

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 23 July 2007

Public Authority: Cranfield University
Address: Cranfield
Bedfordshire
MK43 0AL

Summary

The complainant requested information concerning allegations made about the Vice Chancellor of the public authority and the subsequent investigation made into these allegations. The information requested was withheld under sections 36, 40, 41 and 42. Following the intervention of the Commissioner, some information was disclosed to the complainant. In relation to the remainder of the information, the Commissioner finds that sections 36 and 42 have been applied correctly. As sections 40 and 41 were applied to information that the Commissioner has concluded should be withheld under section 36, the Commissioner has not formed a conclusion in relation to these exemptions. The Commissioner also finds that the public authority failed to comply with the procedural requirements of section 17 when refusing the request, but that this breach does not necessitate remedial action.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

The Request

2. Following a reorganisation within the public authority, allegations were made about actions taken by the Vice Chancellor.
3. On 10 April 2005, the complainant requested the following information from the public authority:

- “(1) *The document submitted to the Council of the University towards the end of last year (with additions submitted earlier this year) by [Council Member A] expressing concern about certain actions of the Vice-Chancellor.*
- (2) *Any minutes or notes relating to the deliberation of the sub-group established to consider these concerns*
- (3) *The legal opinion which was sought on these same concerns.”*
4. The public authority acknowledged this request on 15 April 2005. On 9 May 2005, the public authority wrote to the complainant to advise that it was considering whether or not it would be in the public interest to disclose the requested information and would not be in a position to provide a final response until the middle of June. It explained that key members of staff would be unavailable for part of that period.
5. On 20 June 2005, the complainant sent a further letter to the public authority chasing a response to his request.
6. On 22 June 2005, the public authority provided a refusal notice. This notice cited 3 exemptions in relation to the requested information:
- Section 36 (Prejudice to Effective Conduct of Public Affairs)
Section 41 (Information Provided in Confidence)
Section 42 (Legal Professional Privilege)
7. It argued that the requested information relates to an investigation by a committee established by the University Council. It explained that the Vice-Chancellor, who had been designated as the qualified person for the purposes of section 36 by the Department for Education and Skills and the Department for Constitutional Affairs considered that *“it is imperative for the proper functioning of such a process that it is undertaken in the knowledge that information is provided on a confidential basis and that those conducting the investigation can consider the issues freely and frankly. The Vice-Chancellor, as the designated officer, has confirmed that disclosure is likely to inhibit the free and frank exchange of views for the purpose of deliberation or would otherwise prejudice the effective conduct of public affairs.”*
8. It added that *“Legal advice was obtained by the committee of Council on a confidential basis. That advice is exempt from disclosure as it is professionally privileged and the University does not consider that the public interest requires disclosure.”*
9. It then directed the complainant to apply to the Commissioner’s office if he had any further complaints.
10. In a letter dated 10 July 2005 but with an enclosure dated 14 July 2005, the complainant wrote to the Chancellor at the public authority challenging its position. This letter expressed particular concern about what the complainant saw as a conflict of interest for the Vice-Chancellor. It also stressed the public interest in accountability and referred to earlier guidance from the

Commissioner's office which states that "*There is a presumption running through the Act that openness is, in itself, in the public interest*".

11. The Chancellor at the public authority acknowledged this letter on 1 August 2005 and advised that the public authority would be conducting an internal review of its original decision.
12. In a letter dated 11 August 2005, the public authority advised the complainant that, having considered the points he had raised, it nevertheless upheld its original decision not to disclose the requested information. It also directed the complainant to the Commissioner's office if he had any remaining concerns.

The Investigation

Scope of the case

13. In a letter received on 13 May 2005, the complainant contacted the Commissioner to complain about the way his request for information had been handled. At that stage he was concerned about the public authority's failure to respond within 20 working days. The complainant also stated that the University had advised him that it had no "*appropriate [complaints] procedure*" and expressed concern that the Vice Chancellor was the only person designated to make decisions about this request at the public authority when the information requested related to alleged criticism of the Vice Chancellor's actions.
14. The Commissioner acknowledged this complaint on 6 June 2005.
15. The complainant then forwarded further correspondence referred to in paragraphs 6 to 12 above to the Commissioner along with a letter he had sent to the then Secretary of State for Education and Skills, the Rt Hon Ruth Kelly MP. This letter raised concerns about the fact the Vice Chancellor was the "qualified person" for the purpose of applying Section 36 of the Act given that the information to which this exemption had been applied related to the actions of the Vice Chancellor.
16. The complainant raised concerns about 4 issues:
 - the fact that the public authority's refusal notice was not received within the statutory 20 working day period.
 - the application of Section 36 with particular reference to the apparent conflict of interest involving the Vice Chancellor
 - the application of Section 41
 - the application of Section 42.

Chronology

17. The Commissioner wrote to the public authority on 17 October 2005. He asked for the following information:

- a) The document submitted to the Council of the University towards the end of last year (with additions submitted earlier this year) by Council Member A expressing concern about certain actions of the Vice-Chancellor.
 - b) Any minutes or notes relating to the deliberations of the sub-group established to consider these concerns.
 - c) The legal opinion which was sought on these same occasions.
 - d) A statement of opinion from the public authority's qualified person explaining the application of section 36
 - e) The public authority's more detailed public interest arguments with respect to the application of section 36 and Section 42 in this case
 - f) The public authority's comments on the applicability of Section 41. The Commissioner raised concerns that the information in question had been generated by the University itself.
18. The Commissioner also raised concerns about a lack of clarity in the public authority's explanation of the public interest test in its refusal notice. It drew the public authority's attention to section 17(3) of the Act (reproduced in full in a Legal Annex to this Notice). This section requires a public authority to explain why it believes that the public interest favours maintaining a particular exemption that has been cited.
19. The public authority responded on 10 November 2005. It acknowledged the procedural shortcomings that the Commissioner had identified and provided further comments on the applicability of the exemptions cited. Having given further consideration to the request, it also argued that the provisions of section 40 (Disclosure of Personal Data) were applicable.
20. The public authority recognised that it could have offered further explanation to the complainant and was prepared to do so at this stage. Before doing so, it said that the Commissioner may wish to continue with consideration of this case and reach a view on the exemptions applied by the public authority. The public authority did not wish to supply to the Commissioner the information it had withheld from the complainant prior to the Commissioner reaching a conclusion on the applicability of the exemptions cited.
21. It is apparent to the Commissioner from subsequent correspondence that the public authority misunderstood, to a certain extent, the Commissioner's role in handling complaints under the Act. The public authority appeared to believe that the Commissioner acted as a conduit for the disclosure of requested information and that if it disclosed the requested information to the Commissioner for the purposes of his investigation, the Commissioner would disclose it to the complainant if he considered that the exemptions had not been correctly applied.
22. The Commissioner contacted the public authority and explained that sight of the withheld information was necessary in order to assess whether the exemptions had been applied correctly. The public authority subsequently provided the requested information to the Commissioner at the beginning of January 2006.

23. In its letter of 10 November 2005, the public authority provided more detail about the information itself and how it was created. It explained that an independent member of the Council read out a statement at a meeting in October 2004. A sub-committee of the Council was set up to consider the statement. It met twice and interviewed relevant parties. As part of its deliberations it also sought Counsel's opinion.

Section 36

24. The public authority stated that it had sought legal advice on whether or not it was possible to delegate the Vice Chancellor's role as the qualified person in determining the use of the Section 36 exemption. It said that its legal advisers had approached both the Department for Education and Skills (DfES) and the Department for Constitutional Affairs (DCA) on this point. It explained that both bodies were firmly of the view that this role could not be delegated.
25. The public authority queried the need to produce a "qualified person's statement" as requested by the Commissioner but noted the need to document clearly the reasons for any decision reached on this point. It outlined the steps it had taken to seek the qualified person's opinion as to the applicability of Section 36. It commented that unfortunately a note was not taken of the meeting but that it would ensure that appropriate documentary evidence would be produced and retained in the future.
26. The Commissioner asked the public authority for any first-hand evidence the public authority might have of this process. Specifically, he asked for:
- a) The date the qualified person was asked for his opinion
 - b) The nature of the request made to the qualified person
 - c) The agreement of the qualified person in relation to the above request
27. The public authority provided a copy of a memo sent to the Vice-Chancellor on 6 June 2005 and advised that the meeting to discuss the question was held on 15 June 2005. As outlined in paragraph 24 above, no note of the meeting was retained but the refusal letter resulting from that meeting was sent to the complainant on 22 June 2005. The public authority offered to send a copy of an entry in an electronic calendar as proof that the meeting took place. The Commissioner did not consider that this was necessary.
28. The public authority submitted more detailed arguments about the likelihood of prejudice to the effective conduct of public affairs. It set out the following reasons:
- "1. If allegations are known to be published this may stop individuals bringing allegations for fear of the potential ramifications of expressing their views and full and frank opinions*
 - 2. Those involved in any investigatory process may not provide their views and opinions openly, honestly and completely if they felt that their comments would be widely published*

3. *Those conducting such investigations may also feel inhibited to exchange those views, put forward their understanding of the situation, discuss the issues and provide advice."*
29. It added that *"The Vice-Chancellor therefore considered that potential disclosure of the requested information would be detrimental to the investigatory process because this would lead to less candid discussions which would prevent the University from making a decision based on relevant information."*
30. The public authority also provided its public interest arguments as to why it believed that this exemption should be upheld. The public authority reported that the Vice-Chancellor recognised a public interest in disclosure to assist in ensuring accountability and scrutiny of the public authority's processes. However, the Vice-Chancellor considered that *"the prejudice that would be caused if the information was disclosed was not in the public interest"*. He therefore considered that *"there was a stronger public interest in the [public authority] being able to carry out a thorough investigation in the first instance and that doing so would be assisted for the reasons already indicated if the information requested was not released."*
31. The public authority also explained that its Council includes independent or lay members *"who have fiduciary duties to act impartially and in accordance with the Nolan principles of public life and the Committee of University Chairmen's Code of Practice re-issued in November 2004. Their duty, and that of those Council members from within the University, is not owed to the Vice-Chancellor, but to the University and this provides an established constitutional check and balance."*

Section 40

32. The public authority had not cited this in its correspondence with the complainant but had since considered the interrelationship between Section 41 and Section 40. It listed individuals or sets of individuals whose personal data was included in the requested information. It explained that those individuals who expressed their opinions during the investigation process did so on the understanding that this information was confidential and would not be publicly disclosed. It concluded that disclosure would contravene both the first and second data protection principles because the information will be disclosed for a purpose which was not envisaged at the time that it was obtained and that this disclosure would be unfair.
33. It also argued that some of the requested information was the complainant's personal data and that it was happy to advise him to make a subject access request in accordance with his information access rights under the Data Protection Act.

Section 41

34. The University explained that Council Member A is an independent external member of the Council and that the public authority therefore owed a duty of confidentiality to him. It argued that it also owed a duty of confidentiality to those who had given interviews as part of the subsequent investigation.

Section 42

35. The public authority stated that it considered disclosing this information, but it was concerned that disclosure would undermine the principle of legal professional privilege. It argued that confidentiality was enshrined in the principle of legal professional privilege and that it promoted "*trust in the law and open and honest explanation to legal advisers. In turn this enables legal advisers to provide full and frank advice*". It further argued that good legal advice enabled "*individuals and organisations to take a view as to the best course of action [and ensured that public authorities] carry out their functions on an informed basis.*" In its view, it is not in the public interest to erode the principle of legal professional privilege because this would mean that public authorities would not be in the best possible position to make decisions.
36. On 2 May 2007, the Commissioner asked the public authority to clarify which of the exemptions cited applied to each of the requested pieces of information. The Commissioner noted that, whilst section 36 was considered to apply to the information requested at part 2 of the request, it was not clear if the public authority considered that section 36, as well as sections 40 and 41, also applied to the information requested at part 1 of the request.
37. The public authority responded to this on 24 May 2007. In its response, the public authority stated that it did consider that section 36 applied to the information requested in part 1 of the complainant's request.

Subsequent disclosure

38. During the course of the Commissioner's investigation the caseworker attempted to resolve this complaint informally. The public authority agreed to release a summary of one of the Council documents that it had previously withheld and which would fall within the scope of part 2 of the request. The caseworker commented that this document summarised the outcome of deliberations and that disclosure would have a less prejudicial effect, particularly given the passage of time since the complainant made his request. The public authority considered the matter further and disclosed a summary of the document on 15 December 2006. It also provided the complainant with copies of his personal data under the subject access provisions of the Data Protection Act 1998 as indicated at paragraph 33 above.
39. The Commissioner has not given further consideration to whether the public authority appropriately claimed the exemptions cited in relation to the material contained within the summary. He has confined his analysis to the outstanding information which the public authority has continued to withhold from the complainant.

Findings of fact

40. The Department for Constitutional Affairs' website has an up-to-date record of qualified persons (for the purpose of determining prejudice under Section 36 of the Act) for each public authority listed in Schedule 1 of the Act

<http://www.dca.gov.uk/foi/yourRights/publicauthorities.htm#part4>. It states that the relevant qualified person for this type of public authority is the “*Vice Chancellor or Chief Executive (depending on title used)*”.

41. Information falling within the scope of each aspect of the complainant's information request is held by the public authority.

Analysis

Procedural matters

Section 17

42. The public authority responded to the information request initially on 9 May 2005, within 20 working days of its receipt of the request. In this response, the public authority stated that its considerations of the public interest were not yet complete. This response failed to comply with the requirements of section 17(2)(b) that the relevant provision from Part II of the Act be cited where an extension of time in order to consider the public interest is necessary.
43. The public authority responded substantively to the information request on 22 June 2006. This response did not include any details of the internal review procedure of the public authority and did not, therefore, comply with the requirement of section 17(7).

Exemptions

Section 36

44. Relevant extracts from Section 36 are given in a legal annex to this notice. Briefly, section 36(2)(b)(i) and section 36(2)(b)(ii) apply where “*in the reasonable opinion of a qualified person*” disclosure would, or would be likely to, inhibit the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
45. As indicated in paragraph 40 above, the qualified person in this case is the Vice Chancellor. The complainant raised particular concerns about the potential conflict of interest where the qualified person is deciding on the application of this exemption for information which relates to scrutiny of his actions.
46. The Commissioner recognises the complainant's concerns about the potential for conflict of interest in these circumstances. However, having given the matter due consideration, he is satisfied that the public authority had no alternative but to seek the opinion of the Vice Chancellor where it sought to apply Section 36.
47. In considering the application of Section 36 (prior to consideration of the public interest test), the Commissioner's analysis is confined to considering whether or not the opinion of the qualified person is reasonable. If the Commissioner were to

“step into the shoes” of the qualified person, he might reach a different but equally reasonable opinion about the impact of disclosure. However, for the purpose of analysing the application of Section 36, that is not relevant. As long as the Commissioner is satisfied that the qualified person’s opinion is objectively reasonable and reasonably arrived at, he is, as a consequence, satisfied that the exemption is engaged. However, even if the Commissioner is satisfied that the exemption is engaged, he must then consider whether, in all the circumstances of the case, the public interest in maintaining that exemption outweighs the public interest in disclosure.

48. As outlined in paragraphs 24 to 29, the Commissioner sought detailed representations from the public authority as to the circumstances in which the opinion was sought. The Commissioner also examined the information in question. Having considered all these factors, the Commissioner has decided that the qualified person’s opinion is objectively reasonable and was reasonably arrived at. He is therefore satisfied that the exemption is engaged.

The Public Interest Test

49. Having decided that this exemption is engaged, the Commissioner went on to consider whether the public interest in maintaining this exemption outweighed the public interest in disclosure.
50. It was the opinion of the Vice Chancellor that disclosure in this case would inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. As noted above, in accepting that the opinion of the Vice Chancellor is reasonable, the Commissioner has accepted that disclosure here would inhibit free and frank exchanges in future. The role of the Commissioner here is to consider whether the public interest in disclosure outweighs these concerns.
51. In the case of *Guardian & Brooke v The Information Commissioner & the BBC*, the Information Tribunal acknowledged that the application of the public interest test to the s36 exemption, “involved a particular conundrum,” noting that although it is not for the Commissioner to form his own view on the likelihood of prejudice under this section (because this is given as a reasonable opinion by a qualified person), in considering the public interest, “it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice” (para 88).
52. In the Tribunal’s view, the reasonable opinion is limited to the *degree of likelihood* that inhibition or prejudice would occur, on the balance of probabilities. It therefore argued that the reasonable opinion, “does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant” (para 91).
53. This means that whilst the Commissioner should give due weight to the reasonable opinion of the qualified person when assessing the public interest, he

can and should consider the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.

54. In this case, the public authority set up a sub committee to investigate and consider how to respond to the allegations made by Council Member A. The argument of the public authority is that disclosure of the information requested by the complainant about the workings of the sub committee and of the allegations made to it would inhibit its ability to respond in future in similar circumstances. In considering the public interest, the Commissioner should, whilst giving weight to the opinion of the qualified person, consider the severity, extent and frequency of the prejudice or inhibition caused to the effective conduct of public affairs.
55. When considering the balance of the public interest, it is necessary for the Commissioner to give consideration to the nature of the information withheld. The specific information withheld from the complainant is set out above in paragraph 17 A – C. The content of the sub committee documents relate to events within the public authority considered by some controversial. The Commissioner accepts that discussions of this type could be inhibited through the possibility of future disclosure and that such inhibition could be of a significant extent.
56. The nature of the information included within the allegations made by Council Member A is, by its nature, clearly controversial. Where an individual is considering making allegations that include questioning of the conduct of staff at the most senior levels within the public authority, it is clear that they could be discouraged from doing so by fear that their allegations could later be disclosed.
57. The public authority has argued that disclosure of the information requested would prejudice its ability to respond to serious allegations made in future. The public authority believes that the potential for a wide disclosure of information recorded in the course of an investigation would inhibit participants in an investigation from making a full disclosure. These participants would include those bringing the initial allegation, the individuals subject to the investigation, those carrying out the investigation and those assisting the investigation, such as witnesses or advisers.
58. In terms of severity and extent of inhibition and prejudice caused and the subsequent impact on the ability of the public authority to conduct itself effectively, it is necessary to firstly consider the severity of the inhibition or prejudice. Secondly, the severity of the impact of this prejudice or inhibition on the public authority should be considered.
59. If an individual was considering bringing to the public authority allegations of a sensitive or controversial nature, the individual may only wish to do this where the fact that they had brought these allegations would remain confidential. If the fear of disclosure would prevent the individual from bringing these allegations, the level of inhibition caused through disclosure would be severe.
60. When considering severity of inhibition to the candour of those involved in the investigation of the allegations, it should be noted that these allegations relate to staff at a senior level within the public authority. Whilst the Council would no

doubt remain conscious of their duty to discuss with full candour the allegations made, it is clear that an argument could be made that, compared to a situation where the confidentiality of the discussions is assured, discussions carried out in the knowledge that the details of these discussions could later be disclosed would be severely inhibited.

61. Turning to the issue of the severity of the impact on the public authority, if an individual was inhibited from bringing to the public authority allegations that were accurate and required investigation, the impact of this to the ability of the public authority to conduct itself effectively could clearly be considerable. Also, if, in a case where allegations had been made, those charged with investigating these allegations were inhibited from doing so thoroughly, this could hamper the public authority from responding to a situation where its ability to conduct itself effectively was dependant on an appropriate response to the allegations. This enhances the public interest argument in favour of maintenance of the exemption.
62. When considering severity, it is of significance that the public authority has advised the Commissioner that it considers it unlikely that Council Member A, the author of the information requested at part 1 of the information request, would object to the release of the information requested at part 1 of the request to specific individuals. The qualified person, however, considers that the release of this information would prejudice the effective conduct of public affairs.
63. The Commissioner recognises that an argument could be made that the information requested at part 1 of the request could be released with the caveat that this information is only released in this case because Council Member A has specifically consented to this. This disclosure would not have the feared impact if it was clear that similar information would not be released in future against the wishes of the individual bringing the complaint.
64. Despite the representations of the public authority that Council Member A would not object to the disclosure of this information, the Commissioner accepts the opinion of the qualified person as reasonable here. Council Member A may feel that disclosure of this information would be of no detriment to him, but the qualified person is clearly better placed to judge whether the release of these allegations would prejudice the public authority. That Council Member A would not object to the disclosure of this information does not necessarily mean that the prejudice caused to the public authority through disclosure would not be severe.
65. The public authority has also argued that the disclosure of information concerning its investigations is unnecessary given the presence on its Council of independent members who have a duty to act impartially. The argument of the public authority is that these members offer an existing check and balance and disclosure as a further such measure is not necessary. Whilst the Commissioner recognises that the duty to act impartially is a relevant argument, he considers that it must be balanced against the legitimate interest in the public having access to information which explains how the allegations were investigated and the conclusions reached.

66. Turning to arguments in favour of disclosure, as stated above it is necessary for the Commissioner to consider the frequency of any inhibition or prejudice that could be caused through disclosure of the information requested. It is apparent through the actions of the public authority in creating a sub committee specifically for the purpose of considering the allegations made here that circumstances similar to this are unlikely to arise regularly. That this situation arose from a reorganisation of the structures of the public authority also suggests that it is unlikely that a similar situation would arise often. The Commissioner considers it unlikely, therefore, that frequent prejudice to the effective conduct of public affairs would result from disclosure in this case.
67. It is also significant that the investigation carried out by the sub committee into the allegations made by Council Member A was completed prior to the date of the information request. As this investigation is complete, disclosure would not have any impact on the process about which information has been requested. The Commissioner considers that this enhances the arguments in favour of disclosure.
68. The Commissioner notes that a recent reorganisation at the public authority has been controversial where it has had a direct impact on some individual members of staff. Concerns had been raised about the turn of events at the time and about whether or not proper procedures had been followed when the reorganisation was implemented. This matter was discussed by the sub-committee.
69. The complainant has also raised concerns about not being able to verify statements made by the public authority if it is not required to release the requested information. It is the case if the public interest lies in allowing scrutiny of this information, it should be released regardless of the inhibition caused to free and frank discussions within the public authority.
70. The complainant believed that the public authority would be able to make statements to defend its position without regard to whether these are true or false if it was not required to disclose the information that he had requested. The complainant believed that disclosure was necessary in order that he could challenge the accuracy of statements made by the public authority that he believed to be false.
71. In such circumstances the Commissioner recognises that there is a public interest in information being released which would demonstrate the way that the investigation into allegations about the handling of the reorganisation was conducted. This includes material which shows what evidence was considered by the sub-committee as well as the outcome of its deliberations. This is likely to increase public confidence that a thorough investigation of the allegations into a controversial issue has been carried out and that all the relevant evidence has been considered. Disclosure could also be used by the public authority as an opportunity to demonstrate that the sub-committee has acted impartially.
72. However, equally where the overall circumstances in which the requested information has been recorded are considered by some controversial, it is of particular importance that the public authority has space to be able to consider

the situation thoroughly. In order to do this, the public authority must be in a position to carry out free and frank discussions. As noted previously, this may not be possible where the participants in these discussions have concerns that their input may later be disclosed. The Commissioner considers that this argument has significant weight in this case.

73. The public authority itself recognised a public interest in disclosure to ensure accountability and the Commissioner agrees that a valid argument can be made in favour of disclosure being in the public interest where this enhances the accountability of the public authority. The public authority, however, felt that this was outweighed by the importance of ensuring that the public authority was able to act appropriately in the first place, which it would not be in a position to do unless the provision of free and frank advice and free and frank exchange of views was possible without the possibility of disclosure at a later date.
74. The complainant has also argued that the authors of the Act intended that section 36 should be cited only rarely where there are outstanding reasons why this provision should be cited, which would generally mean that disclosure would prejudice the public authority's ability to function effectively. The complainant did not accept that the information in this case was of such importance and believed that the public authority was citing this provision indiscriminately.
75. In response to this the Commissioner agrees to the extent that he will not hesitate to rule that the opinion of the qualified person is not reasonable in any case where it appears that section 36 has been cited without sufficient justification. However, in this case, as already covered above, the Commissioner has accepted the opinion of the qualified person is reasonable.
76. It should also be noted that the public authority is partially publicly funded. Therefore decisions to restructure particular departments are likely to involve the expenditure, at least in part of public funds. Further such decisions also affect parties aside from employees such as students attending the institution. Where the appropriateness of such a restructure or the way in which it is handled is called into question, arguably there is a public interest in people having access to information about the actions taken by the authority to review the situation. It may also inform debate about whether similar changes are necessary and how they may best be handled.
77. As stated above, at paragraph 31, the members of the Council are under a duty to carry out their role diligently. An argument could be made here that, should these Council members be called upon to investigate any future allegations, this duty should outweigh any concern about disclosure that may otherwise have inhibited them from contributing fully and frankly. The Commissioner recognises, however, that inhibition could still result, albeit to a lesser extent, through fear of future disclosure, despite the duty Council members are under.

Section 36 conclusion

78. As stated above, the Commissioner accepts the opinion of the Vice Chancellor as reasonable and therefore considers that this exemption is engaged. This

exemption is subject to the public interest and the Commissioner's conclusion in this regard is as follows.

79. The Commissioner accepts the importance attached by the public authority to the maintenance of the confidentiality of information provided in relation to the work of the sub committee. The Commissioner accepts that the individuals who contributed to this would have an expectation of confidentiality. The Commissioner also accepts that the quality and thoroughness of the investigatory process in place at the public authority would be prejudiced if individuals were inhibited from making a full disclosure by concern that the information provided would later be subject to disclosure and that the impact of such prejudice could be severe.
80. However, whilst accepting the opinion of the Vice Chancellor that disclosure of the information requested would prejudice the effective conduct of public affairs, the Commissioner also recognises that there are public interest arguments in favour of disclosure. On an overall point, the Commissioner believes that disclosure of details of internal discussions is in the public interest where this would aid public understanding of decisions taken by a public authority where such understanding is hampered without disclosure. The Commissioner also considers that the fact that the work of the sub committee is now complete to be a strong argument in favour of disclosure here.
81. As referred to above at paragraph 38, the public authority has disclosed to the complainant a summary of the sub committee's work and the outcome of its deliberations. This partial disclosure is highly pertinent here.
82. The Commissioner recognises the strength of the public interest arguments in favour of disclosure. If no disclosure had been made until this point, the Commissioner may have been minded to require the public authority to make a partial disclosure. In the event, to the extent that the public interest favours disclosure of any of the requested information, the Commissioner is satisfied that this is satisfied by the public authority's voluntarily disclosure.
83. As already mentioned the analysis above relates only to the information over and above what was included in the summary. In relation to that information the Commissioner's conclusion is that the public interest favours the maintenance of the exemption provided by section 36 in this instance.

Section 40

84. The public authority has stated that disclosure of the information requested at (1) and (2) of the complainant's information request would include the disclosure of personal information relating to third parties. The public authority believes that this information is exempt under section 40(2) as to disclose this information would constitute a breach of the data protection principles.
85. Although the public authority has cited this exemption, this is not considered further in this notice. As the Commissioner has concluded that section 36 applies to the same information to which section 40(2) has been applied and has decided

that the public interest favours the maintenance of this exemption, the issue of whether section 40(2) exempts this information is moot. If the Commissioner was to conclude that section 40(2) did not apply to this information, this would not result in the release of this information as the Commissioner has also concluded that it should be withheld under section 36.

86. The summary disclosure made by the public authority does contain personal information relating to the members of the sub committee and the Vice Chancellor of the public authority. Whilst the Commissioner has not formed a conclusion on section 40(2) in relation to the personal information included within the summary, the Commissioner does not believe that the disclosure of the personal information included within the summary should be taken as setting a precedent that suggests that the exemption provided by section 40(2) would not apply to any of the personal information withheld.
87. The Commissioner notes firstly that the summary disclosure was carried out voluntarily by the public authority and the Commissioner did not comment or provide advice at that time about any personal information included within the summary. Secondly, the Commissioner notes that the personal information disclosed within the summary relates only to individuals in their professional capacity as members of the sub committee.

Section 41

88. Similarly to the above, section 41 has been applied to the same information that has been withheld under section 36, the application of which the Commissioner has concluded should be upheld. Consideration as to whether the exemption provided by section 41 has been applied correctly has not been given as this would not alter the result in terms of whether the Commissioner will require information withheld previously to be disclosed to the complainant.
89. In terms of whether the summary would be subject to the exemption provided by section 41, the Commissioner notes again that the public authority released this summary voluntarily and has not argued that this also should be exempted under section 41. To the extent that disclosure of the summary may be seen as a waiver of the claim of section 41 to the information to which section 36 applies, the Commissioner notes that his investigation of this matter had suggested that the claim to section 41 would be unlikely to stand.
90. This exemption can apply only to information that has been provided to the public authority by a third party. The argument of the public authority was that Council Member A was the third party that had provided information to it and that this information had been provided in confidence. The Commissioner's initial considerations had suggested it was unlikely that Council Member A could be considered a third party in this context and that section 41 would not, therefore, be engaged.

Section 42

91. As noted above previously, the public authority has, in an attempt to resolve this matter informally, disclosed a summary of the information requested by the complainant at point 2 of his request. This summary also includes some of the content of the legal advice withheld from the complainant.
92. This disclosure could be interpreted as a waiver of any claim to legal professional privilege in respect to the information withheld. However, this notice focuses on whether section 42 was valid at the time that the request was refused. The issue of whether any claim to legal professional privilege has been waived could be relevant in relation to a future request for this information, but this issue will not be addressed in this notice.
93. The Commissioner's guidance on the application of Section 42 describes the principle of legal professional privilege as follows:

"Legal professional privilege is a common law concept developed by the courts rather than one which is set out in an Act of Parliament. There is no attempt to define the term in the FOI Act. Common law concepts, by their very nature, are not defined in statute. The scope of the exemption may change, therefore, as the courts further develop the concept.

The principle is based upon the need to protect a client's confidence that any communication with his/her professional legal adviser ... will be treated in confidence and not revealed without consent. This is to ensure there is the greatest chance that justice is administered to the client.

Legal professional privilege protects communications between a professional legal adviser and client from being disclosed, even to a court of law. The emphasis should be on communications (for the purposes of FOI this means information rather than documents). Communications include oral as well as written correspondence. FOI is only concerned with 'recorded information' so oral communications, unless recorded, would not be disclosed in response to a request".

94. There are two categories of legal professional privilege:
a) Advice privilege – where no litigation is contemplated or pending
b) Litigation privilege – where litigation is contemplated or pending
95. Having examined the information in question, the Commissioner is satisfied that it is legal advice provided by external Counsel. He is also satisfied that it attracts legal professional privilege and, therefore, that the exemption is engaged.

The Public Interest Test

96. The Commissioner also considered whether the public interest favoured maintaining the exemption. In doing so the Commissioner considered that there is a strong element of public interest built into legal professional privilege, which must be taken account of when considering the application of section 42.

97. In the case of *Bellamy v the Information Commissioner and the DTI*, the Information Tribunal observed that “there is no doubt that under English law the privilege is equated with, if not elevated to, a fundamental right at least insofar as the administration of justice is concerned.” (paragraph 8)
98. In summing up, the Information Tribunal stated that “there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest”. It concluded that “it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut case...” (paragraph 35)
99. The public interest in disclosing the information must therefore, at the least, match the public interest in maintaining the exemption before privilege will be overturned, and it is recognised by the Information Tribunal that the public interest in protecting the doctrine of legal professional privilege is strong.
100. The Commissioner recognises that the complainant and other individuals have genuine concerns about decisions taken recently at the public authority. The complainant and others have been directly affected by some of these decisions. Disclosure of this information could assist in understanding the decision making process and this is an argument in favour of disclosure of the legal advice.
101. As noted previously in respect to section 36, there is a general public interest in the disclosure of information relating to the decision making process of a public authority. This disclosure provides a check and balance which helps to ensure the quality of the decision making process within the public authority. The legal advice received by the public authority was sought in connection with and has influenced its decision making process.
102. An important consideration here is that the deliberations of the sub committee are now complete. That this legal advice is no longer current would reduce any sensitivity associated to this and this would, in itself, be an argument in favour of disclosure.
103. Also of importance is that the Information Tribunal considers that legal advice that could be considered “*stale*” could more readily be disclosed. It is appropriate to consider, therefore, whether the legal advice in question here could be considered stale.
104. The Commissioner notes that in this case the legal advice would be likely to be of relevance to the complainant and any other individual who may be in dispute with the public authority as a result of changes to the College of Aeronautics. Given this, the Commissioner does not believe that this legal advice could be considered stale.

Section 42 conclusion

105. The Commissioner, as noted above, recognises that there is a public interest argument in favour of disclosure here in that this would enable the decision making process of the public authority to be scrutinised by individuals directly affected by decisions taken by the public authority. Also, there is a general public interest in the openness of the decision making process of any public authority.
106. A further, strong, argument in favour of disclosure is that the legal advice relates to a situation that is no longer current. It is unlikely, however, that this advice could fairly be considered stale.
107. However, the inherent public interest in the maintenance of legal professional privilege is strong. The Commissioner recognises that the fact that the exemption provided by section 42 is subject to the public interest demonstrates an intention of the part of the authors of the Act that there would be circumstances in which disclosure will be of greater public interest than the maintenance of legal professional privilege and the Commissioner has issued decisions ordering disclosure on the grounds that the public interest favours this over the maintenance of legal professional privilege.
108. In order for the Commissioner to conclude that legal professional privilege should be overridden, it must be clear that there is a strong public interest favouring this. Whilst the Commissioner recognises that there are public interest arguments in favour of disclosure in this case, the conclusion here is that these are outweighed by the inherent compelling public interest arguments for the maintenance of legal professional privilege which apply.

The Decision

109. The Commissioner's decision is that the public authority dealt with the request in accordance with the requirements of the Act in that the exemptions provided by sections 36 and 42 were applied correctly and the public interest favours the maintenance of these exemptions.
110. However, the Commissioner has also decided that the public authority failed to comply with sections 17(2)(b) and 17(7) when responding to the information request.

Steps Required

111. Whilst the Commissioner has found that the public authority breached sections 17(2)(b) and 17(7), these breaches do not necessitate remedial action. Therefore, the Commissioner requires no steps to be taken.

Right of Appeal

112. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

113. Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 23rd day of July 2007

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**