

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 July 2021

Public Authority: The Universities and Colleges Admissions Service (UCAS)

Address: Rosehill
New Barn Lane
Cheltenham
GL52 3LZ

Decision (including any steps ordered)

1. The complainant has requested any records concerning a deceased named individual's university applications. UCAS withheld the requested information under section 36(2)(c) (prejudice to effective conduct of public affairs) of the FOIA.
2. The Commissioner's decision is that the requested information is exempt from disclosure under section 36(2)(c) of the FOIA and the public interest favours maintaining the exemption.
3. The Information Commissioner does not require any steps to be taken as a result of this decision notice.

Request and response

4. On 25 February 2020, the complainant wrote to UCAS and made the following request for information:

"I understand that the deceased Manchester Arena bomber Salman Abedi applied via UCAS to various universities. His DOB was 31st December 1994 and he died on the 22nd May 2017. He attended Salford University from [time period redacted].

I would like any records that you have concerning Salman Abedi's applications to universities."

5. UCAS responded on 24 March 2020. It stated that it was withholding the requested information under section 36(2)(c) of the FOIA on the basis that the disclosure of the requested information would, or would be likely, to prejudice the conduct of public affairs.
6. The complainant requested an internal review of UCAS' decision on 24 March 2020.
7. Following an internal review UCAS wrote to the complainant on 23 April 2020, maintaining its original position.

Scope of the case

8. The complainant contacted the Commissioner on 3 June 2020 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of her investigation to be to determine if UCAS has correctly withheld the requested information under section 36(2)(c) of the FOIA.

Reasons for decision

Section 36 – prejudice to effective conduct of public affairs

10. Section 36(2)(c) says that information is exempt from disclosure if, in the reasonable opinion of a qualified person, disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
11. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised qualified person for that public authority. The qualified person's opinion must also be a "reasonable" opinion, and the Commissioner may decide that the section 36 exemption has not been properly applied if she finds that the opinion given is not reasonable.
12. To determine whether UCAS correctly applied the exemption, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore, in order to establish that the section 36 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.

The qualified person

13. In deciding whether UCAS has correctly engaged the exemption, the Commissioner has first considered who within UCAS is the "qualified person" for the purposes of the exemption.
14. The relevant qualified person is defined by section 36(5) of the FOIA.
15. The ability of the qualified person to determine whether information is exempt cannot be delegated to another person. The reason for asking who gave the opinion is to ensure that the decision was taken by the correct person. If the person who gives the opinion is not the qualified person, then the requested information cannot be exempt.
16. In this case, UCAS has confirmed that the qualified person for the purposes of the exemption is its Chief Executive, Clare Marchant. The Commissioner accepts that UCAS has identified the appropriate person for the purpose of providing a reasonable opinion and has therefore gone on to consider whether the qualified person has provided an opinion and when the opinion was provided.

Did the qualified person give an opinion and when was it given?

17. UCAS stated to the Commissioner that the qualified person's opinion was sought on 10 March 2020. It stated that UCAS' position on the application of section 36 was recorded in the section 36 "record of the qualified person's opinion" on 18 March 2020 and shared with the qualified person. It went on to explain that the opinion was discussed and signed in a meeting with the qualified person on 20 March 2020 where the annotation of their opinion was added to the "record of the qualified person's opinion".
18. The Commissioner is therefore satisfied that the qualified person gave an opinion and has therefore gone on to consider whether the opinion given was a reasonable one.

Was the opinion reasonable?

19. The Commissioner has issued guidance on the application of section 36¹. With regard to what can be considered a “reasonable opinion”, it states the following:

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

20. In determining whether an opinion is reasonable in the context of section 36(2) and whether the exemption is engaged, the Commissioner must consider whether the inhibition or prejudice claimed relates to the specific subsection of section 36(2) that UCAS is relying upon.
21. In this case, UCAS has stated that it is relying on section 36(2)(c).

Section 36(2)(c)

22. The Commissioner’s guidance on section 36 explains that information may be exempt under section 36(2)(c) if its disclosure would, or would be likely to, cause an adverse effect on the public authority’s ability to offer an effective public service or to meet its wider objectives or purpose. Such adverse effect does not have to be on the authority in question; it could be an effect on other bodies or the wider public sector. It may also refer to the disruptive effects of disclosure, for example the diversion of resources in managing the effect of disclosure.
23. The guidance explains that section 36(2)(c) is concerned with the effects of making the information public. However, it does not relate, for example, to the internal effect on the public authority of collating information that has been requested or of making decisions on redaction.
24. As part of the Commissioner’s investigation, UCAS provided the Commissioner with a copy of the “Record of the qualified person’s opinion” document. This standard document, produced by the ICO, helps public authorities to record the minimum information that the Commissioner would expect them to be able to provide to her when they have used the section 36 exemption. This includes the submissions

¹ https://ico.org.uk/media/fororganisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

made to the qualified person by FOI staff at the public authority when their opinion is sought.

25. The submissions made to the qualified person in this case advised them on several factors, as follows:

"The information requested would have been considered the personal data of the subject under the Data Protection Act 2018 and GDPR prior to his death. As a result, any such request would likely have meet (sic) the conditions for refusal under Section 40(2) of the Freedom of Information Act. There is no mirror exemption for information related to individuals who are deceased, and data protection legislation is only applicable to information regarding living individuals.

Due to the personal nature of information obtained during a UCAS application it is considered to hold a significant level of sensitivity for the applicant and potentially their wider family. Applicants sign up to the UCAS privacy policy where the protection and use of their personal data is annotated. This does not include any commentary about the potential disclosure of information through FOI. Applicants are provided with assurance that information will be handled in accordance with data protection legislation and not shared with third parties without a suitable lawful basis. It is considered that it would be within the reasonable expectation of applications that their information will remain protected and secure from public disclosure even after death.

There is a general concern that disclosing personal details about a deceased student and their university application has the potential to cause distress to family and friends thereby potentially causing harm to others. Disclosing this information also has the potential to undermine the trust that students, teachers and parents have in UCAS and how we hold, process and disclose personal data.

Although the response to a single FOI does not set precedent in the future handling of like requests, it is appropriate to consider the impact a single release may have on the wider applicant body and the handling of future requests of this nature.

In this specific case we also must consider the impact of any disclosure on the wider public and particularly the families and individuals directly affected by the actions of the subject. New disclosure of application information may cause further distress to these individuals.

Although FOI requests should be considered applicant blind, in this case, it is clear that the requestor works within the media industry which means that any disclosure is likely to be placed in the wider public domain via used for news or entertainment purposes. Use of information about this subject in this manner is likely to cause distress to the individuals noted above.

26. In addition to the above, the submission took into account the following wider review of the impact of any disclosure in this case:

"There are a range of wider concerns regarding the disclosure of this information in terms of the potential prejudice to ongoing legal activity.

Although the trial of the individual's brother has announced the outcome, sentencing is pending and a wider public inquiry is due to begin in June. Any prejudice to either of these cases could cause legal action against UCAS or wider prejudice to those activities. Through interaction with the University of Salford their Legal Team have confirmed that the Crown Prosecution Service relative to the trial of the subject's brother and the Chair of and Counsel to the Public Inquiry are incredibly sensitive as to release of information outside the immediate circle of directly concerned participants. It was indicated that participants have been required to sign personal undertakings as to confidentiality which suggested an increased level of protection required for this specific information.

27. The qualified person's opinion is that if the information requested were to be disclosed, it "would be likely to" "harm the trust UCAS has with its applicants through the admissions process".

The Commissioner's analysis

28. The Commissioner has considered UCAS' arguments in relation to section 36(2)(c) being engaged and has reviewed the withheld information.
29. It is important to note that the question of whether the exemption is engaged is not determined by whether the Commissioner agrees with the qualified person's opinion, but by whether she considers the opinion to be in accordance with reason. In other words, the Commissioner must consider whether the qualified person's opinion is one that a reasonable person could hold. This only requires that it is a reasonable opinion, not necessarily the *most* reasonable opinion. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, she must find that the exemption is engaged.

30. The Commissioner accepts that it was reasonable for the qualified person to hold the opinion that disclosure of the requested information would be likely to result in prejudice to the effective conduct of public affairs. In particular, the Commissioner accepts the qualified person's reasoning regarding the effect disclosure would be likely to have on the trust that applicants going through the admissions process have in UCAS.
31. In view of this, the Commissioner is satisfied that a reasonable opinion has been given and therefore she finds that the exemption is engaged.

Public interest test

32. Section 36 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in disclosing the information

33. The complainant argued in his internal review request that *"as a filmmaker and journalist who has been researching the Manchester Arena bombing for some time, I believe there is an exceptional public interest in releasing Salman Abedi's documents. There is very little of Salman Abedi's writing that has survived so releasing the UCAS form gives an idea of the direction his life was heading towards before he was radicalised. Releasing it will give greater public understanding of Salman's evolution from student to terrorist."*
34. UCAS accepts that the actions of the deceased individual in the request may be of interest to the public in understanding his past and the decisions around his further education choices.
35. UCAS also argued that the requested information is no longer covered under data protection legislation or any of the personal data related FOIA exemptions, and therefore it may be considered that the Government has not legislated to protect the information of deceased individuals because it is not considered that it requires additional protection.
36. UCAS also stated that there continues to be public interest in the matters surrounding the death of the individual named in the request, particularly as, at the time of the request, the sentencing in the related trial and the public inquiry remained outstanding and therefore wider release of information may have assisted in the public understanding of the history of the deceased individual named in the request.

Public interest in maintaining the exemption

37. UCAS has argued that the requested information was personal data as defined by the General Data Protection Regulations (GDPR) prior to the death of the individual named in the request and it is considered that the wider protection of information with this definition post death is in the public interest, otherwise all personal data of deceased individuals would be suitable for disclosure to the wider public.
38. UCAS argued that its own privacy policy mentions the protections in place around the handling of personal data and states that information will be handled securely and freely. It stated that the disclosure of this type of information is not generally compatible with the privacy policy which all applicants confirm acceptance of.
39. UCAS argued that devaluing the effectiveness of the privacy policy and UCAS' controls of data previously considered personal data is likely to cause a negative effect on the behaviour of future applicants particularly where UCAS is identified as the source of that information.
40. UCAS stated that within the wider application record, there will be information linked to third parties who are not subject to the initial request for information, including referees and UCAS employees. These individuals will have a reasonable expectation of privacy and would not expect their data to be placed into the public domain.
41. UCAS stated that any potential negative impact on its ability to provide an application service may have a significant impact on the organisation's ability to meet its charitable objectives.
42. UCAS argued that as a disclosure of information under FOIA is considered a disclosure to the world, UCAS will lose control of the information released and be unable to review or mandate the onward uses of that information. UCAS stated that it is likely that publication or wider use of the requested information could cause distress to the family of the subject and potentially the wider families affected by the deceased individual's actions.

Balance of the public interest

43. When considering complaints regarding the application of the exemption at section 36(2)(c), where the Commissioner finds that the qualified person's opinion was reasonable, she will consider the weight of that opinion in applying the public interest test. This means that whilst the Commissioner accepts that a reasonable opinion that prejudice would, or would be likely to, occur has been expressed, she will go on to consider the severity, extent and frequency of that prejudice in forming her own assessment of whether the public interest test favours disclosure.

44. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding how public authorities make their decisions and carry out their functions, and in turn fosters trust in public authorities.
45. The Commissioner acknowledges the comments made by the complainant in his request for internal review. She recognises the value in disclosing information about the deceased individual's background which may help to further the public's understanding of the events that ultimately led to his actions on 22 May 2017.
46. She also considers that some weight must be given to more general public interest in journalists being able to access information in order to better inform the public about, and increase the public's understanding of, events of such significance. However, the fact that the requester is a journalist cannot be taken into account when considering the application of this exemption.
47. The Commissioner also accepts UCAS' argument that the disclosure of the requested information could negatively impact the trust between applicants and UCAS, which could in turn also negatively impact UCAS' ability to meet its charitable objectives.
48. The Commissioner also accepts that, at the time of the request, there were ongoing legal activities that may have been impacted by the disclosure, and the disclosure of the information requested could have caused distress to the family of the deceased individual and the families affected by the deceased individual's actions.
49. The Commissioner also notes that there is already a significant amount of information in the public domain about the deceased individual and the events of 22 May 2017. Whilst the requested information would no doubt add to public's understanding of those events and what may have led to them, the information already in the public domain goes some considerable way to serving that purpose.
50. Having considered the various public interest arguments for and against disclosure, the Commissioner considers that greater weight must be given to the ability of UCAS to continue carrying out its functions, and therefore that the public interest falls in favour of maintaining the section 36 exemption. The Commissioner's decision is therefore that UCAS is entitled to rely on section 36(2)(c) of the FOIA to withhold the information requested by the complainant.

51. In view of this, the Information Commissioner does not require UCAS to take any steps as a result of this decision notice.

Right of appeal

52. 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

53. 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.
54. 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