



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2009/0034
Information Commissioner's Ref: FS50140374

**Heard at Manchester Civil Justice Centre,
West Bridge Street, Manchester
On 3rd., 4th. and 5th. November, 2009**

Decision Promulgated

8 December 2009

BEFORE

CHAIRMAN

David Farrer Q.C.

and

LAY MEMBERS

Paul Taylor

and

Pieter de Waal

Between

UNIVERSITY OF CENTRAL LANCASHIRE

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

DAVID COLQUHOUN

Additional Party

Subject matter: FOIA Section 36 – opinion of a “qualified person”
FOIA Section 43 – commercial interest of a University in course material that it has created.

Cases: *Guardian Newspapers v IC and the BBC EA/2006/0011*
McIntyre v ICF and Ministry of Defence EA/2007/0068
Home Office and Ministry of Justice v IC [2009] EWHC 1611 (Admin)
Office of Communications v IC [2009] EWCA Civ 90
Woodcock v Committee of the Friends School [1987] IRLR 98
Alderson and others v Secretary of State for Trade and Industry [2003] ICR 512
Student Loans Co. v IC EA/2008/0092
South Gloucestershire v IC EA/2009/0032

Representation:

For the Appellant: Timothy Pitt - Payne
For the Respondent: Anya Proops
For the Additional Party: Professor Colquhoun in person

Decision

The Tribunal upholds the decision notice dated 30th. March, 2009, dismisses the appeal and directs that all the steps required by the Decision Notice be taken within 28 days of the date of this Decision.

Dated this 2nd.day of December, 2009

David Farrer Q.C.

Deputy Chairman, Information Tribunal

Reasons for Decision

Introduction

1. This appeal raises general and specific questions as to the commercial interest in course material created within a university, the impact on the university of its disclosure and, if the asserted exemptions to disclosure are engaged, the strength of the conflicting public interests, in protecting the financial standing of universities and exposing their teaching materials and standards to general scrutiny.
2. The University of Central Lancashire (“UCLAN”) offers a very wide range of first degree and post – graduate courses, which attract students from within and outside the United Kingdom. Different departments are engaged in a wide spectrum of research. It contracts on commercial terms with such bodies as the NHS and the nuclear industry for the provision of specific skills and knowledge to their staffs. In performing these functions, it operates in highly competitive markets for student recruitment, government funding and unregulated earnings from overseas students and industry.
3. In 2005, UCLAN first offered students a course in Homeopathy leading to a BSc. degree. Only one other UK university offered such a course but a substantial number of non – university institutions awarded diplomas and other qualifications in the subject. Homeopathy is not a regulated occupation.
4. Whether homeopathy is properly to be regarded as a science or a valid alternative or complement to the practice of conventional medicine is controversial, especially within the scientific and medical communities. It is not the function of the Tribunal to form a collective view on such issues, let alone to express one, since an opinion on them is quite irrelevant to the determination of this appeal. However, the sharp divide between supporters of homeopathy and its opponents, such as Professor Colquhoun illustrates the keen public interest in the debate. In that regard, it is arguable that the disclosure of the particular information requested in this case may

not properly be equated with that of corresponding information as to courses such as applied mathematics, zoology or law. There may be considerable interest as to whether such courses are well taught at a particular institution yet a general acceptance that they are subjects suitable for the award of a university degree. Much of the evidence and argument deployed on this appeal applied to university degree courses generally. Recognising that certain broad questions of principle are indeed involved, we stress that our decision relates to particular material, the characteristics of which would not necessarily be repeated in every other academic discipline.

The request for information

5 The Additional Party, Professor Colquhoun is a distinguished pharmacologist formerly holding the A.J. Clark chair, now research professor at University College London. He is profoundly sceptical as to the value of homeopathy. In an FOIA request dated 24th. July, 2006 he requested

“(i) copies of the course material...given to undergraduates on your course code B251 (BSc (Hons) Homeopathic Medicine)...(including) course notes....PowerPoint presentations....list of the textbooks recommended for this course.”

5. *(ii) Copies of all the correspondence and committee meetings that led to the validation of this course as appropriate for a BSc.(Hons.) degree”*On 21st. August, 2006, UCLAN provided the validation material requested in (ii) as well as reading lists supplied before enrolment to prospective students. It refused the request as regards (i), relying on s.43(2), which is a qualified exemption to which s.1(2)(b) of FOIA applies.

6. On 23rd. August, 2006, Professor Colquhoun requested an internal review. That was duly undertaken. By letter of 4th. October, 2006, UCLAN, through Professor McGhee, confirmed its original decision, citing, as an additional ground of exemption , s.21 of FOIA.

The complaint to the Information Commissioner

7. Professor Colquhoun complained to the IC on 21st. October, 2006, arguing, as was argued before us, that the financial but not the commercial interests of UCLAN were engaged and that disclosure was in the public interest in any event. In a postscript, he offered to refine his request so as to seek only the course materials for two identified third – year modules so as to reduce the volume of material involved. That concession did not overcome UCLAN `s objection to provision of the information.
8. It is highly regrettable that by 21st. January, 2008, the IC was still at the stage of an introductory letter to UCLAN, making preliminary enquiries prior to the appointment of a caseworker. In the course of subsequent correspondence UCLAN rightly invoked FOIA s.41 to protect case histories expressly provided in confidence. It is accepted on all sides that they are exempt from disclosure.
9. UCLAN further requested the IC to consider all the originally requested material as it thought the more restricted request might not result in a proper understanding of the arguments. The IC decided to make his decision on the basis of the original wider request. Accordingly, UCLAN supplied all the material in September, 2008. We also received that material and, with the agreement of the parties, examined samples of the content after evidence and submissions. Our purpose was merely to gain a general sense of its nature. It was common ground that a detailed review of the considerable mass of text and powerpoint slides was unnecessary.
10. By e mail dated 26th. September, 2008, Mrs. Bostock, UCLAN `s FOIA and Data Protection officer, having consulted with their solicitors, asked Professor McVicar, the Vice – Chancellor of UCLAN, to issue a certificate under s.36(2)(c) of FOIA that disclosure of the requested information would or would be likely to prejudice the effective conduct of public affairs, namely the administration of UCLAN. The prejudice asserted arose from the number of similar applications for other UCLAN courses that, Dr. Bostock argued, would or would be likely to be triggered by the disclosure requested. She also referred to possible problems with copyright and moral rights. On 29th. September, 2008 Professor McVicar replied by e mail, expressing his agreement. This was treated as his certificate under s.36. He was

said to be the “qualified person” for the purposes of s.36(5)(o). This additional exemption, which, like s.43(2) is a qualified exemption, was raised by UCLAN in a letter to the IC on the same day. We shall return both to the substance of the opinion and the way it was arrived at later in this Decision.

11. The IC issued a Decision Notice on 30th. March, 2009. He ruled that s.41 was properly invoked by UCLAN in respect of confidential case histories. He found that none of the exemptions relied on, in relation to the rest of the withheld material, namely those in ss.21, 36(2)(c) or 43(2) were shown to apply. He found UCLAN to be in breach of s.17, in that it did not identify all its grounds for refusal in its response to Professor Colquhoun. In this appeal, UCLAN does not challenge the Decision Notice so far as it relates to s.17 nor the exemption under s.21. Therefore, the FOIA provisions material to our task are s.36(2)(c) and s.43(2). Both involve qualified exemptions so that, if either or both is/are engaged, the Tribunal must decide whether UCLAN has shown that the public interest in maintaining the exemption outweighs the public interest in disclosure.

The appeal to the Tribunal

12. UCLAN appealed against the rulings that those provisions were not engaged. If they or either of them were, then it argued that the public interest in disclosing this information was less than the public interest in withholding it .

13. The IC `s stance remained that neither exemption was available on the evidence and that, if that were not correct, the public interest in disclosure should prevail.

14. The parties agreed that, with reference to the decision of the Court of Appeal in *Office of Communications v IC [2009] EWCA Civ 90*, we should consider adjourning our decision on this appeal to await the ruling of the Supreme Court only if that decision might, on the facts as we found them, affect the outcome of this appeal. In the event, that decision will not affect the outcome of this appeal and we have proceeded to our decision.

15. At a relatively late stage Professor Colquhoun was joined as an additional party on his application. He submitted short written submissions, gave oral evidence and cross examined witnesses for UCLAN. He supported the IC `s case and made further submissions reflecting his professional view and his expertise. He strongly advocated unrestricted publication of course materials generally.

The questions for the Tribunal

16. They were as follows :

As to s.43(2)

- (i). Does a university have commercial as opposed to merely financial interests ?
- (ii) If so, how are they to be identified?
- (iii) Depending on the answers to (i) and (ii), did UCLAN have commercial interests relevant to the request in this case?
- (iv) Were they or were they likely to be prejudiced by disclosure?
- (v) If the answers to (iii) and (iv) are yes, did the public interest in July 2006 in maintaining the exemption from the duty to provide such material outweigh the public interest in disclosing it ?

As to s.36(2)(c) :

- (vi) Was the Vice – Chancellor shown to be a “qualified person”, pursuant to s.36(2) and s.36(5)(o)(iii) ?
- (vii) If he was, was the substance of his opinion that disclosure would or would be likely to prejudice the effective conduct of public affairs at UCLAN objectively reasonable?
- (viii) If so, was it reasonably arrived at?

- (ix) If the answers to (vi), (vii) and (viii) are all yes, did the public interest in July 2006 in maintaining the exemption from the duty to provide such material outweigh the public interest in disclosing it?

Finally, if we concluded that both exemptions were engaged, but that, separately viewed, in each case, the public interest in withholding the information did not outweigh the interest in disclosure

- (x) Did the combined strength of the interests in maintaining the exemptions outweigh the public interest in disclosure?

Our findings on other issues relieved us of the difficult task of applying the *Ofcom* ruling to the facts of this case¹.

Submissions of the Parties as to the law and the facts.

17. Put shortly, UCLAN`s case was as follows :

As to s.43(2) :

(i) Commercial interests

- The interest of a university in its course work is commercial, not merely financial. Mr. Pitt Payne urged us to adopt a broad definition of the term as was done in the *Student Loans* case.
- UCLAN, like the great majority of universities, operates in a global market in which it competes vigorously for students. Its funding from The Higher Education Funding Council for England (HEFCE) depends on meeting recruitment targets. The investment of time and money in creating a new degree course is an asset which gives a university a head start in enrolment

¹ *Office of Communications v IC [2009] EWCA Civ 90 at paras.34 – 43* This appeal involved the Environmental Information Regulations 2004, not FOIA, but we think the same principle must apply.

not only of UK but also of overseas students, whose fees are not subject to regulation.

- Even on a narrow construction, he argued, such an interest was commercial in nature, relating, as it does, to the ability of UCLAN to sell its services in competition with others.

(ii) Prejudice or the likelihood of prejudice

- The principal prejudice which would or would be likely to result from disclosure was the loss of that competitive advantage. Competitors, whether universities or private institutions offering alternative qualifications, would be able freely to exploit material created within UCLAN to promote their own courses, saving themselves the expenditure of resources that the independent creation of a competitor course would entail.
- Moreover, potential recruits to the UCLAN course might decide that they could use course materials, including reading lists, to teach themselves homeopathy (or whatever other subject) without incurring the costs of enrolment on a three – year degree course.
- This loss of recruitment was especially threatening where the occupation or profession to which the course related was unregulated and where alternative qualifications were accessible. Furthermore, private institutions with which UCLAN competed, were not required to practise reciprocal transparency.
- Mr. Pitt - Payne rejected the argument that all this course material was anyway available from enrolled students on the grounds that none had a complete set at any one time and that they were unlikely to supply what they had.
- A further factor was the likely damage to UCLAN `s relations with third parties who granted copyright licences strictly for the purposes of teaching the particular course. Whilst disclosure of course material to the world at large would not prejudice their rights as a matter of law, the risk of breaches

was greatly increased. UCLAN students were warned very clearly about copyright. Enforcing such rights through litigation was expensive and laborious.

(iii) The balance of public interests in relation to s.43(2)

- A public interest in the quality and validity of a course substantially funded by the taxpayer was acknowledged. However, it was outweighed by the interest in protecting course material from general exposure in the interests of innovation. Without such protection there was no incentive to innovate.
- In an additional written submission after the close of the oral hearing², Mr. Pitt – Payne argued that the exemption of universities from the duties imposed by the *Re-Use of Public Sector Information Regulations 2005* (“the 2005 Regulations”) on public authorities was an indication that the European (the regulations stemmed from Directive 2003/98/EC) and the Westminster Parliaments recognised the importance of protective fostering of innovation in universities and rebutted a suggestion that the public interest lay rather in a free exposure to the public gaze of the teaching materials created.
- Anyway, UCLAN already did much to enable potential students and the general public to assess the value and quality of its degree courses. Its website contained a wide range of information. It provided introductory materials to potential students, including reading lists. Moreover, standards were ensured by the validation procedures which were required before a course was launched and which involved independent expert external monitors and by quality assurance (Q.A.A.) which demands a continuing compliance with national standards.

² Further written submissions were made as to the relevance of the 2005 Regulations after the oral proceedings, in accordance with directions given at the conclusion of the hearing. This issue had been raised by the Tribunal during the hearing. We are most grateful for the assistance provided by all parties.

- The public would gain little from an uninformed scrutiny of the requested material. That was not needed for participation in the debate on the value of a course or the academic standards prevailing. Analogies with the publication of school coursework so as to inform the vigorous debate as to standards were unhelpful.
- Very few universities practised the open door policy on teaching materials advocated by Professor Colquhoun. M.I.T. was not a valid comparator.

As to s.36(2)(c);

(iv) The reasonableness of the Vice – Chancellor `s opinion

- As to the exemption under s.36(2)(c), the opinion of the Vice – Chancellor was reasonable in substance and reasonably arrived at.
- There was good reason to suppose that disclosure in this case would provoke a disruptive volume of requests for comparable material relating to a large number of other courses. Such requests would divert significant resources from more valuable activity.

(v) Was it reasonably arrived at?

- The procedure adopted to obtain the opinion was clearly set out in the documents. It had involved consultation with UCLAN `s solicitors.
- Its validity was unaffected by its timing, that is to say after Professor Colquhoun `s complaint to the IC.

(v) The balance of public interests in relation to s.36(2)(c)

- As to the public interest, the disruption would be significant. Moreover, the likely damage to the trust of third parties with copyright interests in the requested material was relevant here also.

- Redaction of the third party copyright material would be far too cumbersome to meet the objection to disclosure.

19 (i) The IC`s case: s.43(2) Commercial interests

- The IC argued as to s.43 that the interests that UCLAN sought to protect were financial but not commercial. It was a charity whose objective was education and the diffusion of knowledge.
- We were referred to the definition of “in the nature of a commercial venture” approved by the Court of Appeal in *Woodcock v Committee of the Friends School [1987] IRLR 98*. The facts of the *Student Loans* case were far from those present here.

(ii) Prejudice or the likelihood of prejudice

- It was for UCLAN to show at least the likelihood of real prejudice. Speculation as to risk is not enough.
- Many factors attract students to a particular institution or course, not merely the apparent course content.
- UCLAN was not in the same market as private institutions, which did not have the benefit of state funding.
- It was most unlikely that competitors would uncritically exploit UCLAN`s course content if disclosed, given the stigma attaching to plagiarism in the academic world.
- They would know of the civil and criminal sanctions attaching to breaches of copyright and, to avoid breaches, would have to do afresh much of the work involved in creating course material, thus substantially reducing any inroads they might make on UCLAN`s competitive advantage.
- The exemption from disclosure of the case histories (see paragraph 9 above) significantly protected the course material from easy imitation.

- This was not commercially sensitive material; students were not required to treat it in confidence. If it were, a competitor could obtain it for the £3,000 cost of enrolment.
- It was questionable whether the materials prepared for the BSc, (Homeopathy) course had any real commercial value, having regard to the very limited number of recruits during its operation and the lack of overseas interest.
- Finally, UCLAN ignored the evidence that publication of such material could positively improve recruitment by raising public awareness generally and awareness of this course in particular. We were referred to a recent article to this effect in Times Higher Education, citing the M.I.T. experience.

(iii) The balance of public interests in relation to s. 43(2)

Ms. Proops, for the IC, identified four elements in the public interest favouring disclosure, three general and one specific to this course.

- There was a general interest in the opening up of educational processes to a broad public, most especially those who had not had the best educational opportunities
- There was a need for accountability where very large public funds were involved. The public should have the means to see how its money was spent. What is the content of this course? How is it taught? By what methods and to what standard?
- There was a powerful interest in opening up the content of courses to other institutions in the interests of improved teaching techniques and learning. There was no evidence that innovation was blunted by exposure. On the contrary, it could well galvanise the whole sector.
- As to this BSc. (Homeopathy) course, there was considerable controversy as to its validity as a university degree course or a branch of science.

Homeopathy is unregulated, following a Parliamentary Select Committee report. The public should be able to form a judgement as to whether this is a valuable alternative or complement to conventional medicine or an unscientific amalgam of unsubstantiated beliefs. Validation and external monitoring are no answer to this point. External experts are likely to be practitioners of homeopathy or persons who accept its essential tenets. In any case, whatever the value of such scrutiny, people are entitled to reach their own view. Publication of procedures does not suffice. The same answer applies to the claim that access to the UCLAN website could satisfy public curiosity.

As to s.36(2)(c);

(iv) The reasonableness of the Vice – Chancellor`s opinion

- UCLAN`s case was speculative. There was no evidence that disclosure would result in the forecast turmoil nor any consequent loss of income.
- If it did result in an increase in applications for information, to advance that as an objection was to attempt to thwart the purpose of FOIA.
- Similarly, the fear that third parties might be alienated by the threat to their copyright was unreal. None had given evidence of such a development. Their copyright would be untouched, as a matter of law and they could not reasonably object to UCLAN fulfilling its FOIA obligations, if such they were.
- As to the alternative argument as to the costs of redaction, Parliament enacted s.12 of FOIA to protect public authorities from unreasonable costs of compliance and s.36 was not to be used as an illegitimate extension of s.12. Reference was made to observations of Keith J. in *Home Office and Ministry of Justice v IC [2009] EWHC 1611 (Admin)* at paragraph 20.

(v) Was it reasonably arrived at?

- This exemption was invoked late in the day

- It was thinly reasoned and evidenced.

20 Professor Colquhoun`s submissions were made in the course of his evidence. He supported the IC`s case. He emphasised that his request had been significantly narrowed. He indicated that he wanted to see the relevant modules in order to see how homeopathic principles could be squared with the discipline of, for example, biology which featured in the same course. Above all, he was concerned that universities publish their course material so that proper peer review could be practised and good teaching practices could be widely disseminated.

Evidence

- 21 Three witnesses testified on behalf of UCLAN. To a degree, the effect of their evidence has been conveyed in the summary of the arguments that flowed from it.
- 22 Professor Malcolm McVicar is the Vice – Chancellor of UCLAN and it was he whose opinion is relied on for the purposes of the exemption under s. 36. He described the radical changes in the funding and the market for higher education in recent years. His witness statement gave a detailed picture of the different groups of potential consumers and their funding, full – time UK and EU undergraduates, funded by a mix of HEFCE grants and tuition fees, part – time students, international “unregulated” students whose fees are determined by the market and private and public sector concerns, which enter into full – cost contracts for award – bearing courses with UCLAN and its competitors. He emphasised how keen was the competition for all these customers. The job of a university was to remain solvent. Its HEFCE funding depended on maintaining its recruitment. Course materials represented a major investment of time and money which would be largely wasted if competitors had access to them. He contended that the public “need to know” was already met by preliminary

materials which are readily available and the processes for external monitoring referred to above.

- 23 He set out the problems of disruption and cost which he said would result from disclosure and which have already been described. He also dealt quite briefly with the s.36 procedure and the forming of his opinion.
- 24 UCLAN had not recruited to the BSc. (Homeopathy) course since September, 2007, following an internal report. It had been recruiting at the time of the request. Of itself, the suspension of this course pending regulation does not affect our determination of this appeal.
- 25 Mr. Peter Hyett, the Executive Director of Finance, gave more specific evidence as to the financial structure of UCLAN and the perceived results of the IC `s decision. He reported that the HEFCE block grant represented only 39% of revenue, indicating UCLAN `s dependence on other competitive activities to balance its books. Dealing specifically with the homeopathy course, he gave the figures for recruitment in the three years for which it ran. They showed that the highest recruitment was 55 UK students and 3 from overseas in its first year.
- 26 Professor David Phoenix, the Deputy Vice – Chancellor, gave evidence on certain of the same topics but additionally dealt with Professor Colquhoun `s evidence as to a trend towards greater openness with such materials. It came down to the point, which was not really controverted, that M.I.T. alone was truly pursuing such a policy and that its funding and status bore little comparison with the great majority of, or indeed any UK universities. Such a trend was followed by very few and in respect of a very limited number of courses. He also dealt with the processes of validation and the Q.A.A.
- 27 The tribunal sampled the very large volume of course material supplied and obtained a general impression of its nature.

Our Decision

- 28 Save as to the proper construction of “commercial interests” in s.43(2), the issues for our determination involve the application of broadly agreed legal tests

to largely uncontroversial facts and, depending on the result of such application, considerations as to the balance of the public interest.

29 We are not called upon to make a definitive ruling as to the application of sections 36(2)(c) and 43(2) to all university course materials nor a general statement as to the public interest in relation to such information. Nevertheless, some arguments advanced on this appeal have a wider application and our findings will inevitably reflect that.

30 We deal first with the asserted exemption under s.43(2) which provides :

“43. Commercial interests.

(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

31 We respectfully agree with the approach adopted by this Tribunal in the *Student Loans* appeal at paragraph 42, namely that “commercial interests “ is a term which deserves a broad interpretation which will depend largely on the particular context. We do not consider that the fundamentally charitable character of a university means that it should have no commercial interests. A body which depends on student fees to remain solvent has a commercial interest in maintaining the assets upon which the recruitment of students depends. Moreover, we accept on the evidence that UCLAN operates in competition with other institutions of higher education in seeking to sell its products, namely undergraduate courses, to potential students. Therefore, whether on a broad or narrow construction of the statutory words, we are satisfied that UCLAN `s interests in teaching material produced for its degree courses are properly described as “commercial”.

32 That element of the exemption established, it is then for UCLAN to show either the certainty or the likelihood of prejudice to such interests, if the requested information is disclosed. It is now well established, for the purposes of both exemptions invoked here, that “likely to prejudice” is to be construed as involving

“a significant and weighty chance of prejudice”, though it does not have to be more likely than not.³

- 33 We are not persuaded that such a likelihood is demonstrated in relation to the course material for the BSc.(Homeopathy) course. We found Ms. Proops` criticisms of UCLAN`s case on this issue compelling.
- 34 The starting point is the absence of evidence that disclosure has affected recruitment where it has taken place, though the Tribunal accepts that this has occurred only rarely and partially. More significant, in the case of this course, is the exemption of the body of case histories, without which, it seems to us, the material lacks empirical support. Any competitor would need to obtain such material before a comparable qualification could be offered, which suggests that the “head start” that innovation should earn, ought not to be significantly eroded.
- 35 The D.I.Y. student who might use disclosed course material to pursue his qualification at home seemed to us a rare, indeed speculative species, who would, if he existed, study under vast disadvantages (no tuition, no case studies, no degree to aim for) which would deter him fairly swiftly from such a venture.
- 36 We were not impressed by the claim that third parties with copyright in the disclosed materials would be alienated by UCLAN`s compliance with a decision that this information must be provided. None gave evidence to that effect.
- 37 It was not clear to us how a competitor could significantly exploit access to this material, without infringing UCLAN`s copyright or brazenly aping the content of a course, which would surely attract the scorn of the wider academic community. Moreover, it seemed to us likely that most potential students would be attracted to a particular course by the reputation of the teaching staff and a range of extra – curricular factors at least as much as by a comparative study of the powerpoint presentations and notes provided to current students.

³ See *John Connor Press Associates v IC* EA/2005/0005 at para.15, *Guardian Newspapers v IC and the BBC* EA/2006/0011 at para.53, adopting the words of *Munby J. in R (on the application of Lord) v Home Office* [2003] EWHC 2073 (Admin) at para.100

- 38 Whilst there may be dangers in equating university competition for students with competition within the professions, we note that accountants, solicitors and barristers` chambers, for marketing purposes, routinely publicise without charge the fruits of their experience and professed expertise in the shape of articles, seminars and web – based instruction. Ms. Proops ` argument that UCLAN undervalues the commercial advantages of publishing its wares has some force, we conclude.
- 39 Finally, in this particular case, we doubt whether this course had a significant commercial value, given the limited enrolment and the virtual absence of overseas interest.
- 40 In the light of this finding, it is not strictly necessary to decide the balance of public interest as to disclosure. Nevertheless, since the issue has been carefully and very fully argued, we shall indicate shortly our view, had the likelihood of prejudice been established.
- 41 As ever, the question is whether the public interest in maintaining the exemption outweighs the interest in disclosure.
- 42 It is plainly important that universities should be encouraged to innovate in the courses that they offer and in the methods of teaching that they employ. The question is whether disclosure of course material, specifically in this instance but with an eye to the wider picture, will blunt the urge to innovate by removing the incentive.
- 43 In the case of this BSc course, considered as at July, 2006, we doubt whether disclosure would have produced such an effect, largely for reasons given in the discussion on prejudice. Only one other university offered a comparable qualification. There was little or no sign of competitors anxious to take advantage of UCLAN `s work, at least in the near future. We agree with the Commissioner that private institutions, unsupported by state funds and unable to award degrees, are not truly operating in the same market.
- 44 More generally, it seems likely that this issue would arise, if at all, in the case of vocational courses, especially the entirely novel or those of recent origin. For

reasons set out in paragraphs 34 – 38, we remain unconvinced of any general discouragement to innovation resulting from corresponding disclosure. That would require a pattern of recruitment lost to parasitic competitors who can exploit disclosure with sufficient speed, resource and publicity to destroy any head start or competitive advantage to which the innovator is entitled. We accept that the issue would need re – examination in each case. There might be some where such long - term disincentive could be shown but much clearer evidence would be required than has been presented to us.

45 As to UCLAN `s submission based on the 2005 Regulations, we consider that they offer at best, very limited assistance to this argument as to innovation. We note that :

- (i) The Regulations are concerned, not with information, but with the re – use of documents held by public authorities where, but for the regulations, such re – use would or might constitute a breach of the authority `s copyright. Copyright is preserved. Re – use requires an application. The authority may refuse, subject to appeal, or place conditions on re – use. Documents containing third party copyright material are excluded.
- (ii) The authority is empowered, by Reg.7 to make its documents available for re – use, as defined by Reg.4. In contrast with FOIA, it is under no general duty to do so.
- (iii) The exclusions set out in Reg. 5(3) apply to a wide range of educational and cultural establishments, some of which, such as schools, libraries and archives are not obviously vulnerable to the disincentives to innovation said to result in the case of universities from disclosure of documents revealing how they work.
- (iv) The 2005 Regulations impose significant burdens on authorities which make documents available for re – use, including the maintenance of a list of main documents available for re – use (see generally Reg.16).
- (v) As noted already, the 2005 Regulations derive from Directive 2003/98/EC. The explanatory memorandum published by the European

Commission, at p.9, briefly explains the exclusion of the institutions described in Reg.5(c)

“(They) merit a special treatment in view of a combination of different factors .The application of the directive may cause a relatively high administrative burden for them in comparison with the benefits to be gained. Much of their information would anyhow fall outside the scope of the Directive in view of third party copyrights. Finally, their function in society as carriers of culture and knowledge give them a special position.”

The thinking behind the exclusion is clearly set out in the second and third sentences. Whatever the implication of the last sentence, it does not seem to refer to the need to protect them from discouragement from innovation. Why any exclusion is needed in the absence of a duty to permit re – use is not obvious but that consideration is immaterial to the point in issue.

46 The public interest in disclosure seems to us appreciably stronger. Apart from the universal arguments about transparency and the improvement of public awareness, we find that there are particular interests here, arising from the nature of a university and the way it is funded.

47 First, the public has a legitimate interest in monitoring the content and the academic quality of a course, particularly a relatively new course in a new area of study, funded, to a very significant extent, by the taxpayer. It is no answer, we consider, to say that this function is performed by the process of validation or the continuing monitoring of standards with external input. Whether or not these processes are conducted with critical rigour, it must be open to those outside the academic community to question what is being taught and to what level in our universities. The apparent perception in some quarters that the intellectual demands of some or many degree courses have been relaxed, that higher classes of degree are too lightly earned, may be largely or entirely unfounded. But it is highly important that the material necessary to a fair judgement be available. That material will often, if not always, include the basic content of the course, such as is requested here.

48 Secondly, this is especially the case where, as with the BSc. (Homeopathy), there is significant public controversy as to the value of such study within a university. In this case, that factor standing alone would have persuaded us that the balance of public interest favoured disclosure.

49 We are not attracted by the somewhat patrician argument that the general public, uninstructed in the specialist subject under scrutiny, would be incapable of forming a proper judgement. That might be so, were it impossible to seek independent expertise to assist in making an assessment. Happily, it is not.

50 Finally, there is a public interest in opening up new methods of teaching and new insights as to the content of courses, so as to stimulate the spread of good practice.

51 As to the second exemption claimed, section 36, so far as material, reads :

36.— Prejudice to effective conduct of public affairs.

(1) This section applies to—

(b) information which is held by any other public authority.

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.

As noted at paragraph 17, it is common ground, established as to (iii), by the jurisprudence of the Tribunal, that this exemption is engaged if three requirements are met. They can be shortly labelled

(i) “qualified person”

- (ii) “reasonable opinion”
- (iii) “reasonably arrived at”

- 52 The evidence as to the Vice – Chancellor `s qualification, pursuant to s.36(5)(o) has to be sought from a website. Whether or not it was properly proved, neither the Commissioner nor Professor Colquhoun took any point as to admissibility and, in the circumstances of this appeal, we shall proceed on the basis that qualification was established.
- 53 We observe, however, that the qualification of the person, upon whose opinion reliance is placed, requires proof and should be readily ascertainable by the requester. Save for authorities identified specifically in s.36(5) (a) to (n), it must be clearly shown to the requester, the Commissioner and in evidence to the Tribunal, either that the opinion is that of a minister of the crown ((o)(i) or that the minister has designated the authority or official giving the opinion as the qualified person ((o)(ii) and (iii)).
- 54 We regard the claim of disruption and consequent expense resulting from a flood of similar requests prompted by disclosure of this information as tenuous. Moreover, if such requests were likely, such an argument runs counter to the fundamental philosophy of FOIA, assuming them to be made in good faith. It amounts to saying: if we comply with this request we shall have to comply with a mass of others.
- 55 The argument as to third party alienation as a result of perceived threats to copyright we have already considered. The problem arising from the alternative solution of redaction of such material from what is disclosed is said to be the commitment of time, hence the cost involved. The types of work to be included in estimating the cost of compliance with information requests are dealt with in s.12 of FOIA and reg. 4(3) of the Freedom of Information and Data Protection

(Appropriate Limit and Fees) Regulations, 2004 (“the 2004 regulations”). They do not provide for the costs of redaction. The reasoning of Keith J. at paragraph 20 of *Home Office and Ministry of Justice v IC [2009] EWHC 1611 (Admin)*, addressing the use of s.36 to circumvent the limits on the type of work covered by s.12 and reg. 4(3) of the 2004 Regulations holds good for this argument also, in our judgement. If Parliament had intended the need for such work to create an exemption, it would have drafted s.12 and/or the 2004 regulations accordingly. It is not permissible to use s. 36(2)(c) to extend the ambit of s.12.

56 A reasonable opinion may be one with which the Tribunal emphatically disagrees, provided it is based on sound argument and evidence. With great respect to Professor McVicar, whose sincerity is not in question, we can find no adequate evidential basis for this opinion and consider that it rests on two misconceptions as to the application of FOIA. We do not find that it passes the required test of objective reasonableness.

57 We considered separately whether the opinion was reasonably arrived at. Again, our answer is no.

58 Section 36 provides for an exceptional exemption which the public authority creates by its own action, albeit subject to scrutiny of its reasonableness, the likelihood of prejudice and the question of the public interest. That factor of itself justifies a requirement that the authority provide substantial evidence as to the advice (other than legal advice) and the arguments presented to the qualified person upon which his opinion was founded. We emphasise that no set formula is required, just a simple clear record of the process.

59 The need for such evidence is all the greater where, as here, the authority invokes s.36 for the first time after the complaint to the IC⁴.

60 The evidence consists of a briefly argued e mail from Mrs. Bostock suggesting that s.36(2)(c) be invoked on the very broadly argued grounds already reviewed. The tone implicitly acknowledges that the claim is rather speculative. We are not concerned with the slightly uncertain use of “possibility” and “likely” but the impression left is of a last – minute idea, not really thought through or investigated but merely discussed with solicitors to tie it in to FOIA. It was sent to the Vice – Chancellor at 3.20pm. on a Friday afternoon, 26th. September, 2008, asking for the Vice – Chancellor `s agreement. That agreement was forthcoming in a single sentence without further comment in an e mail reply timed at 12.05pm.on the following Monday.

61 We find that the process of forming the necessary opinion was, to say the least, perfunctory, indeed far short of the careful assessment and investigation that normally supports a qualified opinion for the purposes of s.36.

62 Accordingly, we do not find that it was reasonably arrived at.

Conclusion

63 It is for these reasons that we uphold the Decision Notice. We record our gratitude for the helpful and succinct submissions of counsel on both sides and the incisive contribution of Professor Colquhoun. We

⁴ In the *Student Loans* appeal, reliance was placed on an opinion formed after the Decision Notice issued by the IC. The Tribunal ruled that it lacked jurisdiction to consider an exemption, the factual basis of which had not existed at the date of the Decision Notice, since its task was to decide whether that Notice was in accordance with the law (s.58(1)(a)). We do not consider that jurisdiction is excluded where, as here, the Commissioner was able to and did rule on the s.36 exemption in the Decision Notice, even though it was not relied on at the time of the request. Our attention was very properly drawn by Ms. Proops, in her additional submission after the hearing, to the very recent decision of a differently constituted Tribunal in *Roberts v IC & DBIS* EA/2009/0035, 20 November 2009 to the effect that s.36 could only be invoked by a public authority before the complaint to the IC. She indicated that the Commissioner did not intend to rely on it, partly because he was uncertain that it was correct. We think that that concession was properly made. With respect to the Tribunal that decided *Roberts*, we are not minded to follow it.

wish to add that, whilst we have not accepted the great majority of the arguments advanced by UCLAN, we do not in any way seek to cast doubt on the veracity of the evidence of its witnesses, nor the honesty and loyalty with which they have sought to serve its interests.

64 Our decision is unanimous

Signed:

David Farrer Q.C.
Deputy Chairman

Date 2nd. December, 2009