

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 16 July 2021

Public Authority: The Council of the University of Salford
Address: The Crescent
Salford
M5 4WT

Decision (including any steps ordered)

1. The complainant has requested the complete university records for a deceased individual, including any communications with third parties. The University withheld the majority of the information under section 32(2) as it was held only by virtue of it being part of an inquiry and withheld the remaining information under section 36(2)(c).
2. The Commissioner's decision is that the University has correctly withheld the information in documents 1 – 37 on the basis of section 32(2). The information in documents 38 – 50 does engage the section 36(2)(c) exemption but the public interest favours disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information in documents 38 – 50 subject to any redactions under section 40(2) for personal data.
4. 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

5. On 15 February 2020 the complainant made a request to the University in the following terms:

"I understand that the deceased Manchester Arena bomber Salman Abedi was a student at Salford University from [redacted].

I would like a copy of his complete university records including communications with any other institution or third party. I understand that parts of this record will be redacted for privacy issues."

6. The University responded on 20 March 2020 stating that the information formed part of the records relative to legal proceeding in the Manchester Arena Public Inquiry and therefore the information was exempt under section 32 of the FOIA.
7. The complainant asked for an internal review on 20 March 2020. He stated that the section 32 exemption could not apply as the information he had requested was not specifically created for court use.
8. After intervention from the Commissioner, an internal review was concluded and the outcome provided to the complainant on 4 August 2020. The University confirmed that the University records were provided to the inquiry and that it considered it was exempt as it was information recorded in a documents that has been filed in the custody of a person conducting an inquiry. The University accepted that the information was initially processed as the process of providing education but once Mr Abedi left the University the records were to be archived. The University considers the records now are only being used as part of the inquiry. In addition to this the University stated it had a duty of confidence under an undertaking made to the inquiry that it had entered into at the request of the public inquiry to not disclose information held relating to the inquiry. This includes the records that are the subject of this request.

Scope of the case

9. The complainant contacted the Commissioner following the internal review on 4 August 2020 to state he remained unhappy with the outcome.
10. During the course of the Commissioner's investigation the University also identified that a number of the documents in scope of the request had not actually been provided to the inquiry and therefore could not be withheld under section 32(2) of the FOIA. The University sought to rely on the section 36(2)(c) exemption to withhold the information in these documents.

11. The Commissioner considers the scope of her investigation to be to determine if the University has correctly withheld the information requested on the basis of either section 32(2) or section 36(2)(c) of the FOIA.

Reasons for decision

Section 32 – court records

12. Section 32(2) states that information held by a public authority is exempt information if it is held only by virtue of being contained in:
 - (a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of arbitration, or
 - (b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.
13. The Commissioner has issued guidance on section 32¹. Section 32(4) explicitly restricts the definition of the term 'inquiry' to those inquiries which are governed by statute. The University has explained that the information it is withholding under this exemption is relevant to the trial and sentencing of Hashem Abedi (the brother of Salman Abedi) and the Manchester inquiry. This is an independent inquiry established on 22 October 2019 by the Home Secretary under the Inquiries Act 2005. As such the Commissioner is satisfied that the inquiry in this case meets the relevant definition as it is governed by statute.
14. The guidance on section 32(2) states that for the exemption to be engaged the information must be:
 - Contained in (or obtained from) a type of document specified by the exemption; and
 - Held 'only by virtue ...' of being contained in that document.
15. There are two main tests in considering whether information falls within this exemption. First, is the requested information contained within a relevant document. Secondly, is this information held by the relevant public authority only by virtue of being held in such a document?

¹ [Court, inquiry or arbitration records \(section 32\) v1.1 - FOIA guidance \(ico.org.uk\)](https://ico.org.uk/foia-guidance/section-32-court-inquiry-or-arbitration-records)

16. In the Commissioner's view, the phrase 'only by virtue of' implies that if the public authority also holds the information elsewhere it may not rely upon the exemption.
17. In relation to the first point; the University has explained that the information withheld under this exemption has all been disclosed to the Inquiry. The Inquiry made a formal request for the disclosure of documentation from the University in November 2018. The Commissioner has viewed the exact wording of this request and notes it was purposively broad but also specifically asked for much of the same information as this information request. The Commissioner therefore accepts that the information is in documents placed in the custody of a person conducting an inquiry, for the purposes of that inquiry.
18. Turning to the second point; the Commissioner's guidance is clear that this will be determined by the route by which the public authority obtained the information. In this case, the University was obtained by the University itself, Salman Abedi and other students/staff and was used for the purpose of, and in connection with, providing education services to Salman Abedi. Whilst this would generally exclude this information from being 'held only by virtue of being contained in a document' passed to an inquiry, it can be considered 'held only by virtue of' if the information is no longer being kept for the purposes for which it was originally obtained and is now being held solely for the purposes of the inquiry.
19. The University argues this is the situation in this case and that the information is no longer held for the purposes of the provision of education and prior to the information request from the Inquiry the information was not being used and was, in line with the University's retention policy to be archived pending destruction. The University also confirmed that since the information was passed to the Inquiry it has not been used for any other purpose or disclosed further and it is now solely held for purposes connected with the Inquiry.
20. The Commissioner has viewed a copy of the University's retention policy and notes that student files are retained after the student's relationship with the University ends. As the individual in question was a student at the University the University retained his student file in line with its retention policy. However, the University has made it clear this information was no longer being used by the University as its relationship with the student had ended and it was simply being held in line with its retention policy to be archived and later destroyed.
21. The Commissioner accepts that, at the time the information request relevant to this decision notice was made, the information had been passed to the Inquiry and had been listed for destruction. The

information is now only held by virtue of having been passed to the Inquiry and the Inquiry now requires the University to retain it. As such the Commissioner accepts the University has correctly applied section 32(2) to the information in the documents numbered by the University as 1 – 37.

22. Sections 32(1) and (2) are class based exemptions. This means that any information falling within the category described is not subject to a prejudice test and is automatically exempt from disclosure. It is therefore conceivable that the exemption could apply to information which may otherwise be available to an applicant via other means or to information which is already widely available. Sections 32(1) and (2) are also absolute exemptions and are therefore not subject to any public interest considerations.
23. The Commissioner has therefore decided that the University was correct to withhold the information in documents 1 – 37. She will now go on to consider documents 38 – 50 which have been identified by the University as not relevant to the Inquiry at the time of the request.

Section 36(2) – prejudice to the effective conduct of public affairs

24. Section 36(2)(b) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, disclosure of the information:

(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

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

25. Section 36 requires the qualified person at a public authority to give an opinion on the likelihood of prejudice occurring. The Commissioner's role is to determine whether an opinion has been provided by the qualified person, determine if the opinion is 'reasonable' and consider the public interest test.
26. The University provided the Commissioner with a copy of a submission put to the Vice-Chancellor on 8 October 2020, outlining why it would be appropriate to rely on section 36(2)(c) to withhold the information in documents 38-50 i.e. the information in the scope of this request that was not passed to the Inquiry. The opinion of the qualified person was

given the next day agreeing the exemption should be used. The Commissioner accepts the correct person provided their opinion.

27. The qualified person's opinion stated that section 36(2)(c) was engaged. Specifically, the opinion states that:

"... disclosure of the information would prejudice the Manchester Arena Inquiry process. The University repeats what is said about the importance of the Inquiry Chairman and team being able to maintain control over access to information relevant to the Inquiry to prevent prejudice to the proceedings. In view of the significance and sensitivity of the matter which form part of the Inquiry process, there is a clear and overwhelming public interest in ensuring that proceedings are not prejudiced in any way."

28. The Commissioner is doubtful that disclosure of the information in these specific documents, that were not in the end passed to the Inquiry, would prejudice the effective conduct of public affairs. The arguments presented in the opinion, and in the submissions to the Commissioner focus on the impact on the Inquiry and seem to be relevant only to those documents that were provided as part of the request from the Inquiry.
29. However, the Commissioner also accepts the qualified person's opinion does not have to be the most reasonable opinion anyone could have that everyone would agree with. In this case, the qualified person has argued the prejudice 'would' result from disclosure which provides a much higher threshold to meet.
30. For section 36(2)(c) to be engaged the qualified person must be able to identify some form of prejudice not envisaged by any other limb of the exemption. The qualified person's opinion refers to the prejudice to the Inquiry process and the University's submissions expand on this somewhat in explaining that although the documents in question were not passed to the Inquiry but the University retains them on the basis that there is still a possibility they may be disclosed to the Inquiry at a later stage of the process. The qualified person goes on to argue that the Inquiry process must be preserved and there is strict access to information that may be part of Inquiry proceedings to prevent prejudice to these proceedings.
31. The Commissioner is not convinced (as she will go on to explain) that this prejudice is as likely or as severe as is claimed, particularly in relation to the specific information in documents 38 – 50. However, she accepts that this opinion falls within a spectrum of opinions that a reasonable person might hold and she therefore accepts that this limb of the exemption is engaged.

Public interest test

32. Section 36 is a qualified exemption and therefore, even where prejudice is identified as resulting from disclosure, the information can only be withheld if the balance of the public interest favours maintaining the exemption.
33. Whilst there will always be some inherent public interest in preventing any identified prejudice from occurring, the weight to be assigned to that public interest will vary depending on the likelihood and severity of the prejudice identified.
34. In explaining why the public interest favoured maintaining the exemption, the University explained that:

" In view of the significance and sensitivity of the matters which form part of the Inquiry process, there is a clear and overwhelming public interest in ensuring that the proceedings are not prejudiced in any way. The confidentiality undertakings and restriction orders made by the Inquiry Chairman prevent such prejudice in controlling the use of and access to information shared with the Inquiry during the Inquiry process. Maintaining the section 36 exemption during the course of the Inquiry proceedings, and unless and until such information is made public during the course of the proceedings, is therefore deemed by the University to outweigh the public interest in disclosure.

Of significance is the fact that the Inquiry Chairman is under a statutory duty, subject to any restrictions or orders he imposes, to take such steps as he considers reasonable to secure that members of the public are able to attend the Inquiry or to see and hear a simultaneous transmission of proceedings at the Inquiry and to obtain or to view a record of evidence and documents given, produced or provided to the Inquiry. The Inquiry hearings are currently being live-streamed from the Inquiry's YouTube channel and evidence and transcripts of each day's hearings are made available on the Inquiry website. Information produced in evidence during the proceedings is therefore placed into the public domain. At the end of the Inquiry, subject to any restrictions or orders made by the Chairman, members of the public may be able to access further documentation 5 pertaining to, or disclosed in connection with, the Inquiry. The public interest in disclosure of the information held by the University may therefore be met either during the course of the Inquiry proceedings or following the conclusion of the Inquiry"

35. As already explained, the University also added that the documents in question contain information that was not passed to the Inquiry but it still maintains this information would prejudice the Inquiry as it may be used or requested at some stage of the process.

36. In favour of disclosure is the significant public interest in the Inquiry and the Manchester Arena attack. Any information offering an insight into those responsible is likely to attract significant interest as this was an incident that affected people across the country.
37. The complainant also pointed to the fact he had obtained records from other educational institutions that the individual had attended without causing any prejudice to the Inquiry.
38. In the Commissioner's view, the balance of the public interest in this case favours disclosure of the information.
39. The Commissioner considers that the University did not provide any meaningful arguments towards the public interest in disclosure. Nor did its arguments regarding maintaining the exemption seem compelling given the information does not seem, to date, to have formed part of the Inquiry process so it is extremely difficult to see how the proposed prejudice to the Inquiry would occur.
40. The Commissioner has viewed the information in documents 38 – 50 and notes that these consist mainly of attendance records and records of the individual's activities as a student. The Commissioner is not persuaded there is a significant likelihood of disclosure of this information causing prejudice to the Inquiry given it was not requested by the Inquiry and does not appear to the Commissioner to be anything other than factual information about a student's attendance and activities record.
41. The Commissioner considers that the public interest in maintaining the exemption will be lowest when the information is largely factual or mundane, as is the case here. The Commissioner recognises there is a very strong public interest in understanding how the Manchester Arena attack happened and information around those involved. Whilst she does not consider this information will shed any significant light on this it does provide some insight. She also must add weight to the public interest in transparency that would be benefited from disclosure.
42. Having carefully considered the circumstances of this case, the Commissioner is therefore satisfied that there is a stronger public interest in disclosure of this information and, the public interest in maintaining the exemption was weak when considered in the context of the actual information being withheld. Whilst the Commissioner accepts that section 36(2)(c) of the FOIA is engaged in respect of this particular information, she considers that the balance of the public interest, in these particular circumstances, favours disclosure.

Right of appeal

43. 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

44. 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.
45. 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

Jill Hulley
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