

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 18 September 2020

**Public Authority:** The Council  
**Address:** Keele University  
Keele  
Staffordshire  
ST5 5BG

### Decision (including any steps ordered)

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1. The complainant has requested from Keele University (the "university") the correspondence between Professor Clifford Stott and the Independent Police Complaints Council ("IPCC") in Hong Kong during a period of four months in 2019. The university refused to provide the requested information, citing sections 36, 41 and 22(A). During the Commissioner's investigation the university disclosed some information to the complainant with the redaction of certain personal information under section 40(2). It also cited sections 27, 38 and 43 as additional exemptions in respect of the remaining information it was continuing to withhold.
2. The Commissioner's decision is that the university has appropriately applied both section 36 and section 40(2) to the withheld information.
3. The Commissioner does not require any further steps to be taken by the university.

### Background

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4. Professor Stott who is Professor of Social Psychology at Keele University was one of five law enforcement experts advising a Hong Kong fact-finding study into public order events that were connected to protests. He subsequently stepped down, as did the other members of the foreign expert panel. In a statement released on Twitter Professor Stott raised concerns that the IPCC lacked the -

*"...powers, capacity, and independent investigative capability necessary to match the scale of events and the standards required of an international police watchdog operating in a society that values freedoms and rights."*<sup>1</sup>

5. Since the Professor stepped down, the IPCC published in May 2020 a *"Thematic Study Report on the Public Order Events ("POEs") arising from the Fugitive Offenders Bill since June 2019 and the Police Actions in Response"* in the words of its own press release<sup>2</sup>.

## Request and response

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6. On 11 December 2019 the complainant made the following request for information under the FOIA for:

*"All written correspondence sent between Prof Clifford Stott, Dean for Research Faculty of Natural Sciences, and the Independent Police Complaints Council in Hong Kong (including its representatives or junior staff) between August 11, 2019 and December 11, 2019."*

7. The university responded on 21 February 2020 and refused to provide the requested information, citing the following – section 36(2)(b)(i) and 36(2)(c) (prejudice to the effective conduct of public affairs), section 41(1) (information provided in confidence) and section 22(A) (research information).
8. The complainant requested an internal review on 24 February 2020.
9. The university provided an internal review on 17 April 2020 in which it maintained its original position.

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<sup>1</sup> <https://twitter.com/cliffordstott/status/1193086839416078336?lang=en>

<sup>2</sup> [https://www.ipcc.gov.hk/doc/en/pr/pr\\_20200515\\_e.pdf](https://www.ipcc.gov.hk/doc/en/pr/pr_20200515_e.pdf)

10. After the Commissioner wrote to the university, it subsequently provided some redacted information to the complainant. The university cited section 40(2) (personal information) with regard to the redactions.
11. In its response to the Commissioner the university additionally applied section 27 (international relations), section 38 (health and safety) and section 43 (commercial information) but no longer relied on section 41(1).

### **Scope of the case**

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12. The complainant contacted the Commissioner on 21 April 2020 to complain about the way his request for information had been handled, expressing the view that it was in the public interest to release the requested information.
13. The Commissioner considers that the scope of the case concerns the university's citing of sections 36, 27, 22(A), 38, 43 and section 40(2).

### **Reasons for decision**

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14. Section 36 FOIA provides that,

*"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 -*

*(2)(b) would, or would be likely to, inhibit -*

- i. the free and frank provision of advice, or*
- ii. the free and frank exchange of views for the purposes of deliberation, or*

*(2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."*

15. The university has cited section 36 in relation to all the withheld information. The Commissioner has seen the information to which section 36(2)(b)(i) and 36(2)(c) has been applied. She is unable to describe in any detail the withheld information for obvious reasons but she can say that the information is fairly extensive and it covers a period where correspondence was exchanged between Professor Stott and the IPCC in his role as an expert on an international panel set up by the IPCC.

16. The Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed that opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
- Establish that an opinion was given;
  - Ascertain who was the qualified person or persons;
  - Ascertain when the opinion was given; and
  - Consider whether the opinion was reasonable.
17. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. The qualified person in respect of Keele University is the Vice-Chancellor, Professor Trevor McMillan. The Commissioner is satisfied that the Vice-Chancellor who gave his opinion was the appropriate qualified person. The opinion of the qualified person was provided on 19 February 2020 in order to respond to the complainant and again on 21 July 2020 when the university looked again at its response.
18. The Commissioner next needs to establish whether the qualified person's opinion was reasonable.

*Is the qualified person's opinion reasonable?*

19. The qualified person in relation to the exemption at section 36(2)(b)(i) and 36(2)(c) must give an opinion that the release of the requested information would or would be likely to inhibit the free and frank provision of advice and would or would be likely to prejudice the effective conduct of public affairs.
20. The Commissioner's guidance<sup>3</sup> regarding the definition of "reasonable" is as follows:

*"In this context an opinion either is or is not reasonable. In deciding whether an opinion is reasonable the ICO will consider the plain meaning of that word, rather than defining it in terms derived from other areas of law...The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is: "in accordance with reason; not irrational or absurd". If the opinion is in accordance with*

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<sup>3</sup> <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

*reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable.”*

21. In order to determine whether section 36(2)(b)(i) and 36(2)(c) is engaged the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered the following factors -
  - Whether the prejudice relates to the specific subsection that has been cited, in this case 36(2)(b)(i) and 36(2)(c). If the inhibition or the prejudice is not related to the specific subsection the opinion is unlikely to be reasonable.
  - The nature of the information and the timing of the request.
  - The qualified person's knowledge of, or involvement in, the issue.
22. The university has argued that disclosing communications between itself and the IPCC would inhibit the free and frank provision of advice by damping the candour of university employees who, in future, would be deterred from expressing views and opinions due to the possible threat of disclosure, particularly while the matter is still current and active. This is the so-called "chilling effect" though the university did not refer to it as such. It did state that such hindering of the provision and quality of advice would result in staff either opting not to offer their expertise at all, or ultimately result in a lack of objective benefit to the audience seeking advice.
23. The university has not cited section 36(2)(b)(ii) so the Commissioner cannot consider the free and frank exchange of views for the purposes of deliberation, only the free and frank provision of advice.
24. The university has also cited section 36(2)(c) that disclosure of the requested information would otherwise prejudice the effective conduct of public affairs. The university contended that disclosure would adversely affect its ability to meet its wider objectives, part of which include offering access to its academic resources directly to other public bodies and to the wider public sector, both nationally and internationally, to address current social issues.
25. The university suggests that organisations would become wary of approaching the university to assist in knowledge-sharing, advice or research on important issues if the communications and resources shared between them were likely to be released while such issues were still live and impacting upon organisations, individuals and societal structures. Such aversion to engagement would result in less robust outcomes and objective scrutiny of ideas and processes which impact on the public.

26. The qualified person signed to the view that in respect of both section 36(2)(b)(i) and 36(2)(c) the inhibition to the free and frank exchange of advice "would" occur and that there would be prejudice to the effective conduct of public affairs if the requested information was released. This indicates that the university considers that the higher threshold of "would" inhibit or prejudice to be appropriate which requires a higher evidential burden.
27. The Commissioner accepts that the qualified person's opinion is reasonable, that the release of this information would otherwise prejudice the effective conduct of public affairs. She considers that it is more probable than not (a more than 50 per cent chance) that this would occur given the nature of the request and its timing. The Vice-Chancellor was provided with links to the information and a precis of the arguments. He signed to that opinion in an email and the Commissioner's view is that his opinion is reasonable.

### **Public interest**

28. Even though section 36 is engaged, the Commissioner needs to consider whether it is in the public interest to disclose the requested information.

#### *Public interest factors in favour of disclosing the information*

29. The university acknowledges that there is public interest in the transparency of the provision of advice provided to external bodies but notes that the International Expert Panel released a public statement detailing the reasoning for its withdrawal in December 2019.
30. The complainant argues that the public interest in disclosure is clear and compelling both in the UK and Hong Kong. He states that the UK has a special relationship with, and responsibility toward Hong Kong under the Sino-British Joint Declaration and the residents of Hong Kong have an obvious interest in the conduct of the police force. The wider international community also has a stake in the city as a major financial hub, operating under a different sets of rules and policies than mainland China.
31. He contends that numerous reports of police misconduct during last year's protests in Hong Kong led the Hong Kong government to enlist international policing experts to oversee the work of the IPCC and issue recommendations, where necessary. The fact that they stepped down and the comments made afterwards meant that there are outstanding questions about the conduct and credibility of the Hong Kong police and the IPCC. The complainant believes that it is of great importance that the public is able to scrutinise the material and that its release would

help inform the significant debate about the political, societal and legal issues that face the city.

*Public interest factors in favour of maintaining the exemption*

32. The university's view is that there is great public interest in maintaining its ability to conduct public affairs effectively in providing free and frank advice on serious local and global issues of the day. Organisations and institutions need to have the confidence to approach and engage the university's expertise in objective knowledge-sharing or fact-finding. Such engagement fuels organisational and institutional improvements and challenges norms for the enhancement of society, at both the individual and wider-community levels.
33. The university concluded that the negative effect the release of data concerning an ongoing and sensitive issue of large import would have on related live issues, pertaining to continuing public unrest in Hong Kong, would not be in the public interest.

*The balance of the Public interest*

34. The public interest in this matter has weighty considerations on both sides. The complainant presents a persuasive argument about the conduct and credibility of the Hong Kong police force and the IPCC in the light of international experts having stepped down from their advisory role. He believes that scrutiny of this information would inform the public debate about political, societal and legal issues in Hong Kong.
35. In light of this, the university's arguments might appear to be more abstract and concern the ramifications of any such disclosure on its ability to effectively conduct public affairs and the wider role it has in organisational and institutional improvement in the world via the provision of its expertise.
36. Nonetheless, the Commissioner has decided that the public interest in non-disclosure weighs more strongly. She agrees that releasing this information which contains a great deal of sensitive information which was clearly intended to be kept confidential at this time would not be in the public interest. If the information was to be released it would undermine the understanding that existed between the parties and impact negatively on the academic standing of the university and result in organisations at home and abroad being unwilling to engage with those that can provide expertise. The fact that one side of the correspondence, Professor Stott, stepped down and issued a statement explaining the reasons behind it goes some way to satisfying public interest in this matter. The Commissioner, although she understands the complainant's position, cannot agree that releasing what was 'live'

information at the time of the request in a context of continuing public unrest would be appropriate. There may be potentially harmful and certainly unknown repercussions.

37. As the Commissioner has concluded that the university has correctly cited section 36(2)(b)(i) and 36(2)(c) in relation to the whole of the requested information, she does not propose to look at the application of sections 27, 22(A), 38, and 43.

### **Section 40(2) – personal information**

38. The university disclosed some information to the complainant after the Commissioner began her investigation. However, part of that information was redacted because the university considered it to be personal information.
39. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
40. In this case the relevant condition is contained in section 40(3A)(a)<sup>4</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
41. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
42. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

*Is the information personal data?*

43. Section 3(2) of the DPA defines personal data as:

*“any information relating to an identified or identifiable living individual”.*

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<sup>4</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

44. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
45. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
46. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
47. The university has itemised the personal data that has been redacted as follows –
  - personal private phone numbers;
  - personal private email addresses;
  - the identifying beginnings of corporate email addresses (not suffixes);
  - names and titles of individuals who are not members of the Panel or Chair of the IPCC.

This information identifies individuals who are acting on behalf of the IPCC, the identifying parts of corporate email addresses and their phone numbers. The personal phone numbers and email addresses of other named individuals have also been withheld. Additionally a small amount of personal information has been redacted which relates directly to the travel arrangements of an individual. Having considered the withheld information, the Commissioner accepts that it is within the definition of 'personal data' in section 3(2) of the DPA.

48. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
49. The most relevant DP principle in this case is principle (a).

**Would disclosure contravene principle (a)?**

50. Article 5(1)(a) of GDPR states that:

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".*

51. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
52. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

### **Lawful processing: Article 6(1)(f) of the GDPR**

53. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in the Article applies.
54. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*"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"<sup>5</sup>.*

55. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test: -
  - i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
  - ii) **Necessity test:** Whether disclosure of the information is

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<sup>5</sup> Article 6(1) goes on to state that: -

*"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".*

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that: -

*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".*

necessary to meet the legitimate interest in question;

iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

56. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

*Legitimate interests*

57. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

*Is disclosure necessary?*

58. 'Necessary' means more than desirable but less than indispensable or of absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

59. The complainant has not specifically expressed a view regarding the redactions in the personal information that has been released to him. The university has explained that the redactions were made because of these individuals (in relation to IPCC staff) "*non-public lives and expectation of privacy*" which the Commissioner understands to mean that they do not have a public-facing role.

60. The Commissioner has decided that disclosure of the personal telephone numbers, email addresses of named individuals and information relating to the travel arrangements of one named individual (non-IPCC staff) is not necessary to meet the legitimate interest in disclosure and she has therefore not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

61. However, she has gone on to consider the balancing test in relation to the names of the individuals acting for the IPCC. It is not possible to make the same argument as there is no other way to meet the legitimate interest of the complainant.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

62. 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 the 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.

63. 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.

64. 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.

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

66. The Commissioner agrees with the university that individuals who are not members of the Panel or Chair of the IPCC have an expectation of privacy as to the roles they hold. She also accepts the university's view that there is no legitimate interest in the identity of administrative IPCC staff and non-public contact details. The release of these redacted names, email addresses and phone numbers would be likely to result in unwarranted damage or distress because of the unrest in Hong Kong and the unknown, potentially harmful consequences that might ensue.

67. Based on the above factors and the release of the content of the emails, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and

freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.

68. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to consider separately whether disclosure would be fair or transparent.

69. The Commissioner has therefore decided that the university was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

### **Section 10 – time for compliance**

70. Section 10(1) of the FOIA provides that a public authority must comply with its obligations under section 1(1) within twenty working days of the request being received.

71. The complainant made his request on 11 December 2019 but the university did not respond until 21 February 2020. Therefore it breached section 10(1).

## Right of appeal

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72. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

73. 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.
74. 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** .....

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**