

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 August 2020

Public Authority: The Council of London South Bank University
Address: 103 Borough Road
London
SE1 0AA

Decision (including any steps ordered)

1. The complainant has requested a copy of a report with supporting evidence, compiled as a result of a 'whistleblowing' concern submitted to London South Bank University ('the University'). The University relied on the FOIA exemptions provided under section 36(2)(c) (prejudice to effective conduct of public affairs), section 40(1)(applicant's personal data) and section 40(2)(third person personal data) to refuse the request.
2. The Commissioner's decision is as follows:
 - The University is entitled to rely on section 36(2)(c) of the FOIA to withhold the requested information and the balance of the public interest favours maintaining this exemption.
3. The Commissioner does not require the University to take any remedial steps.

Background

4. The complainant has told the Commissioner that they initiated a whistleblowing concern in July 2019, under the University's 'Speak Up' policy. An investigator met the complainant in September 2019 and at this meeting they were informed that they would be given a copy of the completed report.

Request and response

5. On 7 November 2019 the complainant wrote to the University and requested information in the following terms:

"I am writing to you under the Freedom of Information 2000 to request the following information from yourselves which is the Report compiled by [name redacted] after the Whistleblowing Complaint made by myself along with the evidence that was provided to compile the report. I was informed by [name redacted] the report was compiled in mid October 2019 after I raised concerns about the academic standards on the MSc Addictions Counselling Course and how these lax academic standards may have led to the poor quality of care delivered at the Priory, where a large number of MSc students who attend the course come from - potentially contributing to the deaths of 15 people; amongst other detailed concerns.

Please provide it as a computer document to be sent to my email address."

6. The University provided the complainant with a refusal notice on 5 December 2019. It refused the request under section 36(2)(c) of the FOIA, section 40(1) (personal data of applicant) and section 40(2) (third person personal data).
7. The complainant requested an internal review on 6 December 2019. This correspondence focussed on the University's reliance on section 36(2)(c) and the fact that it had not carried out the public interest test associated with this exemption.
8. In correspondence dated 6 December 2019 the University confirmed that it considered the public interest favoured maintaining the section 36(2)(c) exemption.
9. Following an internal review, the University wrote to the complainant on 14 February 2020. It maintained its reliance on the exemption under section 36(2)(c) of the FOIA.
10. On 21 February 2020 the University advised the Commissioner that, under data protection legislation, it had released to the complainant the information it had withheld under section 40(1) of the FOIA, as this is their own personal data.

Scope of the case

11. The complainant contacted the Commissioner on 13 December 2019 to complain about the way their request for information had been handled.
12. On 8 July 2020 the complainant confirmed they would still like to gain access to the document compiled as part of the whistle blowing investigation. The Commissioner's investigation has therefore focussed on whether the University can withhold that information under section 36(2)(c) of the FOIA, and the balance of the public interest.
13. The University has confirmed that it considers that some of the withheld information is also exempt from disclosure under section 40(2). If necessary, therefore, the Commissioner has been prepared to consider whether that information engages section 40(2) of the FOIA.

Reasons for decision

Section 36 – prejudice to effective conduct of public affairs

14. The information being withheld under section 36(2)(c) of the FOIA is a final report and supporting evidence, such as email correspondence, that was produced following an investigation into a 'whistleblowing' concern that the complainant submitted to the University. The University has provided the Commissioner with copies of this material, which she has reviewed.
15. Section 36(2)(c) says that information is exempt information 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.
16. 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.
17. Other than for information held by Parliament, section 36 is a qualified exemption. This means that even if the qualified person considers that disclosure would cause harm, or would be likely to cause harm, the public interest must still be considered.

18. To determine, first, whether the University 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 exemption has been applied correctly the Commissioner must:
 - ascertain who was the qualified person or persons
 - establish that an opinion was given by the qualified person
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.
19. In this case, the qualified person (QP) was Professor David Phoenix, the University's Vice Chancellor. The Commissioner is satisfied that, in line with section 36(5) of the FOIA, it was appropriate for Prof Phoenix to act as the QP.
20. Regarding the second of the above criteria, the University provided the Commissioner with a copy of a 'Record of Qualified Person's Opinion' form, signed by Prof Phoenix. This evidences that Prof Phoenix confirmed that, in his opinion, disclosing the requested information both would and would be likely to have the effect set out under section 36(2)(c). The Commissioner is therefore satisfied that an opinion was given by the QP.
21. The request was submitted on 7 November 2019. The QP's opinion was sought and given on 5 December 2029, and the University refused the request on the same day. As such, the Commissioner is satisfied that the opinion was given at the appropriate time.
22. Finally, the Commissioner has considered the fourth of the criteria, whether the opinion given was reasonable. It is important to note that this is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it is a reasonable opinion, and 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.
23. In order for the QP's opinion to be reasonable, it must be clear as to precisely how the envisioned prejudice may arise. In her published guidance on section 36 the Commissioner notes that it is in the public authority's interests to provide her with all the evidence and arguments that led to the opinion, in order to show that it was reasonable. If this is not done, then there is a greater risk that the Commissioner may find that the opinion is not reasonable.

24. In its submission to her, the University has explained that the QP had seen the full documents that have been requested ie the report and report appendices/supporting evidence and not simply a summary of that material. In order to facilitate the review, the QP had a meeting, also on 5 December 2019, with the University Secretary and the University's Data Protection and Information Compliance Officer. They then completed their assessment including the Public Interest Test associated with section 36. During this meeting the QP was also presented with the public interest arguments both in favour of and against releasing the information. These arguments are also presented in the 'Record of Qualified Person's Opinion' form.
25. The QP's opinion was, first, that releasing the requested information *would be likely to* dissuade other potential whistleblowers from coming forward in the future. This in turn would prevent concerns from being investigated.
26. 'Would be likely to prejudice...' is a lower standard; it means that the chance of prejudice must still be significant and weighty, and certainly more than hypothetical or remote, but it does not have to be more likely than not that it would occur. The QP in this case had reviewed all the information being withheld and had discussed the matter - that is, the request, the circumstances of the request and the withheld information - with appropriate individuals. As such the Commissioner is satisfied that the QP had sufficient appropriate information about the request to enable him to form the above opinion on the matter of whether section 36(2)(c) was engaged to the information being withheld.
27. However, it is noted in the 'Record of the Qualified Person's Opinion' form that since the allegation that is the subject of the requested report, other allegations had been made. The University was in the process of considering how to manage those allegations and whether to draw on an independent reviewer. The QP's second opinion was that releasing the requested information *would* prejudice any further independent review process and any further investigations arising from that review.
28. 'Would prejudice...' means it is more likely than not that prejudice will occur ie a more than 50% chance. Based on the information provided to the Commissioner, in her view the QP was not presented with sufficient explanation to support an opinion that any further independent review process would be prejudiced if the information in this case was released. There is not enough detail on how or why exactly this prejudice *would* occur ie was more likely to occur than not. The Commissioner therefore does not find this element of the QP's opinion to be reasonable.

29. However, the Commissioner finds that all the points at paragraph 18 have been satisfactorily addressed with regard to the first element of the QP's opinion. As a result, she must find that the QP's opinion that releasing the information would be likely to prejudice the effective conduct of public affairs by dissuading potential whistleblowers to come forward in the future is one a reasonable person might hold. As such, the Commissioner finds that the exemption under section 36(2)(c) of the FOIA is engaged.
30. The Commissioner has found that the QP's opinion was reasonable and will go on to consider the weight of that opinion in the public interest test. This means that she accepts that a reasonable opinion has been expressed that prejudice would be likely to occur, but 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 weighs in favour of disclosure.

Public interest test

Public interest in disclosing the information

31. The complainant says that the University has advised them that it considered no action was necessary following its investigation into their concern. However, they say they need to see the withheld information in order to see if there is a basis for an appeal.
32. The complainant has also expressed concerns about the impact allegedly poor academic standards could have when the students graduate and are in the workplace. As the course in question relates to addictions counselling, the graduates are likely to work in a healthcare setting with responsibility for referring to other agencies when appropriate, for example, child safeguarding agencies.
33. As part of its QP process, the University acknowledged that there is a public interest in demonstrating that it is transparent and accountable for how it responds to cases under its 'Speak Up' policy – that they are investigated and any resulting actions are implemented. It said there is public interest in ensuring the investigatory process is carried out with integrity and impartiality.
34. In its submission to the Commissioner, the University has again noted that there is a wider public interest in it demonstrating that its decision making is transparent and that it demonstrates that it is acting justly and with integrity.

Public interest in maintaining the exemption

35. As part of its QP process, the University noted that it did not consider that releasing the report and associated supporting evidence is the best way to give effect to the above public interests. The University considered that the transparency of the 'Speak Up' process is achieved by: the 'Speak Up' policy being published on its website; members of the University's Executive (or the Chair of the Audit Committee) consider whether an investigation should take place; there is a right to appeal to an independent governor; and the Audit Committee receive regular reports on whistleblowing cases, and an annual report on the effectiveness of the policy.
36. In its submission to the Commissioner, the University has argued that there is more substantial public interest case for withholding the information. It says its 'Speak Up' processes, like all whistleblowing investigations, rely on confidentiality and the trust in anonymity extended to both the reporting party and any witnesses. The University says that if it was to release the full report, even with personal data redacted, it would, first, expose the processes used in this investigation and compromise the processes it may rely on in future investigations. Second, the University says that disclosure would also make employees and students doubt the integrity of the process and their ability to report without their identity being exposed or compromised.

Balance of the public interest

37. As has been noted, section 36(2)(c) is concerned with the effects of making the disputed information public. Prejudice to the effective conduct of public affairs here could refer to the disruptive effects of disclosure, for example the diversion of resources in managing the effect of disclosure. However, it may also refer to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose. The Commissioner considers that it is that effect that is relevant here.
38. In finding that section 36(2)(c) is engaged, the Commissioner has already accepted the QP's opinion is a reasonable opinion to hold. However, in considering the balance of the public interest, the Commissioner takes into account the severity, frequency, or extent of any prejudice that would or might occur.
39. It is the QP's opinion in this case that disclosing the information would be likely to result in potential whistleblowers being dissuaded from submitting concerns to the University through its 'Speak Up' whistleblowing policy, in the future. The Commissioner has accepted this opinion as reasonable. She considers that there is strong public interest in the University having a whistleblowing policy that is robust, that students and staff have confidence in it and that they are prepared to

raise concerns with the University through this policy. It is through such concerns being brought to the University's attention that potentially very serious issues can be identified and addressed, if necessary, so that the University can continue to provide an effective public service in the field of education. The risk of its whistleblowing policy being undermined through disclosure in this case would therefore have a severe consequence for the University.

40. In addition, as the University is still in the process of considering further allegations as noted in paragraph 27 the public interest in maintaining the exemption is strengthened to ensure the integrity of the process is maintained.
41. The Commissioner notes the complainant's arguments but finds that such wider public interest that there may be in how the University carries out whistleblowing investigations has been met through the measures it has described above. She is satisfied that there is greater public interest in the University having a robust whistleblowing policy that individuals trust and have confidence in and that, as such, the balance of the public interest favours maintaining the section 36(2)(c) exemption in this case.
42. Since the Commissioner has found that all the withheld information engages the section 36(2)(c) exemption, and that the public interest favours maintaining this exemption, it has not been necessary to consider whether some of the information is exempt under section 40(2).

Other matters

Public interest test

43. The University acknowledged that it had failed to consider the public interest test when providing its initial response to the complainant. In its submission to the Commissioner it confirmed that it has now amended its process when seeking the QP's opinion to ensure this does not happen in future.

Right of appeal

44. 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

45. 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.
46. 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

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