

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 November 2019

Public Authority: The governing body of the University of London

Address: Senate House

Malet Street

London

WC1E 7HU

Decision (including any steps ordered)

1. The complainant has requested a report into the University of London's handling of a student protest which involved the occupation of the university buildings. The University refused the request under section 36 on the basis that disclosing the information would prejudice the conduct of public affairs by inhibiting the free and frank exchange of views.
2. The Commissioner's decision is that section 36 can only be relied on to withhold a limited amount of the information in the report.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the remaining information from the report. The Commissioner has produced a confidential annex which identifies the information that can be withheld. This will be made available exclusively to the University. The University is required to disclose all the information from the report, apart from that identified in the annex.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 25 October 2018 the complainant requested information of the following description:

“I would like to know whether the independent investigation into the occupation of the University of London this March has concluded its report and, if so, whether it is available anywhere. Please could you direct me towards it, if so?”
6. On 22 November 2018 the University responded. It refused to provide the requested information. The University cited the exemption provided by section 36(2)(b)(ii) – inhibition to the free and frank exchange of views for the purpose of deliberation, as the basis for doing so.
7. On the following day, i.e. 23 November 2018, the complainant requested an internal review. The University sent him the outcome of its internal review on 18 December 2018. The University upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner 2 April 2019 to complain about the way his request for information had been handled.
9. The Commissioner considers that the matter to be decided is whether the exemption provided by section 36 is engaged and, if so, whether the public interest in favour of maintaining the exemption outweighs the public interest in disclosure.

Reasons for decision

Section 36 – prejudice to the conduct of public affairs

10. So far as is relevant, section 36(2)(b)(ii) of the FOIA states that information is exempt if its disclosure would, or would be likely to prejudice the free and frank exchange of views for the purposes of deliberation.
11. Section 36(2) is unique in that it depends on the reasonable opinion of the qualified person in order to be engaged.
12. When considering the application of section 36 the Commissioner will:
 - Establish that an opinion was given;
 - Ascertain who was the qualified person;

- Ascertain when the opinion was given;
 - Consider whether the opinion was reasonable.
13. In the case of the University the qualified person is its Vice Chancellor. The University has provided the Commissioner with a copy of a completed pro-forma setting out the arguments for and against the application of section 36(2)(b)(ii) which has been signed by the Vice Chancellor and dated 15 November 2018. The pro-forma notes the qualified person's opinion that the exemption is engaged on the basis that the inhibition to the free and frank exchange of views is only 'likely' to occur, rather than the higher test that the inhibition 'would' occur. Although relying on the lower threshold makes the exemption easier to engage, less weight is afforded to maintaining the exemption under the public interest test. The Commissioner also notes that the qualified person had read the report itself and would obviously have been very aware of the issues to which it relates.
 14. It is clear that the conditions set out in the first three bullet points of paragraph 12 have been satisfied.
 15. It is now necessary to consider whether the qualified person's opinion that disclosing the information would be likely to inhibit the free and frank exchange of views was a reasonable one.
 16. When considering reasonableness the Information Commissioner relies on the Oxford English Dictionary definition of reasonableness, that is, the opinion must be "in accordance with reason; not irrational or absurd". There can be more than one reasonable opinion on a matter. The qualified person's opinion can only be considered unreasonable if it is one that no reasonable person can hold.
 17. The report which is the subject of the request relates how the University dealt with a protest by students in March 2018 during which the students occupied part of the university building. From newspaper articles that the complainant has directed the Commissioner to, she understands that the occupation took place over nine days and was in support of a campaign by workers at the university, whose jobs had been outsourced, to have their contracts brought in house again. The protest was not without controversy, with allegations that at one point occupiers were locked inside part of the building after a fire escape was temporarily secured to prevent further students entering. The newspaper reports also comment on the amount of money the university spent on increased security measures during the campaign, with estimates of over £400,000 being quoted.
 18. The Commissioner understands, both from the newspaper reports and the University's submission that the occupation was part of a long

running dispute which was still ongoing at the time the request was made.

19. The report was prepared by an organisation which provide internal audit services and is characterised by the University as an internal audit report. The University has presented two main arguments for engaging the exemption. The first is that if staff felt their views would be disclosed they may modify those views which would make the internal audit process less effective and even irrelevant. The Commissioner understands this to be a reference to the candour of those staff who were involved in dealing with the occupation and whose views were sought as part of the review process. The University considers this concern is heightened by the fact that some staff felt intimidated during the occupation. As evidence that these concerns were real, it has provided the Commissioner with copies of communications sent from the vice-Chancellor to staff during the protests in which he recognises these concerns and seeks to re-assure staff of the University's commitment to provide a safe place of work.
20. The Commissioner does not interpret the University's argument to be that the actual authors of the report would be inhibited from expressing their views in a free and frank manner. The organisation producing the report provide internal audit services. Its reputation and ability to attract clients depends on the quality and professionalism of its reports. Such an organisation is unlikely to be easily deterred from delivering a robust assessment of any issues it was asked to report on.
21. The other main argument presented by the University is as follows. The report is an internal document which reviews how student occupations are dealt with and suggests alternative strategies and options for handling similar situations in the future. The University is concerned that it would not be able to ensure the free and frank provision of advice in planning and reviewing security arrangements if the outcome of those plans were to be made available to those who wish to thwart those plans.
22. The Commissioner has carefully considered the relevance of this argument to the application of the exemption. The purpose of the exemption is to prevent disclosures that would inhibit the free and frank exchange of views; it protects the process by which a robust report is produced. The later disclosure of the report would not necessarily undermine the process by which the report was produced even if such a disclosure would allow any new security arrangements proposed by the report to be circumvented.
23. Having said that, the Commissioner recognises that if staff had identified specific weaknesses or vulnerabilities in security arrangements, they

would be less willing to provide such details in the future, if they believed those details would simply be passed to protestors.

24. The Commissioner recognises that the qualified person had genuine concerns that staff would be unwilling to contribute to the preparation of the report if they considered there was a risk of their views being disclosed or that they may be associated with the views expressed in the report. In reaching that opinion the Commissioner has had regard for the actual contents of the report and the fact that the request was made only seven months after the occupation and that student protests were still continuing at that time. It is therefore possible that there would be further reviews of security arrangements which would need input from the staff involved. Therefore the Commissioner finds that it is not unreasonable for the qualified person to be of the opinion that university staff would be sensitive to the disclosure of the report and that this would be likely to inhibit their future cooperation with investigations into such matters. The Commissioner finds that the exemption is engaged.

Public interest test

25. The exemption is however subject to the public interest test. This means that even though the exemption is engaged, the information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.
26. When considering the public interest in favour of maintaining section 36(2)(b)(ii) the Commissioner will give some weight to the opinion of the qualified person. This means that the Commissioner accepts that it is likely that there would be some inhibition to the exchange of views. It is noted that the exemption is engaged on the basis that the inhibition was only 'likely' to occur, rather than the higher threshold of likelihood, i.e. that it 'would' occur. Although some weight is given to the qualified person's opinion the Commissioner will go on to consider the severity, extent and frequency of that inhibition before weighing that against the value in disclosing the information.
27. The Information Commissioner considers that the severity of the inhibition will be determined largely by the sensitivity of the information to which the exemption has been applied. For example, if the information was of a relatively uncontroversial nature, its disclosure would have little impact and not cause staff to shy away from providing free and frank views in similar situations. However the sensitivity of the information will also depend on the circumstances in which the report was produced.
28. The University has to ensure that it provides a safe and secure working and studying environment for the many users of its buildings. It has

stated that over the period leading up to the request it has had to deal with significant threats of disruptive action as well as actual protests, strikes and occupations, and that these threats continue. The University therefore argues that it must be able to conduct robust strategic and operational planning around security and health and safety at the University. To do so requires a frank and open internal discussion of the issues.

29. The Commissioner does not disagree with this argument, but will go on to look at the extent she considers those frank and open discussions would be distorted by disclosing this particular report.
30. The Commissioner has read the report. It is not a particularly lengthy document. The focus of the report is very much on the lessons that can be learnt from how the University handled the occupation, rather than a forensic analysis of everything that occurred during the occupation. It does make recommendations, but these are generally high level. Where any recommendation relates to specific locations the Commissioner considers it likely that the observations made in the report on which those recommendations are based, would be matters already known to protestors. In light of this, the Commissioner is not convinced that disclosing the report would provide those wishing to stage further protests with much, meaningful, intelligence on weaknesses in the University's security arrangements. Furthermore, the Commissioner envisages that once identified, the University would take steps to address those weaknesses. Therefore the Commissioner finds that the inhibition to the free and frank exchange of views caused by staff's fear that their comments would assist those planning future protests, would be very limited and, most likely, only short lived.
31. From newspaper reports the Commissioner can see that the occupation presented the University with a challenging and dynamic situation. It would be unrealistic to expect that any organisation's handling of such a situation would be flawless. Clearly then the review identifies where there would be room to improve the handling of future protests. However the report adopts a very constructive approach and the Commissioner considers that, generally, there is little in it that would cause those contributing to future reviews to be less candid for fear that this could result in criticism of them, or the University, which could later be made public.
32. The Commissioner places greater weight on the University's concerns that staff would be inhibited from sharing their views because the occupation had been a stressful experience, during which some staff had felt intimidated. However the Commissioner considers that the severity of this inhibition would be determined by whether disclosing the information risked identifying the individuals involved. If the risk was high, those individuals would feel vulnerable and one can understand

that if a disclosure placed them in, what they felt to be, an exposed position, they would be very reluctant to contribute to future reviews. The inhibition would be very marked and potentially long lasting in respect of the individuals concerned. It would have a far more limited and shorter lived impact on other staff.

33. The report discusses the incidents in which staff felt distressed or intimidated in only very general terms, as previously stated it does not forensically analyse each incident that occurred. Therefore, on the face of it, the details contained in the report are very anodyne. However both staff and protestors will have a clearer understanding of which incidents are being referred to. The risk of there being speculation as to the identity of the individuals who reported such incidents would be sufficient to raise concern amongst those involved and give rise to the inhibition described in the previous paragraph.
34. In respect of the other information contained in report which does not relate to these stressful or intimidating incidents the Commissioner considers there would be only a limited impact on the candour of staff.
35. An exception to this is where the report refers to the expert views of an external party. The references are very limited and do not detract from the overall understanding of the report. But the Commissioner considers disclosing this information would still be likely to have a significant impact on the University's freedom to seek and receive such views and so protect its position when dealing with occupations.
36. Although the Commissioner has found that in respect of the majority of the information, its disclosure would not have a significant effect on the free and frank exchange of views, the Commissioner has found there is a limited amount of information where the inhibition would be marked. Where this is the case the Commissioner has taken account of the fact that at the time of the request there was a realistic prospect that the University would be involved in further protests. Therefore it was likely staff would be required to participate in discussions about how to tackle such incidents in the future.
37. Furthermore the University has argued that the inhibition would not only affect discussions around student protests, but would extend to those issues to which the protests related. These include the University's approach to organisational change and outsourcing as well as more generally to facilities management. The Commissioner accepts these arguments but considers the impact on such discussion would be less profound, except, perhaps for the discussions on outsourcing.
38. The Commissioner has also had regard for the fact that the report relates to incidents that were very recent and the emotions and stress caused by the occupation would still have still been keenly felt by the

staff involved. The occupation had attracted the interest of the national media and the focus of the media would have heightened the concerns of the staff involved.

39. In light of the above, the Commissioner considers the inhibition likely to be caused by disclosing this more sensitive information will be increased and therefore the public interest in withholding this information to avoid that inhibition is also greater.
40. It is now necessary to balance these public interest arguments against the public interest in disclosure. The University has acknowledged that there is a public interest in transparency of its decision making around its structure, strategy and organisation. As well as there being a public interest in transparency of the University's processes around the security, health and safety and access to its public buildings. In considering these points the Commissioner notes that some of the university buildings are open not just to students but to the general public. This increases the volume of people affected by the University's facilities and safety policies and so increases the public interest in disclosure.
41. The complainant is highly critical of the University's handling of the protests and the conduct of its staff towards protestors. He argues this increases the public interest in disclosing the report and its conclusions. In particular he argues that it is of vital public interest to share the decision making process that led to the events that occurred during the occupation.
42. Clearly the occupation and the University's response to the protest campaign generally has not been without controversy. However as already mentioned, the report does not attempt to give a blow by blow account of all the incidents that took place during the occupation, or how each one was dealt with. Its focus is on the lessons that can be learnt from how the protest was handled, rather than proportioning blame (whether to the University or to the protestors) for the events that occurred. Therefore disclosing the report would not satisfy the public interest in respect of the decision making processes followed by the University to the extent that the complainant envisages.
43. Having said that the report does consider one particular incident that occurred and the safety concerns it raised. Although the report does not purport to provide the full story of that incident, there is a public interest in its disclosure as this would help the public reach a more informed view on how the incident was managed and the justification for certain actions that were taken. The report also includes a brief assessment of safety implications of the actions taken. Disclosing the information would either promote confidence in the University's handling

of the incident or, alternatively, allow the public to challenge the report's assessment.

44. Apart from that one incident, the report adopts a more general approach to the events, looking at themes where improvements could be made, rather than looking at specific incidents. Nevertheless its disclosure would help the public understand the University's approach to the occupation and explain some of the problems in its procedures that became evident. In many ways this would reassure the public as to the University's competence when dealing with these situations and that, it is capable of critically assessing its performance and learning any appropriate lessons.
45. When weighing the public interest in favour of maintaining the exemption against the public interest in disclosure, the Commissioner notes that the qualified person considered it was only likely that the inhibition to the free and frank exchange of views would occur. It is also important to recognise that the Commissioner considers that disclosing the majority of the information would be likely to cause only a limited inhibition to the candour of discussions. In respect to the majority of the information contained in report, the Commissioner finds that the public interest arguments in favour of its disclosure outweighs the harm that disclosure would cause to the free and frank exchange of views. In reaching this conclusion the Commissioner has had particular regard for the value of allowing the public to better understand the issues raised by the occupation and reassure staff, students and the public of the University's capacity to take on board any necessary learning points.
46. There is a particular public interest in disclosing the discussion of the particular incident referred to in paragraph 43 above because of the controversy it provoked and the safety implications involved. Although the controversial nature of the incident increases the potential for this information to be more sensitive, the actual information is presented in a formal, balanced way which simply records what the authors were able to establish happened and does not risk identifying individuals. The Commissioner finds that the public interest favours the disclosure of this information.
47. The Commissioner has found that disclosing a limited amount of the information is likely to cause a far greater inhibition to the free and frank exchange of views (see paragraphs 33 and 35). Disclosing this information would be likely to make some members of staff feel they had been made vulnerable, or would compromise the freedom with which the University felt able to solicit views from third parties. This inhibition would undermine the ability of the University to examine its handling of student protests in the future, and also discussions of related issues such as facilities management and outsourcing of staff. The Commissioner considers it is important that the University can rely

on the open and honest contribution of staff so it can continue to learn lessons when necessary in order to ensure the safety of staff, students and the public and so develop robust, effective policies. The Commissioner finds that the public interest in maintaining the exemption in relation to this, limited information, outweighs that in disclosure. This information can be withheld under section 36(2)(b)(ii). The information to be withheld is identified in a confidential annex which will be made available exclusively to the University.

Right of appeal

48. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

49. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
50. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Rob Mehan
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