

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 6 September 2022

**Public Authority:** Council of Queen Mary University of London

**Address:** Mile End Road

London

E1 4NS

### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to the MBBS Covid mitigation policy.
2. The University disclosed the majority of the information that fell within the scope of the request. It relied upon section 36(2)(b)(i) and (ii) (prejudice to the effective conduct of public affairs) to withhold some information.
3. The Commissioner's decision is that the withheld information engages section 36(2)(b) and the public interest lies in maintaining the exemption.
4. The Commissioner does not require the public authority to take any further steps.

### **Request and response**

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5. On 1 September 2021 the complainant wrote to Queen Mary University of London ('the University') and requested the following information:  
"I should like a copy of any documentation, including minutes of meetings, correspondence, etc., relating to the formulation and approval of the above (MBBS 2020-21 Covid Mitigation policy) policy."

6. On 8 September 2021 the complainant wrote to the University and clarified:

“As an addendum to my request earlier this week, please include any data relating to the 1.5% zone of consideration in relation to the MBBS Covid mitigation policy.”
7. On 14 December 2021 the University responded and disclosed the majority of the information that fell within the scope of the request. It confirmed that the names of ‘less-senior staff and third parties’ had been withheld under section 40(2) (personal information) of FOIA and other information had been withheld under section 36(2)(b)(i) and (ii).
8. Following an internal review the University wrote to the complainant on 17 February 2022. It disclosed further information that had previously been withheld under section 36(2)(b).
9. The University confirmed that it was still withholding a draft copy of the policy, with comments, and a small amount of information from two email chains, under section 36(2)(b).

### **Scope of the case**

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10. The complainant contacted the Commissioner on 28 October 2021 to complain about the way that their request had been handled. The complainant did not express any concerns about the University’s application of section 40(2), just section 36(2)(b).
11. Therefore the Commissioner considers the scope of his investigation to be to determine if the University is correct to withhold information under section 36(2)(b).

### **Reasons for decision**

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12. Section 36(2) of FOIA states that:

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of this information under this Act –

(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”

13. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised Qualified Person ('QP') for that public authority. The QP's opinion must also be a 'reasonable' opinion for the exemption to be engaged.
14. It is not necessary for the Commissioner to agree with the opinion of the QP for the exemption to be applied appropriately. Furthermore, the opinion does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion.
15. The Commissioner only needs to satisfy himself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold. To do this the Commissioner considers:
  - Whether the prejudice identified relates to the specific subsection that has been cited, which in this case is 36(2)(b)(i) and 36(2)(b)(ii). If 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.
16. Section 36 is a qualified exemption, other than for information held by Parliament. This means that even if the Commissioner finds that the exemption has been applied properly, the public authority must still disclose the information unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
17. Since the Commissioner is satisfied that there is significant crossover between the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation, he will consider these subsections together.

### **Who is the QP and how was their opinion sought?**

18. The University has explained that 'The qualified person is Prof. Colin Bailey, the President and Principal of Queen Mary University of London. The opinion of the qualified person was sought on 8<sup>th</sup> October 2021 and he gave his opinion on 13<sup>th</sup> December.'
19. The University has also explained that, in order for the QP to form a reasonable opinion, they were provided with a copy of the withheld information and a summary about the request and section 36.
20. The Commissioner has had sight of this submission and notes that the QP was provided with arguments both in favour of the application of section 36(2)(b) but also arguments in favour of disclosure.

21. The QP's opinion was recorded using the template provided on page 24 of the Commissioner's guidance.<sup>1</sup> The Commissioner notes that the submission strays into consideration of the public interest test which is not the role of the QP, it is only their role to make a judgement regarding any prejudice that disclosure may cause.

**Is the QP's opinion reasonable?**

22. The Commissioner's guidance states 'Information may be exempt under section 36(2)(b)(i) or (ii) if its disclosure would, or would be likely to inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. The rationale for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision making by the public authority.'
23. Therefore, the Commissioner must be satisfied that the QP has given a reasonable opinion that the release of the information that is being withheld would, or would be likely to, inhibit the free and frank provision of advice.
24. The University has explained that 'The withheld information relates to development of a policy aimed at a subset of students. During academic year 2020/21, staff in the School of Medicine and Dentistry, with assistance from the Academic Secretariat in central Professional Services at QMUL, worked with the Students' Union to produce two 'Covid Mitigation Policies': one relating to the MBBS programme<sup>2</sup> and one to the Physician Associate programme.<sup>3</sup>'
25. The University has explained that, during the development of these policies, Queen Mary Students' Union ('QMSU') provided input. Within the withheld information, University staff exchange some free and frank views about how the policy has developed up to that point and changes that are required, including a deliberation as to whether the input of the QMSU was aligned with the University's existing policies.
26. The University has explained that, to develop such policies and by extension, provide the best education that it can, open, honest and frank communication is necessary within the organisation. The QP is

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<sup>1</sup> [section\\_36\\_prejudice\\_to\\_effective\\_conduct\\_of\\_public\\_affairs.pdf \(ico.org.uk\)](https://ico.org.uk/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf)

<sup>2</sup> [Medicine \(5 Year Programme\) - Queen Mary University of London \(qmul.ac.uk\)](https://qmul.ac.uk/Medicine_5_Year_Programme)

<sup>3</sup> [Physician Associate Studies MSc - Queen Mary University of London \(qmul.ac.uk\)](https://qmul.ac.uk/Physician_Associate_Studies_MSc)

concerned that 'Disclosing this information could inhibit future internal discussions of matters raised by QMSU, which are challenging in nature.'

27. This is what is known as the 'chilling effect' and is discussed in the Commissioner's guidance 'Arguments under s36(2)(b)(i) and (ii) are usually based on the concept of a 'chilling effect'. The chilling effect argument is that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making.'
28. The Commissioner notes that public officials are expected to be impartial and robust when giving advice and deliberating the development of policies. This would include discussing any opposing views or contribution of another party, such as QMSU. Public officials should not easily be deterred from expressing their views by the possibility of future disclosure.
29. The University has explained that whilst some of the information 'appears relatively benign, but we argue that one should take account of the relationships with the Students' Union and how similar policies and procedures may be developed and discussed in future, as well as the general co-operation between both parties. It is important that we maintain a good relationship with the Students' Union to find solutions and that the exchange of information is not hindered in ways which affect this and the 'safe space' required by staff.'
30. The University has emphasised that 'the Students' Union, as with other parties, may sometimes hold conflicting views to Queen Mary and advocate different approaches. Developing this MBBS Covid Mitigation Policy was a collaborative process, but it was necessary that Queen Mary senior staff had the ultimate discretion on the final version.'
31. The University is relying upon the lower threshold of prejudice, that disclosure 'would be likely' to prejudice the provision of free and frank advice and exchange of views for the purpose of deliberation. This is a lower level of probability than 'would' but one that the University still considers significant.
32. The Commissioner is conscious that any argument that rests on the concept of a generalised chilling effect on future discussions needs to be questioned. If the issue in question is still live, arguments about a chilling effect on those ongoing discussions are likely to be most convincing.
33. It is not clear to the Commissioner if, at the time that the request was made, if the policies in question, and therefore negotiations with QMSU, had been finalised.

34. The Commissioner asked the University to confirm whether this was the case and the University did not provide an answer. However, it did clarify 'The matter of working collaboratively with our Students' Union is continually live. The arguments supporting our use of section 36(2) do not pertain solely to the development of these policies. Queen Mary is always working with QMSU on a wide-range of initiatives, facilities and policies. We have ongoing close relationships.'
35. The Commissioner's guidance confirms that section 36 is 'about the processes that may be inhibited, rather than what is in the information' but it also states 'Whether it is reasonable to think that a chilling effect would occur will depend on the circumstances of each case, including the timing of the request, whether the issue is still live, and the actual content and sensitivity of the information in question.'
36. The Commissioner notes that the threat of future disclosure may actually lead to better quality decision making and collaboration between the University and QMSU.
37. The Commissioner's guidance states that 'An opinion formed purely on the basis of a 'blanket ruling' may not be reasonable' and the Commissioner notes that the complainant has actually received the majority of the information that they requested. Therefore, the University cannot be accused of applying section 36(2)(b) in a blanket manner.
38. Though the Commissioner has concerns about whether the policies in question were finalised at the time that the request was made, he recognises that it is the QP who is best placed to judge the prejudice that might arise from disclosure, taking into account all the facts of the case, including the state of ongoing relations between the University and QMSU.
39. Returning to paragraph 14, the Commissioner does not need to necessarily agree with the opinion of the QP. The Commissioner only needs to accept that the QP's opinion is an opinion that a reasonable person could hold which he does. Therefore he considers the exemption applied properly.
40. Therefore the Commissioner will go onto determine if the public interest lies in disclosure or maintaining the exemption. To reiterate, even though the information engages section 36(2)(b), it must be disclosed except if the public interest in maintaining the exemption outweighs doing so.
41. Furthermore, the Commissioner has accepted that section 36(2)(b) is engaged on the lower threshold of prejudice, 'would be likely to' which means that there must be more than a hypothetical or remote possibility of prejudice occurring; there must be a real and significant risk of

prejudice, even though the probability of prejudice occurring is less than 50%.

42. It is easier for a public authority to engage that this lower threshold of prejudice has been met but the weight attached to the prejudice is lower. This is relevant when it comes to considering whether the public interest lies in maintaining the exemption or in disclosure. In considering where the public interest lies, the Commissioner will conduct his own analysis as to the severity, extent and frequency of prejudice.

## **The public interest**

### **Public interest arguments in favour of disclosure**

43. The University has, in both its submission to the QP and to the Commissioner, submitted quite general public interest arguments in favour of disclosure. The University recognises 'that there is a public interest in relation to public authorities being transparent.'
44. The University has also acknowledged that disclosure would shed light on the concerns that staff had around the development of the MBBS 2020-21 Covid Mitigation policy. To reiterate, this public interest argument was presented to the QP as part of the University's submission and, as discussed in paragraph 21, should have been discounted by the QP as an irrelevant factor at that stage.

### **Public interest arguments in maintaining the exemption**

45. The University continually emphasised that 'If staff feel deterred from exchanging views, important policies such as the subject of this request, may not be developed as effectively in future, which is not in the public interest.'
46. The University is concerned also concerned that 'the Students' Union, as with other parties, may sometimes hold conflicting views to Queen Mary and advocate different approaches. Developing this MBBS Covid Mitigation Policy was a collaborative process, but it was necessary that Queen Mary senior staff had the ultimate discretion on the final version. It would not be helpful if Students' Union staff felt somehow affronted at comments about their work or contributions, although there was never any intention of that.'
47. The University has also stated 'the withheld information is not particularly material to the actual main focus of the request i.e. the MBBS Covid Mitigation Policy. It will not add much, if anything, to what the requester already has. On the other hand, maintaining good working relationships with the representatives of our student body is very important. It would not be in the public interest to put any strain on such relationships.'



## **The balance of the public interest**

48. The Commissioner considers the balance of the public interest very fine in this instance. However, he has decided that the public interest favours maintaining the exemption.
49. On the one hand, the Commissioner accepts that the QP is in the best placed position, with their awareness of relations between the University and QMSU, to decide whether prejudice would occur and the Commissioner has accepted the QP's opinion, based on the lower threshold of prejudice. However, the University cannot just withhold all discussions with the QMSU indefinitely.
50. On the other hand, the withheld information itself sheds very little light on how the policy in question was developed. The public would learn very little about decision surrounding the policy that was not already in the public domain at the point the request was made.
51. The complainant has explained to the Commissioner that 'there is an overriding public interest in knowing the rationale for academic progression policies, and whether consideration has been given to the impact of a policy on students with disabilities.'
52. However, the Commissioner notes that the withheld information does not address the impact the policy has on students with disabilities.
53. To reiterate, the Commissioner is sceptical of chilling effect arguments and, since the university has failed to answer the Commissioner's specific question, he is unsure if the policy in question was finalised at the time that the request was made. He does note that the policy in question relates to the 2020-2021 academic year and the request was made at the beginning of the 2021-2022 academic year.
54. However, the University appears primarily concerned with the effect that disclosure would have on future discussions to which the QMSU is privy and its relationship with QMSU. Whilst the Commissioner believes that the University may have overestimated the extent, severity and frequency with which this prejudice could occur, he accepts the possibility of future prejudice.
55. Taking into account all circumstances of the case, and the lack of strong arguments in favour of disclosure, the Commissioner considers that the public interest lies in favour of maintaining the exemption.



## Right of appeal

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56. 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: 0203 936 8963

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)

57. 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.

58. 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

**Alice Gradwell**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**