108. In our view UoE were obliged to deploy the exemption in section 40(2) FOIA as regards any special category data in the Report. This is because there was no evidence that relevant data subjects had explicitly consented to such material being disclosed (or any other Article 9 (2) reason applied) and thus disclosure of such personal data was prohibited by Article 9(1).

109. Therefore, as regards the reliance by UoE on section 40(2) FOIA as it pertains to special category data, it is our view that the DN was in accordance with the law and it is not our view that the IC should have used its discretion differently.

Tribunal's review- section 40(2) Personal data

110. By section 40(2) and 40(3A)(a) an absolute exemption applies if the processing of Personal Data would breach the data protection principles. These principles include:-

- Article 5(1)(a) GDPR by which personal data is to be processed "*lawfully, fairly and in a transparent manner as regards the data subject*"
- Article 6(1) GDPR which sets out the circumstances where processing will be lawful including:-
    - (a) where the data subject gives consent (as opposed to explicit consent for special category data)
    - (f) where processing is

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

111. In the Request the Appellant said (B265):-

"*I am requesting an unredacted (except for the deletion of individuals' names) copy of the [the Report]"* and (B265):-

"I fully understand that some extremely limited redactions are necessary to protect the privacy of individuals who gave evidence or who were named in that evidence. I have no objection to the deletion of individuals' names"

112. The DN reviewed UoE's use of section 40(2) FOIA from A8. In summary this set out that:-

- the information redacted by reference to this exemption is personal data which relates to and identifies the individual concerned.
- processing of such data must be in accordance with the data protection principles including Article 5(1)(a) GDPR which requires disclosure to be lawful, fair and transparent in relation to the data subject.
- it is agreed that there are legitimate interests in this case.
- disclosure of the personal data is not necessary to further the legitimate interests as a result for example of the publication of the Report with its existing redactions.

113. The DN went on to set out the IC's analysis of the balance between the necessity for the legitimate purpose and data subjects rights and freedoms as if it had concluded necessity had been found. (A14). The IC says:-

74 It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

75. In considering this balancing test, the Commissioner has taken into account the following factors:

the potential harm or distress that disclosure may cause;

whether the information is already in the public domain;
whether the information is already known to some individuals;
whether the individual expressed concern to the disclosure; and
the reasonable expectations of the individual.

76. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

77. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

114. The IC concluded that the balance favoured non disclosure and therefore UoE was entitled to withhold the information by section 40(2) and 40(3A)(a) FOIA. In support of this conclusion he cites these factors:-

- the majority of the report is in the public domain, but not all of it.
- some of the withheld information may be known by some individuals for example those involved in the events discussed in the report -but it would not be known more widely.
- the subject of the report was *"febrile, contentious and sensitive in nature."*
- those taking part were told their contribution would be confidential.
- there would have been a reasonable expectation that their personal data would not be disclosed to the world at large in response to a FOIA request.
- disclosure of the redacted personal data would cause *"those individuals a good deal of distress"*

115. In the GoA (A40) the Appellant said:-

"*My FOI request specifically permitted the redaction of individuals' names and other identifying information. The first question to be posed with respect to each particular item of information in the Report is therefore: Is the individual still identifiable after the deletion of names and other identifying information?*"

116. As regards other personal data he refers to Article 6(1)(f) GDPR. He notes the agreement about the legitimacy of the purpose then says as regards necessity (A49):-

"I contend that there is a pressing social need to know the details of the Events that took place at the University of Essex that are recounted in the Report…"

117. In the GoA (A51) he puts his case that:-

- those UoE officials who took decisions concerning the Events recounted in the Report should be identified by name and title, for reasons of accountability.
- the names and identifying information of all others (e.g. junior staff, students) should be redacted.
- that UoE officials who are in senior, decision-making and/or public-facing roles should be identified including the VC, the Registrar, heads of departments and centres, senior academic staff.

118. The Appellant also says that in his view (A51) where information has been put into the public domain voluntarily it should be disclosed in full but that *"It nevertheless seems reasonable, as a courtesy to those individuals, to redact their names and other identifying information (such as Twitter handles)"*

119. The Appellant in the GoA reviewed 15 classes of data in the Report(A37) and his view on each (A52) as regards this exemption. These are summarised below:-

The Report	**Appellant's view**
General background information about the University of Essex and its subdivisions	This is manifestly not personal data
General background information about the two invited speakers	This is general background information that was voluntarily placed in the public domain by the two speakers; moreover, it is in no way sensitive. Items (1) and (4) both apply.
General background information about the two Events	General background information about the two Events is not personal data. The proposed content of the two invited speakers' contributions was voluntarily placed in the public domain by the two speakers; items (1) and (4) both apply.
Factual statements about the procedures that were (or were not) followed in organising the two Events.	This is manifestly not personal data
Official public announcements, by the University or any of its subdivisions, concerning the two Events (whether on the website of the University or any of its subdivisions, on other Internet forums such as Twitter or Facebook, or any other public forum)	This is manifestly not personal data

Postings, concerning the two Events, by individual University staff or students (or others), on Internet forums (such as Twitter or Facebook) that are accessible to the general public.	This material was voluntarily placed in the public domain by the authors; item (4) applies.
Postings, concerning the two Events, by individual University staff or students (or others), on Internet forums (such as Twitter or Facebook) that are accessible only to a restricted public (such as the poster's "friends" or "followers").	These postings could be personal data, but only if, even with the name and other identifying information of the author redacted, the author could be identified by people outside the restricted public that already had access to the posting. It is incumbent upon the University, if claiming this exemption, to explain, at least in general terms, how the author could be identified from the available information.
Messages such as e-mail or WhatsApp, concerning the two Events, that were sent by individual University staff or students (or others) to lists with wide distribution	Since these postings were specifically intended by their authors to be accessible to a wide audience (e.g. an entire University department or centre), item (4) applies.
Messages such as e-mail or WhatsApp, concerning the two Events, that were sent by or to individual University staff or students (or others) where the recipient(s)were one or a small number of individuals.	These postings could be personal data, but only if, even with the name and other identifying information of the author redacted, the author could be identified by people outside the restricted public that already had access to the posting. It is incumbent upon the University, if claiming this exemption, to explain, at least in general terms, how the author could be identified from the available information.
Communications among University officials (e.g. department heads, the Registrar, the Vice-Chancellor).	Item (2) applies.
Leaflets or flyers that were publicly posted or circulated	These are manifestly not personal data.
Eyewitness testimony about events that occurred in public fora	Since these were public events, the facts about what occurred there are manifestly not personal data. Furthermore, since there were a large number of potential eye witnesses, it is unlikely that the witness(es) cited in the Report could be identified, provided that their names and other identifying information are redacted. These eyewitness reports are therefore not personal data.
Eyewitness testimony about events that occurred in meetings of a large group (such as a University department)	Once again, since there were a large number of potential eyewitnesses, it is unlikely that the witness(es) cited in the Report could be identified, provided that their names and other identifying information are redacted. These eyewitness reports are therefore not personal data.
Eyewitness testimony about events that occurred among a small number of people.	These eyewitness reports are likely to be personal data, because of the danger that the witness could be identified.
Expression of the personal opinions or feelings of individual University staff or students (or others).	These expressions of opinions or feelings are personal data if there is a significant danger that the person could be identified, but not if the attribution and content are so generic that identification would be impossible.

120. UoE sets out its case on section 40(2) from page A186 of the Bundle. In summary in their submission:-

- in this situation there is a high risk that the mere redaction of a name will not suffice to prevent identification. They say (A191):-

  "Various individual data subjects are named directly. Some are identifiable in the context of the Report, by reading it is a whole. Some will be identifiable from the evidence they have given as recorded in the Report, even when they are not named, because the detail of their accounts, or the references to them, will mean that others with some awareness of the context will be able to work out their identity (and consequently, inform others with the motivation to seek assistance).

- disclosure of the redacted personal data would not be fair (Article 5) or necessary (Article 6(1)(f)) or justified by that Article of the GDPR.

121. As regards fairness (A192) in summary UoE says that it would be unfair to disclose personal data because:-

(a) it was obtained and processed in the Report on the basis of assurances of confidentiality; and (b) disclosure enabling data subjects to be identified in the context of their actions and reactions in the context of the matters discussed in the Report, and the wider trans rights debate, is likely to cause them distress, harm and abuse by third parties (in particular, on social media, which may be targeted at those individuals whether or not they are on the same social media platform). Indeed, there are relatively few matters of public debate at the present time which are more prone to inciting toxic and abusive reaction than trans rights issues. Even where the data subjects' connection with the matters in the Report is already known, disclosure will restart and regenerate existing attacks and abuse to no positive effect. Disclosure is in this context fundamentally unfair.

122. UoE also assert that disclosure is not necessary to pursue the identified legitimate aim because:-

"that aim is materially addressed by the published version of the Report. The redacted portions provide, at most, some background context to the findings and criticisms made of the University; it is those findings and criticisms and recommendations which address the legitimate aim. Disclosure of personal data is simply unnecessary: it is not the least restrictive way in which the aim can be met and the Goldsmith tests are not satisfied.

123. As regards striking a balance with the rights and freedoms of the data subject UoE says:-

"Thirdly, for essentially the same reasons as discussed in relation to the public interest test above, the balance of rights and interests required by Article 6(1)(f) do not favour the disclosure of personal data in this context."

124. We reviewed the evidence given by Mr Morris. On the question of identifiability he said that he agreed with the Appellant's proposition that UoE is *"obliged to apply the minimal redaction that suffices to render the individual unidentifiable, whenever this can be done".* He added (para 72) that:-

"I can confirm that from my perspective, I agree with this principle but genuinely consider that this approach has been followed when considering redactions for the disclosure as part of the Response, as we sought to disclose as much as possible. It was, however, in many instances very difficult to protect individuals from re-identification by simply redacting their names or other personal identifiers."

and explained that:-

"71….when considering the information to be disclosed in response to the Request, we balanced the University's FOIA obligations with its obligations under data protection law and other legal obligations of confidence, in particular noting the real likelihood that people can, and would, attempt to piece together information to identify individuals mentioned within it, and the harms that would result from such identification."

125. He set out the process by which relevant redactions were made saying (para 73):-

"..we conducted a meticulous line-by-line analysis of the Report with a view to evaluating each and every redaction. In each instance involving personal data, we considered the likelihood of identification of an individual from those details alone, other details in the report and/or other information available to the requester, other interested parties, or the public"

126. In conducting this exercise UoE were focused on preventing motivated intruders from working out personal data from the material. He says:-

"In many cases, particularly involving current and former staff, students and alumni of the University, we were aware of the likelihood that individuals with tacit knowledge and understanding of members of the University community and the wider operation of the University would be able to identify others from materials within the Report. From the conversations I was having at the time, which have been discussed above, I was aware we were dealing with very "motivated intruders" and the removal of each redaction of potentially identifiable information had to be tested by myself and others at the University to consider whether that would give a

piece of information which could be combined with existing knowledge or assumptions to deduce or identify individuals".

127. We proceeded on the basis that it was agreed that the issues being pursued were legitimate (eg see UoE at A192) and when dealing with personal data there was no dispute that it was right that the names of junior members were redacted but that in the GoA the Appellant had said (A51):-

"In particular, those University officials who took decisions concerning the Events recounted in the Report should be identified by name and title, for reasons of accountability. More generally, in accordance with the IC's guidance regarding Section 40 (pp. 26–27), I suggest that University officials who are in senior, decision-making and/or public-facing roles should be identified"

128. We reviewed the Report and the Table in the open and closed versions, the submissions and the evidence provided. In addition to our Decision as regards Special Category Data:-

(a) there is no dispute that the names of junior members of staff should be redacted.

(b) as regards more senior staff we do not completely accept the Appellant's submission. **If** the redacted material involved such people then the protection of section 40 would still apply to them. Processing to be lawful must be in accordance with the data protection principles. It is possible that when looking to balance the legitimate interests of the Request against the data rights of the individual the role or position of the data subject might be a factor to consider. However the role would not necessarily mean disclosure would be appropriate. For example (but theoretically) if a senior member of the UoE leadership had given personal evidence for the Report the seniority of the role would not be a relevant factor.

(c) we accept UoE's evidence and submissions regarding the difficulty of but importance of preventing inadvertent identification. When considering the background issues, strength of feeling on all sides and the context of a university community it makes it highly likely that motivated intruders exist and that they would wish to discover the identity of the individuals protected by redaction. We noted Mr Morris's evidence (H997) that:-

"It was clear that some members of the university were spending significant amounts of time trawling through social media to seek out additional facts relevant to the Review and those who were involved in it…This reinforced to me that it was not just a theoretical risk that people might be motivated and able to piece

together information to identify individuals but it highlighted that they actually would take the time to do so"

(d) we accept Mr Morris' evidence that the review of the Report for these purposes was carried out on a line by line basis and meticulously. We note that in so doing he was aware of the need to ensure redactions were limited to that needed to "r*ender the individual unidentifiable, whenever this can be done."*

(e) in our view UoE were right to be on high alert to the issues that could well arise for individuals if their personal data in the Report was to be disclosed.

(f) from the evidence we concluded that UoE properly considered the personal data in the Report by reference to the data protection principles and in particular the need for any disclosure to be lawful (by reference to Article 6(1)(f)), fair and transparent as regards the data subject impacted in each case.

(g) we accept UoE's submission on fairness as set out at page A192 para 61 where the relevant personal data had been obtained in the manner described.

(h) we agree that the Appellant was pursuing a legitimate interest.

(i) we accept the Appellants submission that *(f) "there is a pressing social need to know the details of the Events that took place at the University of Essex that are recounted in the Report…"*

(j) it was not necessary for these purposes for the redacted personal data in the Report to be disclosed because the legitimate interest was satisfied by the publication of the Report in its redacted form which included importantly the recommendations (from E569).

129. We carried out a review of the Report and Table to verify the use of section 40 by UoE and having regard for example to the classes of data identified by the Appellant and the other submissions. From our review the data redacted in reliance on section 40(2) FOIA in the Report is personal data. Appropriate levels of redaction were applied to prevent the identity of individuals being discoverable. There was at least one example (paragraph 22 on page 8) where we wondered whether a slightly lesser redaction would have still afforded enough protection but we were satisfied that UoE had considered this carefully and we could see that lesser redaction would have presented a risk of disclosure.

130. Even if we had been of the view that disclosure was necessary for the purposes of the legitimate interest it would have been our conclusion that those interests were "*overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data"*

Tribunal's Conclusion- section 40(2)

131. Accordingly as regards this element of the Appeal it is therefore our Decision that that DN was in accordance with the law and the IC exercised its discretion properly.

Professors Phoenix and Freedman

132. The Appellant refers specifically to Professors Phoenix and Freedman who are clearly important in the context of the relevant events and the Report. He says (A48):-

"...I have been in e-mail contact with Professors Jo Phoenix and Rosa Freedman. They have expressed their desire that the entire Report be made public, and they have provided their explicit consent to disclosure of any items referring to themselves: see Appendix C for details. (The Tribunal can of course verify this explicitly with them.) I will assume for the sake of argument that lawful basis (a) does not apply to any other individuals"

133. He adds that:-

"Professors Phoenix and Freedman are the key subjects of the Events; the chronology of the Events becomes incomprehensible if references to them are suppressed...Disclosure of the facts about how they were mistreated by the University of Essex — a mistreatment that the University has officially recognised and for which it has officially apologised — would hardly prejudice their legitimate interests; rather, it would help to vindicate them. [I stress that this argument is presented solely on the basis of lawful basis (f). However, the two professors have also given explicit consent to disclosure: see Appendix C.]"

134. At Appendix C (page 88 of the GoA and A117 and following) is what appears to be an email from Professor Phoenix to the Appellant copied to Professor Freedman. It is dated 3 January 2022 and is headed "That Statement you need". It starts:-

"..Attached is a long statement from BOTH Prof Freedman and myself supporting your request that University of Essex makes the FULL Report publicly available despite what we said in August 2021..."

"We wish to state, for the record, that we want the Report to be made public in its entirety. It seems to us that the public has a right to know all the facts and evidence about the appalling things that were done to the both of us.

To this end, we explicitly consent to the public disclosure of anything in the report that might be our "personal data". The University of Essex has shared with both of

us partially unredacted copies of the report. The one supplied to Jo Phoenix shows all relevant references to her and likewise the one shown to Rosa Freedman. We both know what the unredacted information is."

135. It may be that UoE and Professors Phoenix and Freedman have been or will be in direct contact and that if appropriate consent is forthcoming UoE will decide to reissue the Report with the redactions specifically relating to their personal data removed. That is not a matter for this Appeal and we accept the submission of UoE and the IC that this consent was not in existence as at the date of the Refusal. Further in our view consent, even if given, provides a lawful basis for publication but does not compel it.

Tribunal Review – Section 36(2)(b)(ii) and section 36(2)(c) - Review

The QP

136. The QP for UoE by section 36(5)(o) FOIA was the VC. Professor Anthony Forster was appointed VC of UoE in 2012 and was the QP in respect of these matters.

What was the QPO?

137. We have seen a copy of the QPO (pages G920 to G933) and the supporting documents in section G of the Bundle. We note it appears to be signed by Professor Forster and is dated *"23 June 2021,updated 27 July 2021 and 8 September 2021".*

138. From pages G930 -932 we noted that the QPO was that if the information requested were to be disclosed the prejudice/inhibition at section 36(2)(b)(ii) FOIA or section 36(2)(c) FOIA would be likely to occur.

Was the QPO reasonable?

139. We have considered this question on the basis of the Decision in *Malnick* and having noted the lower evidential threshold needed where the QPO is that the prejudice "would be likely etc.."

140. We noted the Appellant's submissions including on page 7 of his skeleton argument of 2 October 2023 where he said:-

"Within this, I stressed the mandatory nature of the requirement (b) for specifying a plausible causal link, without which the QP's opinion is ipso facto not reasonable: see pp. 20–21 of App28Dec2022."

141. We agree with the DN (A6) that the information provided to the VC/OP to assist in the consideration of the QPO:-

"…included: a description of the requested information; confirmation that the withheld information was shown to the QP along with a very detailed 'exemptions grid' which explained the proposed exemptions and the rationale for applying them; and comprehensive arguments as to why the envisioned prejudice would or would be likely to occur if the withheld information were to be disclosed."

142. We also agree with the highlighting of these points by the IC that (A6):-

"When invited to take part in the review participants were assured that their contribution to the review would remain confidential and disclosure of input from/about review participants without their consent may trigger a wave of complaints and disruption for the University, which it would have to manage.

The report covered matters of extreme sensitivity which, in the wider world, are highly contested. The University took care to create an environment of trust where all views could be heard in relation to the associated review. This trust would be severely impacted should the redacted parts of the report be released.

Disclosing additional text may bring safeguarding concerns.

Disclosure would hinder the provision of a safe space for the University community to take forward the actions that followed the report. [The Commissioner considers this argument is of more relevance to the exemptions under section 36(2)(b).]"

143. We also agree with the DN when it says (A6):-

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

144. We agree with the submission made by UoE in submissions (page 18 para 44) that *"The Vice-Chancellor's opinion is careful, moderate and appropriately detailed."*

145. We have seen the QPO and the various relevant documents in section G of the Bundle. We had regard to the evidence on how the process of obtaining the QPO was dealt with at UoE (from 1000).

146. In our view the QPO was reached on the basis of a considerable level (and in our view more than sufficient level) of detailed information thought and analysis. Having considered the submission of the parties and the evidence and the relevant legal authorities our conclusion is that the QPO was reached

reasonably and was reasonable in substance and that these exemptions are engaged.

The PIBT

147. The Appellant refers to the PIBT in particular in part 7 of the GoA (A103-107). In summary as regards the PIBT for section 36(2)(c) FOIA his position is as follows:-

- as regards UoE's argument that there is a public interest in being able to continue to function etc he says:-

  "Yes, but what on earth does this have to do with the proposed FOIA disclosure? The University here insinuates that the proposed disclosure would somehow undermine its ability to "teach, research and engage with its communities and stakeholders" and that it would impose a large financial burden; but it does not give even the slightest explanation of the alleged causal link behind these insinuations. These claims are simply plucked out of the air; they go far beyond even the four harms that the University has claimed — claims that themselves are unsupported by any causal link, as I have shown in Sections 5.1–5.4."

- to UoE's assertion that there would be disruption meaning resources being spent on these matters rather than being directed towards education and/or research he says:-

  "Once again, there is not one iota of evidence or argument as to why disclosure of the Facts and Evidence section of the Report — with, of course, all names and identifying information carefully redacted — would lead to "claims and complaints" (nor any indication of the nature or probable validity of those claims and complaints), much less to "disruption". All this is pure speculation, unsupported by any evidence or plausible causal link; it recycles and then embellishes the University's claims that I have already refuted in Section 5.1."

- as regards UoE's claim that there would be damage to UoE's reputation which would impact staff and student recruitment he says:-

  "*it is, indeed, quite possible that the University — or to be more precise, some of its current high officials, which is a very different thing — might suffer some (limited) reputational damage from the disclosure of the Facts and Evidence section of the Report if those facts turn out to be sufficiently damning. But in that case I can hardly see why it is in the public interest that these officials be protected from public accountability for their mistakes*"

- as regards UoE's argument that disclosure would lead to numerous avoidable time and cost consuming consequences he says:-

  "Here the University simply recycles, once again, its claims that disclosure of the Report — with, as everyone agrees, names and identifying information redacted — would likely lead to "numerous time and cost consuming consequences". These claims have already been refuted in in Sections 5.1–5.4, so I need not say any more."

148. The Appellant refers to the PIBT regarding section 36(2)(b)(ii) FOIA (A106). He identifies three arguments made by UoE:-

- As regards UoE referring to the public interest in protecting individuals he says

  "I agree completely. But how could anyone be victimised if all names and identifying information are carefully redacted (as I have specifically requested)? This argument is a red herring."

- On the importance of encouraging engagement with reviews he says:-

  "...the University has utterly failed to explain in what way disclosure of the Facts and Evidence section of the Report — of course with names and identifying information redacted —"would discourage and reduce the quality and quantity of such inputs". The alleged connection is a pure assertion, unsupported by any evidence or argument or by any indication of the alleged causal link."

- UoE he says, also asserts *"a public interest in the University being able to take forward the actions agreed by its Senate and Council in response to the recommendations of the Review."* To this he says (A106):-

  "Once again, as explained in detail in Section 6.1 above ("alleged chilling effect"), there is not one iota of evidence or argument as to why disclosure of the Facts and Evidence section of the Report would "have a chilling effect on this deliberation process and inhibit the University's ability to make and influence changes, where identified, to its practices", nor any indication of the alleged causal link. Quite the contrary, I have argued forcefully that making available additional relevant evidence would improve the quality of the deliberation process. Certainly the University has not provided any reason to believe otherwise"

149. He also says in his Reply of the 28 December 2022 (from A171) (again in summary):-

"The Commissioner, in his response, says (paragraph 30) that he "acknowledges the Appellant's arguments concerning the envisaged prejudice in respect of s.36(2)(b)(ii) and 36(2)(c)." But he does not address (or even recount) those arguments at all, much less refute them. He simply repeats that he "considers, for the reasons set out

in the University's submissions and Decision Notice, that the public interest favours maintaining the exemption." But in Section 7 of my Grounds of Appeal, I addressed in great detail all of those reasons — both those set out in the University's submissions, and those set out in the Decision Notice — and I explained why they are grossly flawed. The Commissioner, by contrast, has completely ignored my arguments, and has simply repeated the claims of the Decision Notice without any further argument. I would humbly observe, once again, that an assertion does not become proven by mere repetition, and that an advocate does himself no credit by ignoring his opponent's arguments."

150. The IC in the DN concludes at para 37 (A8):-

"T*he Commissioner has noted the complainant's arguments but agrees with the University that the public interest favours maintaining the section 36(2)(c) exemption. First, he understands that, in the current case, the matter associated with the request was 'live' at the time of the request. He understands that the report had been published on 17 May 2021, shortly before the complainant's request. As such the University was likely still to have been in the process of processing and managing its findings. It would then have to agree and implement the report's associated recommendations. Second, the Commissioner has taken account of the nature of the information being withheld and the circumstances in which the University obtained the information. In the Commissioner's view, at the time of the request there was greater public interest in the University being able to action the report's recommendations effectively and efficiently, without the distraction likely to be generated through disclosing the information. In addition, the public interest in contributors to this report being willing to work with the University to implement the report, and in potential contributors to future reviews being prepared to assist the University, is greater than the public interest in the University being fully transparent and disclosing the withheld information in this case."*

151. Mr Morris says at paragraph 86 of his statement:-

"I consider that the public interest arguments, both in favour of and against disclosure, identified in the Record of Public Interest Test remain as valid today as they did when put forward in response to the Request and the Internal Review Request. I believe that the wider public interest has been best served by the approach the University has adopted to voluntary publication of a redacted version of the Report, which has contributed substantially to public understanding and debate, whilst enabling the University to secure engagement with the Review (and implementation of actions post Report) through the commitment to confidentiality, protecting the contributors to the Review from the risk of harm and ensuring that the University is acting in an open and transparent way in relation to its failings as described in the Report. ....I am aware that the public interest balance is a matter

of assessment for the Tribunal, rather than of fact for a witness but I hope my comments on this point assist the tribunal with its assessment."

152. As regards UoE's position the DN in summary says (A7):-

"For its part, the University has acknowledged the public interest in promoting transparency and accountability. This improves public understanding and awareness and, as a result, the public's ability to engage in debate and decision making, on significant issues. The University also notes the specific public interest in the issues considered in the report, which concern issues of academic freedom and freedom of expression."

153. The IC in its Response to the Appeal says (A135):-

"b) The public interest favoured maintaining the exemption so as to enable the University to focus on implementing the report's recommendations without the distraction likely to be generated as a result of further disclosure. Furthermore the public interest in contributors to the report being willing to work with the University to implement the report, and in potential contributors to future reviews being prepared to assist the University, outweighed the public interest in further transparency ([33]-[38])"

154. It also says when concluding that UoE struck the correct balance between disclosed and withheld information (A139):-

"The Commissioner acknowledges the Appellant's arguments concerning the envisaged prejudice in respect of s.36(2)(b)(ii) and 36(2)(c). However the Commissioner considers, for the reasons set out in the University's submissions and Decision Notice, that the public interest favours maintaining the exemption."

"The Commissioner accepts that the University needed time to implement the report's recommendations. Given the nature of the information being withheld, and the circumstances in which the information was obtained in the context of the underlying debate, there was a greater public interest in enabling the University to focus on actioning the recommendations without the distraction that would have likely been caused as a result of further disclosure. The Commissioner also accepts that there was a greater public interest in ensuring contributors to this report being willing to work with the University, as well as future contributors. The Commissioner also accepts that given the expectations of the contributors, and the sensitivity and profile of the underling issues and debates underpinning the report, the public interest favours non-disclosure and that disclosure would have been likely to prejudice the free and frank exchange of views for the purposes of deliberations

An important factor in this decision is also that the Commissioner considers there to be sufficient information already disclosed from the report to provide a reader with an understanding of the nature of the events and, most crucially, the author's assessment of the events and recommendations. In the light of such disclosures the Commissioner particularly does not consider the public interest to favour disclosure of the remaining information given the Qualified Person's reasonable opinion and the arguments presented in favour of non-disclosure"

155. UoE in its Response to the Appeal says (A186):-

"As to the application of the public interest balancing test, the University submits that this is straightforward. If no part of the Report had been published, there would be a powerful argument from transparency, accountability and potential wrongdoing to favour publication of significant parts of it. But the University proactively published the Report. Although there are numerous redactions, large swathes of the Report are unredacted and – of the greatest significance – the University has not redacted (save for minor aspects within paragraphs) the findings made in the Report and the recommendations which result from those. It is the corporate failings identified on the part of the University in which there is the greatest public interest, and it is those matters which were placed in the public domain. The University can be, and has been, held to account by the press and the public, as well as its own community, for those failings and how it is going about addressing them.

It is not disputed that disclosure of the redacted material in the Report would provide some further measure of transparency (although negligible in the case of various of the redactions). However, that further measure of transparency would: (a) add little if anything to the central and proper public debate to be had about the University's compliance with its statutory duties and policies and procedures it has in place in relation to external speakers and freedom of speech on campus; (b) renew public attention on the actions and reactions of individuals rather than on the University, with the material risks attendant in this context; and (c) be likely to cause the various harms and prejudices identified, none of which are in the public interest and of which it is very strongly in the public interest to prevent.

In all the circumstances, the University was right to conclude, and the DN right to accept, that section 36 was engaged and the public interest favoured maintaining the exemption."

156. We noted in the Bundle the content of a document called "Record of Public Interest Test" (AiG934 -941) which is dated 27 July 2021 and then *"updated 9 September 2021, and 27 October 2021 (as part of the internal review)".* It considers the Request and the nature of the PIBT. It lists arguments in favour of disclosure (936) and (938) arguments in favour of maintaining the

exemption split between the 2 parts of section 36 under consideration. The document (940) records the conclusion that:-

"Considering the factors for and against disclosure in the public interest and their respective weights, it is clear that the public interest factors for non-disclosure have a greater weight than those pro-disclosure."

157. This conclusion was explained as follows (940/941):-

"It is also noted how much information has already been made public, the additional details proposed also to be made public and their value and relevance, both to the requester, and more widely. It is also clear how much relevant and valuable detail would be disclosed, compared to those proposed to be withheld. It is not considered that the redacted sections that fall within the S36(2)(b)(ii) or the S36(2)(c) exemption(s) would add anything further of significance to the public interest.

Furthermore, it is noted that the vast majority of redactions have been applied as a result of S40 and S41 exemptions, and not S36(2)(b)(ii) or S36(2)(c). The former are absolute exemptions and are not subject to the public interest test and so the majority of redacted material would not be made available in any event.

The nature of the anticipated harms from disclosure of relevant, redacted material, the severity of that harm and its likelihood of arising (as explained in the annexed qualified person's opinion) mean that, from the very limited value of additional disclosure, it would be very likely that there would be significant harms and negative consequences.

The University has been very careful to balance these considerations with the public interest in the outcome of the investigation. In doing so, the University has been very open and transparent about the investigation and its outcome. The published report contains extensive material assessing against the legal framework the events that took place at the University. The incremental benefits that might result from greater disclosure are, indeed, small because the public can gain insight into the arguments, legal analysis, recommendations for action, and their rationale, from the redacted, public version of the report"

158. We reviewed the Report and the Table to see where and how UoE had relied on section 36. A noteworthy example is the part of the Report where only section 36 was deployed at para 102 of the Report (E518). It is fully redacted on the basis of section 36(2)(c) FOIA namely that the QPO's opinion is that disclosure would be likely to prejudice the effectiveness of the conduct of public affairs. In the Table it is said by UoE that:-

"Direct quote(s) and reporting of their feedback from contributors. Details obtained in confidence."

"S36(2)(c) Disclosure would reveal information about the University's internal decision making processes which would disrupt future processes."

159. Due to the issues raised in this paragraph we accept that disclosure would have been likely to prejudice the effectiveness of the conduct of public affairs.

160. From this and the other evidence we concluded that UoE did carry out the PIBT appropriately.

161. The arguments for and against disclosure (assessed at the date of UoE's Response to the Request) mirror those relevant for the review of section 41.

162. Reasons the public interest would favour disclosure in our view include:-

- the desirability of transparency and openness.
- to allow for the open free and frank exchange of ideas and views.
- that elements of the redacted material if published might add to the readers understanding.
- because there was considerable interest in the issues that form the background to this Appeal.
- the importance of the subject matter for UoE, the Education sector and others who wish to benefit from the Report's insights.
- to add to the public debate on these subjects.
- to support freedom of speech and expression.
- to protect academic freedom

163. Reasons the public interest would favour the maintenance of the exemption include:-

- the public interest in ensuring people taking part investigations in the future have the necessary trust in the confidential nature of the process (as explained to them or expected by them) that they decide to be involved. This is especially so when the issues under review have such a high profile and raise passionate responses.

- that it would invariably be the case that the more people that take part in such investigations providing their view and sharing at times personal thoughts with confidence the more instructive the outcome and recommendations- which is clearly in the public interest.

- the need for UoE to be able to focus on its core activity and deploy its resources accordingly

164. UoE also put forward (see the DN page A8) the argument that the exemption should be maintained because:-

"Reputational damage arising from events would be likely to affect the ability of the University to attract and retain both the best staff and the right numbers of students to allow it to maintain its growth and its contribution to the local community and wider society."

165. We noted but gave no weight to this argument because:-

(a) it appears to suggest that a public authority may wish to withhold information if disclosure might cause reputational damage and thus be likely to prejudice the conduct of public affairs. However if there has been reputational damage it might equally be said that in the right circumstances additional disclosure (while embarrassing in the short term) would, be likely to enhance reputations and assist in the conduct of public affairs.

(b) there was so much already in the public domain by the time of the Response that it is unlikely in our view that this potential outcome would have been as damaging as described.

166. The positive reasons for disclosure are in our view reduced in weight because:-

- of the publication of the Report as it is.

- of the ability to read with clarity the recommendations in particular.

- of the Report's status as a report on an investigation and not the result of an academic study.

- fewer redactions would not have added much to the usefulness of the work carried out by Akua Reindorf KC and the Report itself.

167. In our view, having considered the reasons for disclosure and for maintaining the exemption and having considered the weight of the arguments, the balance is in favour of maintenance.

Tribunal Conclusion – section 36

168. From our review of the evidence and the submissions of the parties it is our view that the QPO was reasonable. It is also our view that UoE considered the PIBT as required and concluded appropriately that in all the circumstances the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

169. Therefore as regards the reliance by UoE on section 36(2) FOIA it is our view that the DN was in accordance with the law and it is not our view that the IC should have used its discretion differently.

Decision

170. Accordingly, having made the conclusions on each of the exemptions detailed in sub headings above, it is our Decision that the DN was in accordance with the law on each exemption and it is not our view that the IC should have used its discretion differently. The Appeal is dismissed.

Signed Tribunal Judge Heald **Date** 21 August 2024

Appendix

Date	Page (if in bundle)	item
27 May 2021	265-266	the Request
23 June 2021	267	UoE initial Response
14 September 2021	296-311	UoE Response
12 November 2021	342-415	UoE outcome of internal review
6 January 2022	596-823	Complaint to the IC
27 October 2022	1-21	the DN
23 November 2022	22-29	Notice of Appeal
23 November 2022	30-127	GoA
16 October 2022	128-147	IC's Response
28 December 2022	148-173	Appellant's Reply
14 March 2023	174-195	UoE's Response
20 March 2023	199-221	Appellant's Reply

Additional Submissions prior to the Appeal

17 March 2023	196-198	IC's submissions on section 41
16 April 2023	222-244	Appellant's submissions on section 36
20 June 2023	245-251	Appellant's further submission on section 36
18 September 2023	Not in bundle	Appellant's comments on the witness statement and other submissions by UoE
2 October 2023	Not in bundle	Appellant's Skeleton argument
2 October 2023	Not in bundle	UoE written submissions
2 October 2023	Not in bundle	IC's supplemental submission on section 36
4 October 2023	Not in bundle	Appellant's Reply to Respondents' final submissions