

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 November 2015

Public Authority: The Governing Body of the University of South Wales

Address: Treforest
Pontypridd
CF37 1DL

Decision (including any steps ordered)

1. The complainant requested information relating to the estates realignment of the University of South Wales ('the University'). The University stated that some information could be viewed in situ and other information was exempt under sections 22 and 43. During the course of the Commissioner's investigation the University withdrew reliance on section 22 and disclosed some relevant information. However, the University stated that it considered sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) and 43 to apply to the remaining withheld information. The Commissioner's decision is that the University has correctly withheld some information under section 36(2)(b). However, he also finds that, whilst section 36(2)(c) was engaged, the public interest in maintaining this exemption did not outweigh the public interest in disclosure. The Commissioner also finds that the University breached sections 10(1) and 17(1) in failing to disclose information relevant to the request and failing to issue a refusal notice within the required timescales.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information which has been withheld under section 36(2)(c) alone, namely the minutes of the Board of Governors' meeting on 8 September 2014 and the confidential appendix to the minutes of the Board of Governors' meeting on 7 July 2014.
3. 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

4. On 27 November 2014, the complainant wrote to the University and requested information in the following terms:
 - "A) Could the university please provide any documents shown to, or provided to the board of governors in regards to the estates realignment of the university of South Wales.
 - B) Please included [sic] any reviews conducted by the university into the state of it's estates and campus' including repair costs and long term expense forecasts.
 - C) Please provide minutes from any board of governor meetings were [sic] decisions were made in regard to the future of Caerleon Campus.
 - D) please provide minutes from the board of governors meeting held Monday the 24th of November 2014".
5. The University responded on 27 February 2015. It withheld information relating to part A of the request under section 43(2) of the FOIA, advised that information relating to part B could be viewed in situ at its offices and stated that section 22 of the FOIA applied to parts C and D as the information was intended for future publication.
6. On 27 February the complainant requested an internal review in relation to the University's refusal to provide information relating to parts A, C and D of his request.
7. The University provided the outcome of its internal review on 27 March 2015 and upheld its decision that section 43 and section 22 of the FOIA applied to the information requested.

Scope of the case

8. The complainant contacted the Commissioner on 8 April 2015 to complain about the way his request for information had been handled.
9. During the course of the Commissioner's investigation, the University withdrew reliance on section 22 of the FOIA and disclosed some minutes

of board of governor meetings. The University also introduced reliance on sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c).

10. In light of the above, the scope of the Commissioner's investigation is to determine whether the University should disclose the remaining information held relevant to the request. The withheld information and the exemptions considered applicable are detailed below:
 - (i) A report on the University's Campus Realignment Programme ('the PDG Report') – withheld under sections 36(2)(b)(i), 36(2)(b)(ii), 36(2)(c) and section 43(2).
 - (ii) A confidential appendix (relating to development of campuses) attached to the minutes of the Board of Governors' meeting on 7 July 2014 – withheld under section 36(2)(c).
 - (iii) The minutes of the Board of Governors' meeting on 8 September 2014 - withheld under section 36(2)(c).

Reasons for decision

Section 36 – prejudice to the effect conduct of public affairs

11. Sections 36(2)(b)(i) and (ii) provide that information is exempt if its 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. Section 36(2)(c) provides that information is exempt if its disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs. For a public authority to cite section 36 of the FOIA the qualified person must give their reasonable opinion that the exemption is engaged. For the Commissioner to determine that the exemption is engaged it must be demonstrated that the designated qualified person has given their opinion, and that the opinion is reasonable.
12. To establish whether section 36 has been applied correctly the Commissioner considers it necessary to:
 - ascertain who is the qualified person for the public authority;
 - establish that an opinion was given;
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.
13. The qualified person for the University is the Vice Chancellor Professor Julie Lydon and the University has confirmed that Professor Lydon gave

her reasonable opinion in her capacity as the qualified person that sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) apply in this case.

14. The University provided the Commissioner with a copy of the submission put to the qualified person and confirmation that she agreed the engagement of section 36. The University also confirmed that the qualified person had sight of the requested information on numerous occasions, as well as specifically at the time the matter was discussed by the Governors and more recently during discussions and deliberations on this request. In the submission to the qualified person, separate representations were made in relation to the application of each limb of section 36 claimed. The Commissioner notes that the qualified person signed her agreement to the submission which indicated that the level of prejudice claimed was the higher threshold of "would" prejudice.
15. The University explained that it was established in April 2013 following the merger of the University of Glamorgan and the University of Wales Newport. Following a request from its Governing Body at a meeting on 7 July 2014 a report on the "Development of Campuses" was presented for consideration at the meeting on 8 September 2014 exploring options for the University's five campuses ('the PDG Report'). Following consideration of the PDG Report, it was decided that the Caerleon Campus would close. Whilst the decision to close the campus was made by the Board of Governors on 8 September 2014, the University advised that other decision-making such as the timing of the movement of specific courses was still ongoing at the time of the request.
16. The University has applied sections 36(2)(b)(i) 36(2)(b)(ii) and 36(2)(c) to the PDG Report. It has applied only section 36(2)(c) to the minutes of Board of Governors' meeting on 8 September 2014 and a confidential annex to the minutes of a Board of Governors' meeting on 7 July 2014 (collectively referred to throughout the remainder of this notice as 'the minutes'). Although sections 36(2)(b)(i) and (ii) are separate exemptions, because of the interlinked nature of the University's arguments, and the withheld information, the Commissioner has considered their application together.

Section 36(2)(b)(i) – inhibit the free and frank provision of advice
Section 36(2)(b)(ii) – inhibit the free and frank exchange of views for the purposes of deliberation

17. The submission to the qualified person set out the argument that the substance or quality of advice received would be materially altered for the worse by the threat of disclosure. The University requires a safe space to be able to make decisions and to operate effectively. The qualified person considers that disclosure will restrain and suppress the

freedom and openness with which options are explored in the future. This would result in a loss of frankness and candour of the provision of advice and in turn damage the quality and accuracy of decision making.

18. In order to facilitate robust internal debate and decision-making the University requires confidence that its Governors and Executive are able to explore and challenge options appropriately so that they are able to gain a clear and accurate picture of any given situation. This in turn ensures appropriate decisions are taken. In this case, Governors were provided with a particularly candid and open report, which includes sensitive analysis of the University's commercial position and weaknesses. The qualified person considers that disclosure would prejudice the ability of the University's Executive and professional staff to provide advice for the purpose of discussion and deliberation without fear of reputational damage caused by disclosure.
19. As well as information that is considered to be commercially sensitive, the PDG Report contains information relating to private conversations with staff, student representatives and key external stakeholders. These conversations were undertaken on the basis that they were private and in confidence. The qualified person considers that those participating in such discussions should be able to do so freely and frankly. She is of the view that the prospect of disclosure would inhibit future consultation as individuals would be less forthcoming with their views and lead to the consultation process becoming less robust. This in turn would cause harm to the University's decision making processes.

Section 36(2)(c) - otherwise prejudice the effective conduct of public affairs

20. The University stated that the development of campuses had been a challenging process and it had been necessary to make many difficult decisions to progress the development of the institution. The PDG Report highlights many of these issues, some of which have not been worked through or resolved. The University considers that disclosure would lead to speculation and concerns from staff, students stakeholders and others at a time when issues have not been fully considered and resolved. A safe space is required to ensure that processes relating to the campus realignment programme continue without causing unjust worry for those concerned.
21. The submission to the qualified person set out the argument that, in light of the sensitivity of the withheld information, disclosure would prejudice the University's ability to offer an effective public service and to meet its wider objective. This is because disclosure would result in resources having to be diverted to manage the effect of the disclosure. Whilst a short amount of time had elapsed since the issue was discussed

and the minutes agreed, the qualified person considers that in light of the sensitivity of the withheld information, and the fact that the campus realignment programme is an on-going process, disclosure would compromise the University's ability to negotiate on matters around the future of the campus and its resources.

22. In reaching a view on whether the exemptions under section 36(2)(b) are engaged in this case the Commissioner has taken into account the fact that the PDG Report was intended for a limited audience within the University and not intended for wider dissemination. It contains content that could be fairly characterised as free and frank and that relate to the provision of advice and / or the exchange of views. Taking into account the nature of the withheld information and the representations provided, the Commissioner is satisfied that it was a reasonable opinion that disclosure would inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. The Commissioner therefore finds that the exemptions at section 36(2)(b)(i) and (ii) were correctly engaged in respect of the withheld information.
23. In relation to section 36(2)(c), the Commissioner accepts that the closure of Caerleon Campus has consequences for both the local area in terms of jobs and potential income, as well as more personal concerns and issues for staff and students currently working and studying at the campus. The Commissioner has also had regard to the media interest surrounding announcements made by the University about the closure of the campus. The Commissioner considers that the opinion of the qualified person was a reasonable one, namely, it was reasonable to consider that disclosure would impact on University resources in managing the effect of disclosure. He therefore finds that section 36(2)(c) is correctly engaged.

The public interest test

24. As the Commissioner is satisfied that the exemptions under sections 36(2)(b) and 36(2)(c) are engaged, he has gone on to consider the balance of the public interest. The role of the Commissioner here is to consider whether the public interest in disclosure outweighs the concerns identified by the qualified person. When assessing the balance of the public interest in relation to section 36, the Commissioner will give due weight to the reasonable opinion of the qualified person, but will also consider the severity, extent and frequency of the inhibition and prejudice that he has accepted would result through disclosure.

Public interest arguments in favour of disclosing the requested information

25. The University has put forward the same public interest arguments in favour of disclosure for each limb of section 36 it has claimed. The University accepts that there is a public interest in transparency around how decisions are made, particularly those that impact on students and stakeholders, as in this case. The University considers that this has been recognised in public statements it has made concerning the closure of Caerleon Campus. In addition, the University has made available around 1200 pages of supporting information about the subject matter of the request, which includes information on the condition of its estate.
26. The complainant asserts that the financial impact of the closure of Caerleon campus is estimated at a loss of between £15 and £20 million a year to the local economy. In addition, the closure will result in a loss of part time and adult learning opportunities in the area. He considers that it is important for the University, as a public institution, to be held to account. Disclosure would allow the public to assess whether the University made the right decision, and the basis on which the decision was made.

Public interest arguments in favour of maintaining Section 36(2)(b)

27. The withheld information relates to the University's Campus Realignment Programme which was launched in July 2014 to explore and develop options for the development of its estate. The PDG Report was produced for consideration at the Board of Governors' meeting on 8 September 2014 for the purpose of informing internal debate on the future of the University's estate. In relation to the application of section 36(2)(b), the University put forward the following public interest arguments in favour of maintaining the exemption.
28. The University contends that it requires a safe space to be able to discuss issues that affect its long term viability without fear of disclosure. The Executive Board and Governors need the time and space to deliberate in private so that decisions can be made in a measured way for the benefit of the community as a whole.
29. The University believes that it needs to be able to undertake a rigorous and candid assessment of all information relevant to business operations, and to consider in confidence the most effective options. In making decisions it is important that it is able to receive information, consider options and deliberate without restriction.
30. The University is of the view that disclosure would impact on the way it receives and manages confidential reports when dealing with challenging

situations. Currently its Governors are provided with papers that present a comprehensive appraisal of options and detail. The University considers that disclosure would inhibit staff (and others) from being so candid in the way in which they provide information for consideration in the future. This would result in information being presented in a matter that would be less open to challenge and cause advice and analysis to be sanitised or partially toned down. This in turn would lead to poorer governance and a less robust decision making process.

31. In relation to the complainant's assertions that the financial impact of the closure of Caerleon campus is estimated at between £15 and £20 million a year, the University advised that it does not recognise the figure quoted, and as far as it is aware it is not based on any robust economic study. In addition, the University does not accept that educational opportunities are being lost as a result of the closure, but rather the opportunities are being redistributed across other campuses
32. The University explained that its Campus Realignment Programme is a two year programme of work to include governance and oversight of the actions arising from decisions made about its estates. The University pointed out that the PDG report was considered at its meeting on 8 September 2014 and therefore only a short amount of time had elapsed prior to the request being made on 27 November 2014. At the time of the request, a decision had been made on 8 September 2014 to close Caerleon Campus. In addition, on 24 November 2014 decisions had been made that the campus would close at the end of the 2015/16 academic year and, in principle, about when certain academic courses would move. The University considers that the subject matter was live at the time of the request in terms of the ongoing issues including:
 - Final course by course confirmation of delivery location for 2015/16 for each year of each course,
 - Decisions around service levels for Caerleon Campus for the 2015/16 academic year,
 - Decisions around the future of Foundation Art provision at all University campuses, and
 - Staffing considerations.

Balance of the public interest test – section 36(2)(b)

33. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of that opinion in the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur, but he

will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.

34. The Commissioner considers that there is a public interest in openness and transparency. He considers that the issue of the closure of Caerleon Campus has led to a significant amount of media attention. Therefore there is a strong public interest in disclosure of information which would enable the public to better understand the decision making process relating to the closure of the campus. Disclosure would be likely to increase public confidence in the process by demonstrating the checks and balances in place within the University and would show the range of options considered during the process. The Commissioner is also mindful that the decision to close the campus is likely to have a financial impact on the local area, albeit he notes that the complainant and the University have differing opinions on the level of any such impact.
35. The Commissioner accepts that 'safe space' arguments are relevant in this case and the impact of disclosing the information on the processes set out in section 36(2)(b), whilst the project was still live, must be carefully considered. The Commissioner appreciates the argument that there will be occasions when, in order that robust and appropriate decisions are made, decision-making will benefit from safe space. If that safe space for frank and free deliberations was not protected, the quality of decision making would be likely to be affected.
36. The Commissioner also understands that there will be occasions when the need for a public authority to be able to receive and act on candid advice prevails over recognisably strong arguments in favour of disclosure. The Commissioner has considered to what extent the public interest in the need to protect the safe space had diminished by the time of the request.
37. The Commissioner notes that the withheld information was produced and considered by the University a relatively short period of time before the request in this case. The Commissioner also accepts that although some decisions had been made about the closure of Caerleon campus, there were issues relating to the subject matter that were ongoing at the time of the request. In relation to the severity of the inhibition, the Commissioner considers that the live nature of the subject matter intensifies the impact of disclosure on the processes described by the exemptions, namely the free and frank provision of advice and exchange of views for the purposes of deliberation.
38. The Commissioner also considers that there is a public interest in preventing a chilling effect on future discussions relating to the subject matter of the request, ie the closure of Caerleon Campus and the

University's review of its estate. Whilst he does not share the view that disclosure of the withheld information at any time would almost certainly have a chilling effect on the frankness of similar discussions in future, he is willing to accept that disclosure of the withheld information at the time of the request is likely to result in such a chilling effect. If the University and officials felt that views they had expressed candidly could be made public so soon after they were expressed and while discussions were still ongoing, they would be likely to be less candid in future discussions, which would not be in the public interest

39. Having considered the opposing public interest factors in this case, the Commissioner concludes that the public interest in maintaining the exemptions outweighs the public interest in disclosing the PDG report. As the Commissioner finds that the information was correctly withheld under sections 36(2)(b)(i) and (ii), he has not considered the other exemptions claimed by the University in respect of this information – ie section 36(2)(c) and section 43.

Public interest arguments in favour of maintaining Section 36(2)(c)

40. The University reiterated that it requires a safe space to deliberate in private so that decisions can be made in a measured manner for the benefit of the community. It is committed to making the merged institution a success and considers that:

“there is little public interest in having to divert significant resources to addressing issues raised through disclosure and used in a manner to harm the institution. There is a greater public interest in the University using its resources on building and improving the institution.

There is little public interest in causing staff and stakeholders unnecessary stress and worry through the release of information that could be used to sensationalise, to cause unrest, and negatively affect staff morale and the University's performance.

41. In considering the balance of the public interest, the University considers that the it favours non-disclosure because:

“the effect disclosure would have on staff and the overall student experience as the University's limited resources are diverted from providing its key services to managing the disruption caused by disclosure”.

Balance of the public interest test – section 36(2)(c)

42. The University's main argument in support of its decision to withhold the information requested under section 36(2)(c) is that of the potential effect of disclosure on the ability of the University to offer effective

public services and the diversion of resources in managing the effect of disclosure. The University has argued that disclosure could be used to sensationalise the subject matter of the request and, cause unrest and negatively affect staff morale and performance.

43. The University submitted the same arguments in terms of engaging section 36(2)(c) and the public interest considerations in relation to both the PDG Report and the Minutes. It has not, therefore, specifically explained why disclosure of the Minutes in question would be likely to have this effect on the conduct of public affairs. As stated earlier in this notice, the Commissioner is satisfied that the University has correctly withheld the PDG Report under sections 36(2)(b)(i) and 36(2)(b)(ii). He has therefore not considered the application of section 36(2)(c) in relation to the PDG Report.
44. The Commissioner accepts that the closure of Caerleon campus will clearly have a significant impact and effect on those working and studying at the institution. The Commissioner notes that the closure of Caerleon campus has received a significant amount of interest from the media and other interested parties. The Commissioner accepts that there were a number of ongoing, live issues relating to the closure of the campus at the time of the request. However, some of the more significant decisions had already been made at the time of the request, including the decision to close the campus¹ and a timetable for moving a number of courses to alternative campuses which was announced on 24 November 2014². In addition, a number of meetings with staff and stakeholders had taken place prior to the request being made. As such the Commissioner is satisfied that at the time the request was made there was already information in the public domain about the issue and there is evidence to suggest there had been local media interest in this issue at least dating back to July 2014 when the University's formal review of its estate was instigated.
45. The Commissioner has therefore focused on whether, despite the information already in the public domain at the time of the request, disclosure of the Minutes would prejudice the University's ability to meet its wider objectives owing to the disruption caused by disclosure. With regard to the argument that disclosure would divert resources in

¹ <http://www.walesonline.co.uk/news/wales-news/nearly-150-jobs-risk-university-7761648>

² <http://www.southwales.ac.uk/news/2014/university-course-moves-campus-investment/>

managing the impact of the report being made public; the Commissioner accepts that there will inevitably be some diversion of resources. However, based on the content of the information within the Minutes, the information that was already in the public domain about the subject matter and the decisions which had already been made about it, the Commissioner is not minded to accept the scale of any disruption would be such that it would impact on the effective conduct of public affairs. He does not consider this argument alone to carry enough weight to justify withholding the information

46. The Commissioner considers that the actual content of the Minutes is key to balancing the public interest. Whilst the PDG Report is a detailed assessment of the development of campuses, the Minutes contain more high level information about the subject matter, summarising options, discussion points and decisions. However, as stated in paragraph 43 above, the University has not referred to the content of the Minutes specifically in its arguments. The Commissioner does not give much weight to the arguments presented by the University in favour of maintaining the exemption in relation to the Minutes. Conversely, he does recognise the importance of transparency and accountability in this case and considers this to carry significant weight. The Commissioner believes disclosure of the Minutes would improve public understanding for the rationale for the decision to close Caerleon campus and go some way to allow for scrutiny of the University's internal deliberation processes to ensure they are robust.
47. In conclusion, the Commissioner has recognised a public interest in avoiding the prejudice identified by the qualified person. However, the Commissioner is not persuaded, on the evidence provided by the University, that disclosure of the Minutes would have such a detrimental consequence that the public interest in maintaining the section 36(2)(c) exemption would outweigh the public interest in disclosure.

Procedural matters

48. Under section 10 of the FOIA, public authorities should respond to a request for information promptly and by the twentieth working day following the date of receipt of the request. In this case, the original request was made on 27 November 2014. The University responded on 27 February 2015, and provided some information but withheld other information under various exemptions. During the Commissioner's investigation the University released additional information relevant to the request. In failing to provide the information it has disclosed within 20 working days of the request, the University breached section 10(1) of the FOIA. The University also did not comply with section 17(1) of the FOIA as it failed to issue a refusal notice within twenty working days of receipt of the request.

Right of appeal

49. 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@hmcts.gsi.gov.uk

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

50. 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.
51. 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

Anne Jones
Assistant Commissioner
Information Commissioner's Office
Wycliffe House
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