IN THE FIRST-TIER TRIBUNAL **EA/2013/0113**
(GENERAL REGULATORY CHAMBER)
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's Decision Notice: FS50475898
Dated: 29 April 2013

Appellant: NORMAN BAIRD
Respondent: THE INFORMATION COMMISSIONER
Second Respondent: GOVERNING BODY OF UNIVERSITY OF LONDON

Heard at: Field House
Date of hearing: 3 December 2013

Date of Decision: 16 December 2013

Before

Annabel Pilling (Judge)
Anne Chafer
Rosalind Tatam

Subject matter:

FOIA – Qualified exemptions – Prejudice to the effective conduct of public affairs s.36(2)(c)

Representation:

For the Appellant:	Norman Baird
For the Respondent:	Heather Emmerson
For the Second Respondent:	Dr Stephanie Wilson, Dr Kit Good

Decision

For the reasons given below, the Tribunal refuses the appeal and upholds the Decision Notice dated 29 April 2013.

Reasons for Decision

Introduction

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 29 April 2013.

2. The Decision Notice relate to two requests made by the Appellant under the Freedom of Information Act 2000 (the 'FOIA') to the Governing Body of the University of London ('the University') for the marking guidelines provided to examiners in respect of certain International Programme LLB examinations in May and June 2012 and the September 2012 re-sit examinations.

3. The University refused to provide the requested information on the basis that it was exempt under section 36(2)(c) FOIA (prejudice to the effective conduct of public affairs). The Commissioner agreed with the University and the Appellant appeals against his decision.

The appeal to this Tribunal

4. The Appellant appeals against the Commissioner's decision. He requested an oral hearing of the appeal. The Tribunal joined the University as the Second Respondent.

5. The Tribunal was provided in advance of the hearing with an agreed bundle of material, and skeleton arguments from the parties. We were also provided with a small closed bundle which was not seen by the Appellant, and which contains the disputed information, that is those

marking guidelines held by the University which were provided to the examiners in respect of the relevant LLB examinations.

6. On the first day of the hearing the Appellant provided the Tribunal with some supplementary documents, a more detailed written submission and a bundle of authorities. Although we cannot refer to every document in this Decision, we have had regard to all the material before us.

The Issues for the Tribunal

7. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it holds the information requested, and (b) if so, to have that information communicated to him.

8. The section 1(1)(b) duty of the public authority to provide the information requested will not apply where the information is exempt by virtue of any provision of Part II of FOIA. The exemptions provided for under Part II fall into two classes: absolute exemptions and qualified exemptions.

9. Where the information is subject to a qualified exemption, it will only be exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (section 2(2)(b)).

10. Section 36(2)(c) of FOIA is a qualified exemption and the relevant parts provide as follows:

> *(2)Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-*
>
> *…*

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

11. The qualified person is defined by section 36(5), and in this case is *"any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown."* In this case, the qualified person is the Vice-Chancellor of the University.

12. The issues for the Tribunal have been identified as follows:

    1) Whether the exemption in section 36(2)(c) is engaged, that is,

        (i) did the qualified person give an opinion that disclosure of the disputed information would or would be likely to prejudice the effective conduct of public affairs?

        (ii) Was that opinion reasonably arrived at and reasonable in substance?

    2) If so, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

Did the qualified person give an opinion?

13. There is no dispute that the Vice-Chancellor is the qualified person for the purposes of this section.

14. On 20 July 2012 the Vice-Chancellor was sent a "Section 36 – Evidence pack for 'qualified person'" by the University Records Manager and Freedom of Information Officer. This is described as "presenting evidence to the 'qualified person' to authorise the application of section 36(2)(c) to a request for information made under the Freedom of Information Act." It is a four page document containing five sections headed as follows – Summary, The request and the proposed exemption, Is the exemption engaged and will it prejudice the

'effective conduct of public affairs?', The public interest test arguments and Next Steps. The Next Steps sections requires the qualified person to review the evidence contained in the pack and, in writing, provide confirmation that this exemption is or is not engaged in regards to this request.

15. On 23 July 2012 the Vice-Chancellor responded as follows:

> *"I have now reviewed the evidence with respect to the FOI request asking for past law examination papers and marking guidelines. It is my conclusion that the opinion – that disclosing the marking guidelines, in this case and as a precedent, would fundamentally affect one of the University's core functions, that of robust exam assessment – is reasonable in substance.*
>
> *I confirm, in my capacity as qualified person, that the exemption is engaged with respect to the request for marking guidelines."*

16. Although not raised as an initial ground of appeal, the Appellant asserts that the Vice-Chancellor did not give an opinion and therefore the exemption is not engaged.

17. He submits that the Vice-Chancellor merely agreed that the opinion expressed by the University Records Manager and Freedom of Information Officer, Dr Kit Good, was reasonable. As he did not state that this was his opinion, or even that he shared the opinion, this is insufficient to meet the requirements of section 36(2)(c) FOIA.

18. The Appellant also drew our attention to the email sent by Dr Good to the Vice-Chancellor attaching the evidence pack, in which Dr Good states:

> "The evidence presented here is to allow the qualified person to reasonably arrive at a conclusion with regards to this request. The opinion – that disclosing the marking guidelines, in this case and as a precedent, would fundamentally affect one of the

University's core functions, that of robust exam assessment – is argued to be reasonable in substance."

19. The Appellant submits that this wording is identical to that used by the Vice-Chancellor and as such means that it is not the Vice-Chancellor's opinion that is being given.

20. The Commissioner and the University disagree. They submit that when read as a whole, it is clear that the response from the Vice-Chancellor is his opinion, having reviewed the evidence and applied the correct legislative provision. They concede that his opinion could have been expressed in a different way and that the Appellant would then not have taken this point on appeal.

21. We agree with the Commissioner and the University. Although the Vice-Chancellor may have expressed himself in a way that echoed that of Dr Good and has invited criticism, the legislation does not require the opinion of the qualified person to be given in a particular form or format. We accept therefore that the qualified person did give an opinion.

Was the opinion reasonably arrived at and reasonable in substance?

22. The Appellant submits that the opinion was not reasonably arrived at for the following reasons:

    (i) the Vice-Chancellor did not personally scrutinise the content of each of the marking guidelines;

    (ii) the University does not in fact hold marking guidelines for each of the separate examination papers requested

23. Our attention was drawn to the decision of the First Tier Tribunal in *McIntyre v IC and Ministry of Defence (*EA/2007/0068) which concluded that a flaw in the process of obtaining the opinion is not necessarily fatal. In that case the Tribunal explained (at paragraph 31) that:

> *"..where the opinion is overridingly reasonable in substance then even though the method or process by which that opinion is arrived at is flawed in some way need not be fatal to a finding that it is a reasonable opinion."*

24. The Vice-Chancellor had been provided with an evidence pack which contained a comprehensive and accurate summary of the issues to be considered; the nature of the request, the examination papers for which the marking guidelines were requested, that the examination papers themselves were available to the requestor, the exemption was set out, the relevant parts of the University's Statutes identified, the status of the marking guidelines explained along with the prejudice flowing from disclosure and the public interest considerations. The Commissioner submits that the Vice-Chancellor did not need to see the exact content of the marking guidelines to be able to give a reasonable opinion in this context.

25. We do not consider that for the opinion of the qualified person to be regarded as reasonably arrived at it is a necessary requirement for that person to scrutinise the disputed information. There may be cases where it would be impossible for the qualified person to reach an opinion without close examination of the material in question but we consider that there will be many cases where the category or general description of the information will be sufficient. In this particular case, the subject matter of the request was within the Vice-Chancellor's area of expertise and experience, namely academics, as opposed to, for example, a request for information concerning the University's infrastructure. He would know what the marking guidelines are in substance and he would know the implications of disclosure. This is not affected by a study of the precise content of any one guideline relating to any one LLB examination paper.

26. The University confirmed before us that marking guidelines are not held in respect of all the examination papers requested. There was no statement from any witness from the University and we had the rather

unsatisfactory situation of evidence being given under the guise of submissions by Dr Good and Dr Wilson. Dr Wilson explained that in some cases marking guidelines might exist only in the form of a discussion between two examiners.

27. The Commissioner had not identified this in his investigation and, if he had, he might have concluded that the University had not dealt with the request in accordance with section 1(1) of FOIA; it should have informed the Appellant that it did not hold all the information he had requested and identified those examination papers for which it did hold marking guidelines.

28. Before us, the Appellant suggested that the University only holds nine marking guidelines of the fifteen requested. On inspection of the disputed information, we believe that the University holds marking guidelines in respect of fourteen subjects, including some for the separate zone A and zone B examinations.

29. We do not consider that the fact marking guidelines are not held by the University in respect of all the examination papers requested renders either the process by which the opinion was obtained unreasonable or the substance of that opinion unreasonable. The Vice-Chancellor gave his opinion that the exemption is engaged in respect of the marking guidelines for LLB examination papers under the International Programme because of the identified factors in the evidence pack and for the same reasons outlined in paragraph 23 above, he did not need to confirm that there were written marking guidelines held in respect of each examination paper.

30. The Commissioner has issued guidance on the meaning of "reasonable" section 36 FOIA and the Appellant agrees with that guidance; it is to be considered in the plain meaning of the word. In particular, if it is an opinion that a reasonable person could hold, then the opinion is reasonable. The opinion does not have to be the only reasonable opinion that could be held on the subject; the qualified

person's opinion is not rendered unreasonable simply because other people may have come to a different – and equally reasonable – conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

31. The Appellant disagrees that the opinion of the Vice-Chancellor was reasonable. He submits that there is no evidence of relevant harms and no logical connection between the harms identified and the prejudice claimed. He submits that there was no risk of the prejudice asserted to students or examiners because the examinations were complete for that academic year and the concerns of the University in respect of students gaining additional assistance from the guidelines did not exist. The Appellant submits that the University's claim that students would be likely to be prejudiced by trying to adapt their answers to marking guidelines for examiners, resulting in mistakes in comprehension and lower attainment scores is "peculiar" and that there is no evidence offered in support.

32. It is impossible to provide evidence of the harm that would be likely to be caused by disclosure. The opinion of the qualified person in respect of the prejudice which would or would be likely to be caused by disclosure of requested information is a judgment call on what might happen in the future and, in many cases, on which people may disagree.

33. The Commissioner accepted the evidence provided by the University that the Vice-Chancellor had prior knowledge of the issues to which the information relates before giving his opinion. In his opinion disclosing the marking guidelines would fundamentally affect one of the University's core functions, namely that of robust exam management, prejudicing the effective operation of examiners and the efforts of students.

34. Students and those teaching them look at past papers and the Examiner's Reports to learn what form the examination will take and the sort of information required in answers. The marking guidelines have not been prepared with that audience in mind but are a tool to assist examiners, which should promote consistency between examiners.

35. The Appellant pointed out that no examiner had responded to a request from the University for views on disclosure of the marking guidelines.

36. The Commissioner submits that the Appellant is entitle to disagree with the opinion of the Vice-Chancellor but that the Vice-Chancellor's conclusion that disclosure would be likely to prejudice the effective conduct of the University's affairs is a reasonable one. The material provided to the Vice-Chancellor, on which his opinion was based, set out the relevant factors and arguments for his consideration, His attention was drawn to the likely prejudice that would be caused by disclosure of the information, as well as the pubic interest arguments in favour and against disclosure.

37. The Commissioner concluded that the opinion was reasonable on the basis that it reflected sound reasons that disclosure of the marking guidelines would cause prejudice, namely:

    (i) fundamentally affect one of the University's core functions, namely, robust exam assessment,

    (ii) be likely to prejudice the effective operation of the University's examiners in preparing the most robust and effective guidelines for marking exam papers,

    (iii) be likely to prejudice the actions and efforts of students who may try to adapt their essay answers to marking guidelines resulting in mistakes in comprehension and lower attainment scores, and

(iv) the publication of marking guidelines would transform them from a useful internal assessment tool to another external facing study aid.

38. We are satisfied that the Commissioner was correct to conclude that it was reasonable in substance and the challenges made by the Appellant on this point fail. The Appellant may hold a different opinion than that of the Vice-Chancellor in respect of the prejudice caused by disclosure of the marking guidelines, and that opinion might also be a reasonable opinion. We consider that the opinion of the Vice-Chancellor was reasonable, based on a comprehensive assessment of the issues and the likely risk in an area within his expertise. The exemption at section 36(2)(c) FOIA is therefore engaged.

39. We do not consider that as part of the internal review of the refusal of the Appellant's request there was any necessity to ask the Vice-Chancellor to reconsider his opinion; the internal review is not an appeal against the decision to refuse but a review of that decision, of which the opinion of the Vice-Chancellor was a part.

40. Having found the exemption engaged in respect of the disputed information, we must go on to consider whether in all the circumstances of the case the public interest in maintaining the exemption at section 36(2)(c) FOIA outweighs the public interest in disclosing the information.

Public interest test

41. As the exemption is engaged, we must carry out our own assessment as to where the balance of public interest lies in relation to the disputed information. The Appellant raised a number of factors in his written grounds of appeal, amended grounds of appeal and his written submissions to the Tribunal. The Commissioner identified the factors he considered in his Decision Notice. We have considered all of these submissions but do not need to set out in our decision each and every factor identified in these documents.

42. The following principles are material to the correct approach to the weighing of competing public interest factors and the matters that we should properly take into account when considering the public interest test, reminding ourselves that each case must be decided on its own facts.

(i) The "default setting" in FOIA is in favour of disclosure: information held by public authorities must be disclosed on request unless the Act permits it to be withheld.

(ii) The balancing exercise begins with both scales empty and therefore level. The public authority must disclose information unless the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(iii) Since the public interest must be assessed in all the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought.

(iv) The assessment of the public interest in maintaining the exemption should focus on the public interest factors associated with that particular exemption and the particular interest which the exemption is designed to protect.

(v) The public interest factors in favour of maintaining an exemption are likely to be of a general character. The fact that a factor may be of a general rather than a specific nature does not mean that it should be accorded less weight or significance.

(vi) Considerations such as openness, transparency, accountability and contribution to public debate are regularly relied on in support of a public interest in disclosure. This does not in any way diminish their importance as these

considerations are central to the operation of FOIA and are likely to be relevant in every case where the public interest test is applied. However, to bear any material weight each factor must draw some relevance from the facts of the case under consideration to avoid a situation where they will operate as a justification for disclosure of all information in all circumstances.

(vii) The "public interest" signifies something that is in the interests of the public as distinct from matters which are of interest to the public.

43. Having accepted the reasonableness of the qualified person's opinion that disclosure of the information would be likely to prejudice the effective conduct of public affairs, namely the University's robust and effective examination system, weight must be given to that opinion as an important piece of evidence in the assessment of the balance of public interest.

44. We give some weight to the opinion of the qualified person, but not the significant weight advanced by the Commissioner. This is not an area of complexity where we have had any difficulty in understanding the disputed information and the consequences which are feared to flow from disclosure.

45. We consider it relevant that the LLB is a qualifying degree which enables a student to enter professional training to become a solicitor or a barrister. This is a very different degree compared to, for example, a BSC in Chemistry for which the Appellant informed us marking guidelines are published by the LSE, part of the University. The University needs to maintain the most robust and effective system for examination assessment in this particular qualifying degree.

46. Disclosure of the marking guidelines could work against the interests of the student by assuming an importance unrelated to their original purpose. They would not be additional help to the information already

available to help students prepare effectively for their examinations. We accept that some students might use the marking guidelines to adapt their approach to the LLB to target their studies and minimise the amount of work they undertake, rather than studying the whole syllabus, studying broadly and revising thoroughly. There is strong public interest in protecting the integrity of the process and ensuring that students on the LLB course have their full knowledge tested in a manner the University considers appropriate.

47. We do not afford much weight to the argument advanced in respect of the impact of disclosure upon examiners. It should not be possible to identify any individual examiner although it might be easy to work out for a specialist subject with limited lecturers and tutors. It does not follow that there would be any campaign against an individual examiner if the marking guidelines were to be disclosed; unless the marking guidelines were to be disclosed with the relevant examination paper and the marked examinations scripts, it would not be possible to confirm whether those marking guidelines had been applied and been applied consistently by individual examiners.

48. We do however consider that if the marking guidelines were to be disclosed, whether in the current form or in a rewritten format, it would be necessary for the examiners to create an alternative system for adequately testing the candidates in an examination assessment.

49. In favour of disclosure, the Appellant submits that there is significant public debate in respect of the standards applied to the International Programme LLB, whether it is the same "gold standard" of the internal LLB and that the public has a legitimate interest in monitoring the academic quality of the course. It is not for us to assess whether standards are being maintained; we can only consider whether there is a particular public interest in the disclosure of this disputed information and how its disclosure would inform any debate on standards.

50. Again giving evidence under the guise of submissions, Dr Wilson

explained that the entrance requirements for students on the International Programme are much lower than the internal LLB and, unlike the internal LLB, involve no public funds.

51. We are not persuaded that there is significant public debate. Any debate there may be is limited to customers of the University or other academics. The evidence from the Appellant in respect of a student petition and a complaint from a student originate from the same student and there is no evidence that the petition was signed by others or by how many and by whom it was signed.

52. The Appellant has identified error(s) in one examination paper and raised this with the University. The Commissioner submits that this was identified without the assistance of the marking guidelines which supports the University's assertion that there are processes in place through which such issues can be dealt. There is no evidence to show that the University is not adhering to established and recognised standards, policies and procedures and therefore we agree with the Commissioner that there is no real public interest in the marking guidelines being disclosed.

53. The University publishes other more useful information which could inform about standards, including the Study Guide, past examination papers, Guidelines on Examinations, its regulations, the QAA and the periodic review of the programme which involves relevant professional bodies. We do not consider that disclosure of the marking guidelines would add anything of significance to the material already available.

54. While there is a legitimate interest in transparency around how examination papers are marked, particularly in an LLB programme, unless the marking guidelines were to be disclosed with the relevant examination paper and the marked examinations scripts, it would not be possible to confirm whether those marking guidelines had been applied and been applied consistently and only possible for those with specialised knowledge of the subject area.

55. The marking guidelines would not necessarily assist students, a limited section of the public, better prepare for examinations. The Study Guide, past papers and Examiner's Report provide more assistance than could be derived from these, often informal, marking guidelines for examiners.

56. We do not consider that there are any weighty factors in favour of disclosure but there are significant factors in favour of maintaining the exemption. We are therefore satisfied that in respect of the disputed information the public interest in maintaining the exemption outweighs any public interest in disclosure. The University is entitled to withhold the information.

57. We therefore must refuse this appeal. Our decision is unanimous.

Annabel Pilling

Tribunal Judge

16 December 2013