

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

### **Decision notice**

**Date:** 31 May 2024

**Public Authority:** The Governing Body of the University of Oxford

**Address:** Wellington Square  
Oxford  
OX1 2JD

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

---

1. The complainant has requested information relating to Project Dray. The University of Oxford ("the University") refused to provide the requested information, citing section 36 (prejudice to the effective conduct of public affairs).
2. The Commissioner's decision is that the withheld information engages section 36(2)(b) and the public interest lies in maintaining the exemption.
3. The Commissioner does not require further steps.

#### **Request and response**

---

4. On 19 September 2023 the complainant wrote to the University and requested:  

"I would like to request all documents regarding Project Dray produced internally by the University since January 2023. If this is unmanageable, I would like to ask for all documents produced regarding Project Dray within the last 3 months (19/6 - 19/9)."
5. The University responded on 30 October 2023, refusing the request, citing section 36(2)(b)(i) and (ii) (prejudice to the effective conduct of public affairs) of FOIA.
6. The complainant requested an internal review on 31 October 2023.

7. An internal review wasn't provided and so the Commissioner accepted this case for investigation without one.
8. During this investigation, the University confirmed that 'much of' the withheld information would also engage section 43(2) (commercial interests).

### **Scope of the case**

---

9. The complainant contacted the Commissioner on 9 January 2024 to complain about the way their request for information had been handled.
10. The Commissioner considers that the scope of his investigation is to determine whether the University is entitled to withhold the requested information.
11. He'll consider the University's application of section 36(2)(b)(i) and (ii) first, since the University has applied these exemptions to all of the withheld information. Depending on his findings, the Commissioner may go onto consider the University's application of section 43(2).

### **Reasons for decision**

---

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, and if the Commissioner decides that the opinion is an unreasonable one, he may find that section 36 exemption has been applied inappropriately.
14. It's not necessary for the Commissioner to agree with the opinion of the QP or for it to be the 'most' reasonable opinion. The Commissioner only

needs to satisfy himself that it's an opinion that a reasonable person could hold.

15. 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, he must still consider whether the public interest in disclosure outweighs that of maintaining the exemption(s).

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

16. The public authority has confirmed that its QP is Irene Tracey, Vice-Chancellor of the University. Their opinion was sought on 17 October 2023 and it was received on 30 October 2023.
17. The Commissioner has had sight of the submission provided to the QP to help inform their opinion; they were provided with examples of the requested data, a summary of the request, supporting arguments in favour of the application of section 36 and a draft copy of the refusal notice. The Commissioner notes the QP wasn't provided with any counter arguments in relation to section 36.
18. The QP signed the submission on 30 October 2023, essentially confirming the exemptions were engaged.

### **Is the qualified person's opinion reasonable?**

19. In relation to section 36(2)(b)(i) and (ii), the QP must give a reasonable opinion that disclosure would, or would be likely to, prejudice the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
20. The submission the QP signed expressed concern that:

"Project Dray and the associated reports were being considered by the University as a live and ongoing issue, and the withheld information concerns matters on which a decision had not yet been taken. As these matters were live, we maintain that the disclosure of this information would have been likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation, and is therefore subject to the exemption in s36(2)(b)."
21. There's clear overlap between 36(2)(b)(i) and 36(2)(b)(ii). In order for advice to be given freely and frankly, public officials need to be able to exchange their views, freely and frankly.
22. As part of this investigation, the Commissioner has studied the information that's being withheld in this instance. It's cost information, reports, business cases, risk assessments and appraisals in relation to

Project Dray. The withheld information is from January to September 2023.

23. Looking at the withheld information and the QP's concerns, the Commissioner is satisfied that the QP's opinion is a reasonable one. Fear of disclosure might dilute discussions relating to an ongoing project. In turn, this might impact the efficacy or outcome of these discussions. This is a reasonable opinion and therefore, the Commissioner finds the exemptions are engaged. As section 36(2)(b) is a qualified exemption, the Commissioner will now go onto consider the associated public interest test.

### **The public interest test**

#### **Arguments in favour of maintaining the exemption**

24. The University has explained:

"Maintaining an effective decision-making process is in the interest of University staff, who may have been affected by the proposed building change of use, the existing tenants of the building, and the public more generally, as the project had implications for the University's use of public funds. It is in the particular interest of these groups that the University comes to sound decisions around these matters."

25. This argument is what is known as the 'chilling effect' argument, which concerns the loss of the 'safe space' officials need to conduct public affairs appropriately. It's a common argument when considering section 36(2)(b).

#### **Arguments in favour of disclosure**

26. In favour of disclosure, the University:

"has accepted that there is some public interest in transparency around Project Dray, which we consider has been met by the information we have already provided."

27. The Commissioner concurs. There is always a general public interest in public authorities being transparent and accountable, especially when it comes to the use of public funds.
28. There will also be a specific public interest in Project Dray and those who will be affected by it, any academics, students or other individuals.

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

29. When considering where the balance of the public interest lies, the Commissioner will take into account a number of factors, such as the timing of the request and whether, at that time, the issue was still live,

the actual content and sensitivity of the information being withheld and how far the public interest in the subject matter has already been, or could be, addressed.

30. Returning to paragraph 27, the University has failed to direct the Commissioner to the information it has already provided, which it envisages meets the public interest in Project Dray. The Commissioner can't see any information on the project in the public domain.
31. Furthermore, the information that the University provided to the complainant in its refusal notice is limited:

“Project Dray’...explores a potential change of use of a building within the University estate. This does not relate to a building occupied by an academic department. Project Dray is a current and ongoing discussion... Please note that, should a decision be made to proceed with this change, notice will be published in the University Gazette (most probably in early November).”
32. In the complainant’s internal review request, they expressed concern that:

“the University Council Decision Note for the 10th July meeting clearly states that “Council approved this project”. Therefore, there is certainly some element of Project Dray that has been decided on and which is not a current ongoing discussion, so it would be inappropriate for the University to withhold this information using this exemption.”
33. However, the University has confirmed on several occasions that Project Day remains live. The Commissioner acknowledges that just because a project has been approved, doesn’t mean it’s not subject to change. The decision for the project to go ahead has been taken, but all other decisions about how, when, costs and risk, like those contained within the withheld information, are still ‘live’ and subject to change and were so at the time the request was made.
34. The University has actually provided the Commissioner with an example of how this ‘live’ project has changed, and which piece of withheld information this relates to, but the Commissioner doesn’t deem it necessary to replicate that in this decision notice.
35. The Commissioner has considered the content and sensitivity of all of the withheld information. It discusses the options for the project, including costs, risks business cases, funding and other considerations.
36. If one option for the project falls through, the University will have to consider another, but this will be difficult to do if discussions and analysis around the options have been diluted through fear of disclosure.

37. The Commission acknowledges that Project Dray involves a large amount of public spending, with that comes the need for transparency. However, with that also comes the need to protect the process, and discussions, that will yield the most value for money use of these public funds.
38. For that reason, and in the absence of any compelling public interest arguments from the complainant, the Commissioner has determined the balance of the public interest lies in maintaining the exemption.
39. Because he's satisfied that all of the withheld information can be withheld under section 36(2)(b)(i) and (ii), the Commissioner doesn't need to go onto consider the University's application of section 43(2).

### **Other matters**

---

40. The Commissioner's guidance states that internal review outcomes should be provided within twenty working days of the review request. This can be extended to forty working days if the review is particularly voluminous or complex.
41. In failing to provide an internal review at all, the University has clearly breached these timeframes.

## **Right of appeal**

---

42. 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)

43. 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.
44. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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