

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 December 2021

Public Authority: The Council of the University of Durham
Address: Palatine Centre
Stockton Road
Durham
DH1 3LE

Decision (including any steps ordered)

1. The complainant has requested correspondence concerning the 2020 Durham Students' Union elections. The Council of the University of Durham ("the University") relied on section 36 of the FOIA (prejudice to the effective conduct of public affairs) to withhold the requested information.
2. The Commissioner's decision is that the University is entitled to rely on section 36(2)(b)(i) of the FOIA and that the balance of the public interest favours maintaining the exemption.
3. The Commissioner does not require any further steps to be taken.

Background

4. In February 2020, the Durham Students Union (DSU) held elections to fill its officer and trustee positions for the forthcoming year.
5. The elections use the Single Transferable Vote system. Each ballot paper lists all the candidates who have been nominated. Students vote by ranking each candidate in order of preference, from first to last. The

system for allocating votes to candidates is complex¹ but it is important to note that, if a vote cannot be allocated to the voter's first preference, it can be allocated instead to their second preference, or, if that can't be achieved, their third preference and so on.

6. However, as well as a choice of nominated candidates, students also have the option to Re-Open Nominations (ie. rejecting all the available candidates and asking for new ones to be put forward) - often abbreviated to voting for "RON".
7. In the build up to the February elections, there was a concerted effort to encourage students to vote for RON rather than any of the other candidates. Those behind the campaign argued that the current DSU leadership was not properly attending to the needs of students.
8. Following a complaint that election rules had been breached by the RON campaign, the returning officer for the election disqualified RON. Any voter who had expressed a first preference for RON had their vote discarded entirely, rather than those votes being re-allocated according to second preferences. DSU argued that this was because:

"the software does not allow transfer of first preference votes for RON but the decision to remove the candidate still needed to be implemented. The votes were therefore removed and not transferred."
9. According to DSU, 58% of votes cast in the election expressed a first preference for RON. It is not clear how many of those votes also expressed a second preference.²
10. DSU is a separate legal entity to the University and is not a public authority for the purposes of the FOIA.

¹ A detailed explanation can be found here: <https://www.electoral-reform.org.uk/voting-systems/types-of-voting-system/single-transferable-vote/>

² <https://www.palatinatate.org.uk/58-of-votes-for-ron-as-dsu-releases-election-results/>

Request and response

11. On 3 July 2020 the complainant requested information of the following description:

"Please disclose the following information in an electronic format:

"[1] Any email (including attachments) sent or received by any member of the University Secretary's Office in relation to the 2020 Durham Student's Union election.

"[2] A breakdown of results for the 2020 student's union election

"[3] The number of votes cast for 'RON' for each position. I note 'RON' has been disqualified, I require the raw number of votes cast for the 'RON' not the votes which have been counted as being valid.

12. The University initially refused the request as vexatious. However, following the intervention of the Commissioner, it issued a fresh response on 8 April 2021.
13. In its fresh response, the University denied holding information within the scope of elements [2] and [3], but confirmed it held the remainder. However, it refused to provide the remainder and relied on section 36(2)(b)(i) of the FOIA in order to do so.
14. The complainant requested an internal review on the same day. The University sent the outcome of its internal review on 6 May 2021. It upheld its original position.

Scope of the case

15. The complainant contacted the Commissioner on 6 May 2021 to complain about the way his request for information had been handled.
16. As the complainant has not challenged the University's assertion that it holds no information within the scope of elements [2] or [3], the Commissioner has only looked at whether the University is entitled to rely on section 36 of the FOIA to withhold the information within the scope of element [1].

Reasons for decision

Section 36 – Prejudice to the Effective Conduct of Public Affairs

17. Section 36(1) states that this exemption can only apply to information to which section 35 does not apply.
18. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the Qualified Person, disclosure of the information:
 - (a) *would, or would be likely to, prejudice—*
 - (i) *the maintenance of the convention of the collective responsibility of Ministers of the Crown, or*
 - (ii) *the work of the Executive Committee of the Northern Ireland Assembly, or*
 - (iii) *the work of the Cabinet of the Welsh Assembly Government.*
 - (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.*
- (3) *The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).*
- (4) *In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".*
19. Section 36 is a unique exemption within the FOIA in that it relies on a particular individual (the Qualified Person) within the public authority giving an opinion on the likelihood of prejudice occurring. It is not for the Commissioner to stand in the shoes of that individual and provide his own opinion. The Commissioner's role is to: establish that an opinion has been provided by the Qualified Person; to assure himself that that opinion is "reasonable" and; to make a determination as to whether there are public interest considerations which might outweigh any prejudice.

Who is the Qualified Person and have they given an opinion?

20. In line with his standard practice, the Commissioner asked the University to provide a copy of the opinion that the Qualified Person had given and to explain the information that had been available to them in order to form that opinion.
21. The University provided the contents of its response and internal review and a summary of what it said the Qualified Person's opinion had been.
22. The Commissioner was unwilling to accept these documents as providing definitive evidence of what the Qualified Person had said, as they did not demonstrate sufficient proximity to the Qualified Person themselves. Given the centrality of the Qualified Person's opinion to the application of this particular exemption, a definitive record of what that opinion was needed to be provided. The Commissioner therefore asked the University to provide any accompanying correspondence or, if the opinion had been provided orally during a meeting, the minutes of that meeting. He also noted that the internal review had been signed by a Professor Antony Long who had given his title as "Deputy Vice-Chancellor." Given that, for most universities, only the vice-chancellor themselves (or equivalent) is entitled to act as the Qualified Person for the purposes of section 36 of the FOIA, the Commissioner asked the University to confirm that Prof Long had the appropriate authority to act as the Qualified Person at the time that the opinion was given.
23. The University responded to say that Prof Long had been the Deputy Vice-Chancellor at the time of the internal review, but was now the acting Vice-Chancellor. It asked the Commissioner if, in order to clarify matters, it was entitled to seek a fresh opinion from its Qualified Person. The Commissioner accepts that University is entitled to seek a fresh opinion, so long as that opinion relates to the circumstances at the time of the request.
24. The University subsequently provided the Commissioner with correspondence exchanged with Prof Long on 27 November and 30 November 2021 in which he agrees with a submission put to him on the application of section 36 of the FOIA by the University Secretary.
25. The Commissioner is satisfied that Prof Long gave an opinion on 30 November 2021 and, at the time he did so, he was entitled to act as the Qualified Person.

What was the opinion and was it reasonable?

26. The submission approved by Prof Long included several bullet points explaining why disclosure of the withheld information would cause prejudice:

- a) **"Public interest is not the same as what the public is interested in** – public curiosity about a subject is not the same as the public interest favouring the release of information.
 - b) **"Free and frank advice:** the University needs to be able to offer advice and guidance regarding issues relating to the Student Union freely and frankly and disclosure of any information that could result in staff being less candid in expressing their views or in providing information in order to seek advice would be prejudicial to the University
 - c) **"All options should be aired:** Staff need to be confident in giving advice that sets out all available options so that those who are ultimately responsible for making decisions and giving appropriate advice and guidance do so in light of all relevant information
 - d) "there may be public curiosity about the University's involvement in the DSU elections, the release of the information requested is not in the broader public interest
 - e) **"Harm potentially significant:** Potential harm caused by the release of the information requested is potentially significant since it would hinder the effective working of the University as detailed in the original decision.
 - f) **"Would not improve public accountability:** release of the information held will not improve public accountability of the University" [original emphasis]
27. The Qualified Person argued that section 36(2)(b)(i) of the FOIA was engaged as disclosure would be likely to inhibit the free and frank provision of advice.
28. As has been noted above, the Commissioner is not required to decide whether the Qualified Person's opinion is the one he himself would have given – or even one he agrees with. He need only decide whether it falls within the spectrum of opinions that a reasonable person might hold and is not irrational or absurd.
29. The Commissioner notes that parts of the QP's opinion were infected by consideration of either the balance of the public interest or what the consequence of disclosure would *not* be. Specifically points a, d, and f. It is not the role of the Qualified Person to make a judgement about the balance of the public interest, nor are they required to state what *won't* be the consequences of disclosure.

30. The Upper Tribunal in *Information Commissioner v Malnick and the Advisory Committee on Business Appointments* [2018] UKUT 72 (AAC) stated that the proper approach to the section 36 exemption was that:

*"The QP is not called on to consider the public interest for and against disclosure. Regardless of the strength of the public interest in disclosure, **the QP is concerned only with the occurrence or likely occurrence of prejudice**. The threshold question under section 36(2) does not require the Commissioner...to determine whether prejudice will or is likely to occur, that being a matter for the QP. The threshold question is concerned only with whether the opinion of the QP as to prejudice is reasonable. The public interest is only relevant at the second stage, once the threshold has been crossed. That matter is decided by the public authority."*

31. Nevertheless, the Commissioner recognises that points b, c and e, raise arguments that are applicable. It is not absurd or irrational for a reasonable person to think that disclosure might cause staff to feel inhibited from sharing forthright advice in future.
32. The Commissioner is therefore satisfied that these parts of the Qualified Person's opinion are reasonable and he therefore considers that section 36(2)(b)(i) of the FOIA is thus engaged.

Public interest test

33. Even though the Qualified Person has identified prejudice which might result from disclosure, the information must still be disclosed unless the public interest favours maintaining the exemption.
34. Given that the Commissioner has accepted the possibility that disclosure might cause prejudice, there will always be an inherent public interest in preventing that from occurring. However, the weight that should be attached to that public interest will be determined by the severity of the prejudice and the likelihood of it occurring.
35. The Qualified Person has stated – and the Commissioner accepts as reasonable – that the lower bar of prejudice ("would be likely to prejudice") is engaged. This means that the chance of prejudice occurring doesn't have to be more likely than not, but there must still be more than a remote or hypothetical chance. Whilst it is easier to demonstrate that the lower bar of likelihood is met, the weight to be attached to that prejudice is also lower.
36. The withheld information in this case comprises of a series of emails both within the University and with the Chief Executive of DSU in which the conduct of the election is discussed and the Chief Executive keeps the University abreast of developments.

37. The complainant argued that the public interest should favour disclosure. He did not consider that University officials should be dissuaded from giving advice by the “glare of minor public scrutiny.”
38. The complainant also pointed to the University’s statutory role under the Education Act 1994. Section 22(2)(e) of that Act requires the governing body of a higher education institution to satisfy itself that any elections held for the purposes of filling the offices of an affiliated students union are “fairly and properly conducted.”
39. The Commissioner recognises that these particular elections were acrimonious. DSU took a controversial decision to disqualify RON. That decision was one which DSU had the authority to make and it is not for the Commissioner to judge whether that decision was or was not appropriate in the circumstances. Nevertheless, regardless of the validity of that decision, it had the effect of nullifying a majority of the votes that were cast in the election. Students that voted for RON were not only denied the opportunity to have their votes counted for their first preferences, but they were also denied the opportunity to have their votes counted for any other preference they might have expressed. Whilst the decision was DSU’s to take, there would be a strong public interest in understanding how that decision had been reached and whether the University had tried to either encourage or discourage DSU from taking this step.
40. The University on the other hand, argued that the balance of the public interest should favour maintaining the exemption. It pointed to the purpose of the exemption in protecting free and frank advice and noted that there was a strong public interest in allowing staff to discuss controversial matters in private.
41. In addition, the University noted that a great deal of information about the elections was already in the public domain. DSU had explained the decision it had taken and information on votes cast had also been published. A more comprehensive review of DSU’s operations had also been carried out and the findings published.
42. The University noted that any decisions around the running of the election were a matter for DSU – which was a separate legal entity. DSU should, the University argued, be able to approach the University on a confidential basis to seek advice – without fear that these approaches would be made public. It would not be in the public interest to dilute the quality of the advice that was being provided by inhibiting staff from providing their opinions.

The Commissioner’s view

43. The Commissioner considers that the balance of the public interest in this case favours maintaining the exemption.
44. Whilst the Commissioner recognises that DSU took a controversial decision, the withheld information itself sheds very little light on how that decision was arrived at. The public would learn very little about the decision that was not already in the public domain at the point the request was made.
45. Whilst the University and DSU no longer needed a safe space at the point the request had been made, the Commissioner recognises the potential for a chilling effect on future discussions.
46. The Commissioner is usually sceptical of chilling effect arguments. He expects public servants – particularly senior staff – to be robust and not easily dissuaded from providing forthright advice.
47. That being said, the Commissioner recognises that DSU is not a public authority. It should be able to approach the University without being concerned that its approaches (and any advice that is provided) will be placed into the public domain.
48. In the circumstances of this case, the Commissioner considers that the public interest in disclosure of this particular information is weak and it is outweighed by the public interest in maintaining the exemption.
49. The Commissioner is therefore satisfied that section 36 is engaged and that the balance of the public interest favours maintaining the exemption.

Other matters

50. The Commissioner would recommend to the University (and indeed any other public authority) that it uses his dedicated template for recording the qualified person's opinion when it wishes to rely on any of the limbs of section 36 of the FOIA.³ The template sets out all the matters the qualified person needs to consider and, if correctly completed, will ensure that qualified person's opinion has been properly constructed and approved.

³ <https://ico.org.uk/media/for-organisations/documents/2260004/record-of-the-qualified-persons-opinion.doc>

Right of appeal

51. 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

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

52. 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.
53. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF