First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2021/0177P

Determined, by consent, on written evidence and submissions
Considered on the papers on 10 January 2022.

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Dr Aimée Gasston
Ms Naomi Matthews

Between

Faisal Qureshi

Appellant

And

The Information Commissioner

Respondent

DECISION AND REASONS

DECISION

1. The appeal is allowed and a decision notice substituted.

MODE OF HEARING

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.

3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 181 and a closed bundle.

INTRODUCTION

4. On 25 February 2020, the Appellant wrote to the Universities and College Admissions Service (UCAS) and made the following request for information:-

> I understand that the deceased Manchester Arena bomber Salman Abedi applied via UCAS to various universities. His DOB was 31st December 1994 and he died on the 22nd May 2017. He attended Salford University from [time period redacted].
> I would like any records that you have concerning Salman Abedi's applications to universities.

5. UCAS responded on 24 March 2020. It stated that it was withholding the requested information under section 36(2)(c) Freedom of Information Act (FOIA) on the basis that the disclosure of the requested information would, or would be likely to, prejudice the conduct of public affairs.

6. The Appellant requested an internal review of UCAS' decision on 24 March 2020. Following an internal review UCAS wrote to the Appellant on 23 April 2020, maintaining its original position.

THE STATUTORY FRAMEWORK

7. Section 36(2)(c) FOIA says that information is exempt from disclosure if, in the reasonable opinion of a qualified person (QP), disclosure would otherwise prejudice, or

would be likely otherwise to prejudice, the effective conduct of public affairs. Section 36 FOIA is a qualified exemption and therefore the Commissioner and now the Tribunal must, even it finds that the exemption in section 36(2)(c) FOIA applies, consider the public interest test and whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

8. In *Information Commissioner v Malnick and ACOBA* [2018] UKUT 72 (AAC) the Upper Tribunal (UT) explained:-

> 29…it is clear that Parliament has chosen to confer responsibility on the QP for making the primary (albeit initial) judgment as to prejudice. Only those persons listed in section 36(5) may be QPs. They are all people who hold senior roles in their public authorities and so are well placed to make that judgment, which requires knowledge of the workings of the authority, the possible consequences of disclosure and the ways in which prejudice may occur. It follows that, although the opinion of the QP is not conclusive as to prejudice (save, by virtue of section 36(7), in relation to the Houses of Parliament), it is to be afforded a measure of respect. As Lloyd Jones LJ held in *Department for Work and Pensions v Information Commissioner* [2016] EWCA Civ 758 (at paragraph 55):
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> > "It is clearly important that appropriate consideration should be given to the opinion of the qualified person at some point in the process of balancing competing public interests under section 36. No doubt the weight which is given to this consideration will reflect the Tribunal's own assessment of the matters to which the opinion relates."

9. The UT then continued to describe the two stages involved in deciding whether information is exempt under s36 FOIA at paragraph 31:-

> 31…..first, there is the threshold in section 36 of whether there is a reasonable opinion of the QP that any of the listed prejudice or inhibition ("prejudice") would or would be likely to occur; second, which only arises if the threshold is passed, whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing it.

10. The UT then emphasised that the 'QP is not called on to consider the public interest for and against disclosure…the QP is only concerned with the occurrence or likely occurrence of prejudice' (paragraph 32). Going on, the UT explained:-

> 32…The threshold question under section 36(2) does not require the Information Commissioner or the FTT 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 (and, following a complaint, by the Commissioner and on appeal thereafter by the tribunal).
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> 33. Given the clear structural separation of the two stages, it would be an error for a tribunal to consider matters of public interest at the threshold stage.

THE DECISION NOTICE

11. In the decision notice of 14 July 2021, the Commissioner explained that UCAS provided the Commissioner with a copy of the 'Record of the qualified person's opinion' document. This includes the submissions set out to the QP by UCAS staff when the QP's opinion is sought as follows:-

> The information requested would have been considered the personal data of the subject under the Data Protection Act 2018 and GDPR prior to his death. As a result, any such request would likely have meet (sic) the conditions for refusal under Section 40(2) of the Freedom of Information Act. There is no mirror exemption for information related to individuals who are deceased, and data protection legislation is only applicable to information regarding living individuals.
> Due to the personal nature of information obtained during a UCAS application it is considered to hold a significant level of sensitivity for the applicant and potentially their wider family. Applicants sign up to the UCAS privacy policy where the protection and use of their personal data is annotated. This does not include any commentary about the potential disclosure of information through FOI. Applicants are provided with assurance that information will be handled in accordance with data protection legislation and not shared with third parties without a suitable lawful basis. It is considered that it would be within the reasonable expectation of applications that their information will remain protected and secure from public disclose even after death.
> There is a general concern that disclosing personal details about a deceased student and their university application has the potential to cause distress to family and friends thereby potentially causing harm to others. Disclosing this information also has the potential to undermine the trust that students, teachers and parents have in UCAS and how we hold, process and disclose personal data.
> Although the response to a single FOI does not set precedent in the future handling of like requests, it is appropriate to consider the impact a single release may have on the wider applicant body and the handling of future requests of this nature.
> In this specific case we also must consider the impact of any disclosure on the wider public and particularly the families and individuals directly affected by the actions of the subject. New disclosure of application information may cause further distress to these individuals.
> Although FOI requests should be considered applicant blind, in this case, it is clear that the requestor works within the media industry which means that any

> disclosure is likely to be placed in the wider public domain via used for news or entertainment purposes. Use of information about this subject in this manner is likely to cause distress to the individuals noted above.

12. In addition to the above, the submission to the QP took into account the following wider review of the impact of any disclosure in this case:-

> Although the trial of the individual's brother has announced the outcome, sentencing is pending and a wider public inquiry is due to begin in June. Any prejudice to either of these cases could cause legal action against UCAS or wider prejudice to those activities. Through interaction with the University of Salford their Legal Team have confirmed that the Crown Prosecution Service relative to the trial of the subject's brother and the Chair of and Counsel to the Public Inquiry are incredibly sensitive as to release of information outside the immediate circle of directly concerned participants. It was indicated that participants have been required to sign personal undertakings as to confidentiality which suggested an increased level of protection required for this specific information.

13. As a result of all this, the QP's opinion was that if the information requested were to be disclosed, it 'would be likely to… harm the trust UCAS has with its applicants through the admissions process'. The Commissioner decided that this opinion was a reasonable one for the Commissioner to hold and therefore the exemption in s36(2)(c) FOIA was engaged.

14. In relation to the application of the public interest test the Commissioner noted that the Appellant had said, in his request for an internal review that:-

> …as a filmmaker and journalist who has been researching the Manchester Arena bombing for some time, I believe there is an exceptional public interest in releasing Salman Abedi's documents. There is very little of Salman Abedi's writing that has survived so releasing the UCAS form gives an idea of the direction his life was heading towards before he was radicalised. Releasing it will give greater public understanding of Salman's evolution from student to terrorist.

15. However, the Commissioner stated that that:-

> 47. The Commissioner also accepts UCAS' argument that the disclosure of the requested information could negatively impact the trust between applicants and UCAS, which could in turn also negatively impact UCAS' ability to meet its charitable objectives.

> 48. The Commissioner also accepts that, at the time of the request, there were ongoing legal activities that may have been impacted by the disclosure, and the disclosure of the information requested could have caused distress to the family of the deceased individual and the families affected by the deceased individual's actions.
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> 49. The Commissioner also notes that there is already a significant amount of information in the public domain about the deceased individual and the events of 22 May 2017. Whilst the requested information would no doubt add to public's understanding of those events and what may have led to them, the information already in the public domain goes some considerable way to serving that purpose.

16. Having considered the various public interest arguments for and against disclosure, the Commissioner considered that greater weight must be given to the ability of UCAS to continue carrying out its functions, and therefore that the public interest fell in favour of maintaining the s36 FOIA exemption, and therefore the Commissioner's decision was that UCAS was entitled to rely on s36(2)(c) FOIA to withhold the information requested.

THE APPEAL AND RESPONSE

17. The Appellant's appeal is dated 15 July 2021 (the day after the date of the decision notice). In this he states that:-

> UCAS is a organisation that processes applications to University and Colleges. They are not an education institute in their own right. Therefore the information they would carry about applicants would be limited to the education history, university preferences and an applicant's personal statement. This is for the applicant to show their best face to any institution they want to attend.
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> I find it bewildering that the ICO agrees in withholding this information when I have obtained education records for Salman Abedi from Manchester College and Trafford College. These have included attendance records, personal statements and teacher assessments on his progress. The amount of data in those records would far exceed anything that UCAS would be holding. These records would have been produced with no expectation of being made public but I believe the public interest justified their release and the same should be done with any records UCAS holds on Abedi.

18. The Commissioner issued a Response on 4 August 2021 which supported the decision notice and said that even though the Appellant had stated that the public interest

favoured disclosure 'this is simply a bald assertion without any argument to support it. The Appellant has failed adequately or at all to set out in his grounds of appeal why the Commissioner was wrong to conclude that the public interest favours maintaining the exemption…'. Just because the colleges mentioned by the Appellant had disclosed information 'it does not follow that …the decision taken by the Qualified Person at UCAS in this case was not reasonable'.

19. On 5 August 2021, the Appellant submitted a Reply. In this he referred to another decision notice by the Commissioner (reference IC-41599-L8G2) dated 16 July 2021 (two days after the decision notice in this case, and a day after the Appellant's appeal in this case). This was in relation to another request by this Appellant to the University of Salford in relation to Salman Abedi, and as the Commissioner explained he:-

> 1…..requested the complete university records for a deceased individual, including any communications with third parties. The University withheld the majority of the information under section 32(2) as it was held only by virtue of it being part of an inquiry and withheld the remaining information under section 36(2)(c).
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> 2. The Commissioner's decision is that the University has correctly withheld the information in documents 1 – 37 on the basis of section 32(2). The information in documents 38 – 50 does engage the section 36(2)(c) exemption but the public interest favours disclosure.

20. In relation to the public interest in that case and its application to the information covered by s32(2)(c) FOIA , the Commissioner concluded:-

> 41….The Commissioner recognises there is a very strong public interest in understanding how the Manchester Arena attack happened and information around those involved. Whilst she does not consider this information will shed any significant light on this it does provide some insight. She also must add weight to the public interest in transparency that would be benefited from disclosure.
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> 42. Having carefully considered the circumstances of this case, the Commissioner is therefore satisfied that there is a stronger public interest in disclosure of this information and, the public interest in maintaining the exemption was weak when considered in the context of the actual information being withheld. Whilst the Commissioner accepts that section 36(2)(c) of the FOIA is engaged in respect of this particular information [mainly of attendance records and records of the individual's activities as a student], she considers that the balance of the public interest, in these particular circumstances, favours disclosure.

21. In his Reply in this case the Appellant explains that the UCAS application form requires all applicants to provide the following information:-

- Personal details (name, address, DOB, contact details)
- Additional information (equality monitoring)
- Student finance (whether applicant will apply for student finance)
- Choices (institution and course preferences)
- Education (previous education history and qualifications earned)
- Employment (previous employment history)
- Statement (500 word personal statement in support of application)
- Reference (contact details for referees)

22. The Appellant makes general points about other educational institutions disclosing information about the individual in question, and then makes specific comment about the case put forward by UCAS that disclosing the information 'also has the potential to undermine the trust that students, teachers and parents have in UCAS and how we hold, process and disclose personal data'. The Appellant says that he is 'concerned …this can lead to a situation where information will only be granted if it is not embarrassing to the organisation…'.

23. In relation to UCAS' argument that although the trial of the individual's brother has finished (pending sentence), a public inquiry was due to start in June 2020 (the request was in February 2020) and disclosure could prejudice these proceedings, the Appellant states that inquiry proceedings are 'but a forensic examination on the circumstances surrounding the bombing and its aftermath'. He points out that several articles have been published during the inquiry which address material not dealt with by the inquiry. He asks why UCAS has not contacted the inquiry if UCAS is concerned about the effect of disclosing the material. Finally, the Appellant disputes the Commissioner's findings that there is a lot of information in the public domain already about the background to the Manchester arena bombing, and says that very little of the writing of the individual in question is available, which is why 'accessing his personal statement so important'.

24. The Commissioner has not responded to these points and has not commented on the conclusions reached in the 16 July 2021 decision notice involving the University of Salford.

DISCUSSION

Application of the exemption

25. We agree with the Commissioner's findings that, applying the approach set out in *Malnick*, the QP's opinion was reasonable in public law terms and that the exemption in s36(2)(c) FOIA applies. We have not at this stage carried out any assessment of what level of likelihood we think there is that prejudice will be caused by the disclosure of the withheld information considered by the QP, nor any assessment of the seriousness of the prejudice caused. Those are assessments, as the UT in *Malnick* and Lloyd Jones LJ in the *Department of Work and Pensions* case tell us, to be carried out during the public interest part of the analysis.

Public interest balance

26. In considering the public interest aspect of the case, we note that we must take into account the QP's reasonable opinion as to the occurrence or likely occurrence of prejudice if the material is disclosed. We also note the QP in reaching the opinion is not called on to consider the public interest for and against disclosure (see paragraph 32 of the UT decision). Further, we note that Lloyd Jones LJ in the *Department of Work and Pensions* case states that 'appropriate consideration' should be given to the QP's opinion 'at some point' in the process of balancing competing public interests.

27. That raises the question as to when exactly we should take the QP's opinion into account. It seems to us that a sensible approach is for the Tribunal to consider first of all whether provisionally, absent the QP's opinion, the public interest balance favours disclosure or not. Once that provisional view has been reached, the Tribunal can then take into account the QP's opinion and see if that changes the provisional view.

28. If the provisional view of the Tribunal is that the public interest balance does not favour disclosure, then it is very likely that 'appropriate consideration' of the QP's opinion will reinforce that view. However, if we form the provisional view that the public interest favours disclosure, then we should give 'appropriate consideration' to the QP's opinion to see if that consideration changes the provisional view. In carrying out this exercise we bear in mind that Lloyd Jones LJ stated that '…the weight which is given to this

consideration will reflect the Tribunal's own assessment of the matters to which the opinion relates'.

29. In the decision notice it was accepted that, in relation to factors which favoured disclosure:-

    (a) The actions of the deceased individual in the request may be of interest to the public in understanding his past and the decisions around his further education choices.
    (b) The requested information is no longer covered under data protection legislation or any of the personal data related FOIA exemptions.
    (c) There continues to be public interest in the matters surrounding the death of the individual named in the request.
    (d) The wider release of information may have assisted in the public understanding of the history of the deceased individual named in the request.

30. We also note the Appellant's point that there is very little of the individual's own writing available, and that that his personal statement to UCAS would constitute a potentially important example of this.

31. The main points in favour of not disclosing the information were said to be:-

    (a) As the information would have been protected from disclosure if the individual was still alive as personal data, protection of the information after death is in the public interest, otherwise all personal data of deceased individuals would be suitable for disclosure to the wider public.

    (b) Disclosure of this type of information is not generally compatible with UCAS' privacy policy about which all applicants will be aware, and is likely to cause a negative effect on the behaviour of future applicants particularly where UCAS is identified as the source of that information.

    (c) Third parties mentioned on the application form will have a reasonable expectation of privacy and would not expect their data to be placed into the public domain.

(d) Any potential negative impact on UCAS ability to provide an application service may have a significant impact on the organisation's ability to meet its charitable objectives.

(e) It is likely that publication or wider use of the requested information could cause distress to the family of the subject and potentially the wider families affected by the deceased individual's actions.

32. In our view, the public interest factors put forward in favour of non-disclosure are not strong. Essentially, this is a case with exceptional circumstances which are very unlikely to be replicated. In the vast majority of cases, disclosure of this sort of information 'post-death' would not be in the public interest. However, in our view UCAS applicants will recognise the exceptional circumstances in this case (as explained in this decision), and would not expect those circumstances to apply to the potential disclosure of their information if they died. It is the case that personal data is not protected in the same way 'post-death' and any applicants who enquired would no doubt be told that by UCAS. We do not think it realistic to argue that applicants would change the way they filled in the UCAS form because of the unlikely possibility that the information might need to be disclosed under FOIA in the event of their death, especially when they consider the very unusual nature of this case. As a result, we also do not think it at all likely that disclosure would have any effect on the ability of UCAS to carry out its functions.

33. We accept that the personal information of third parties on the UCAS form should not be disclosed and we deal with this below. Whilst we accept that the potential distress caused to the deceased individual's family and to the families of those affected by his actions is a factor to consider, we find it hard to envisage how disclosure of this information could add to the distress already caused to those people by the events for which the individual is responsible.

34. Therefore it seems to us that, without considering the QP's opinion, the factors above which are accepted to support the public interest in disclosure outweigh the public interest factors in favour of non-disclosure. We note that in the 16 July 2021 decision notice (IC-41599-L8G2) referred to above, the Commissioner put clear emphasis on the public interest in disclosure of educational information. The Commissioner was not, or course, bound to reach the same conclusion on the public interest in the two decision notices, and the cases have differences,

but we do agree with the statement in that decision notice that '[a]ny information offering an insight into those responsible is likely to attract significant interest as this was an incident that affected people across the country', and take into account the general public interest in transparency.

35. Thus, our provisional view, prior to taking into account the QP's opinion on prejudice is that the public interest is in favour of disclosure. We now must take the QP's opinion into account and decide if it tips the balance in favour of non-disclosure.

36. In considering this exercise, we note that the UT (and Lloyd Jones LJ in the *DWP* case) appear to envisage that the QP's opinion on likelihood of prejudice and the consideration of the public interest will involve the assessment of two different sets of factors. However, in this case the issues relied upon when considering prejudice (to the conduct of public affairs), are largely coterminous with the public interest factors which are said to support withholding the information.

37. In considering these factors as part of the public interest balance, the Tribunal has differed from the opinion of UCAS and the Commissioner as to the weight that should be given to the risk to the ability of UCAS to carry out its functions, given the exceptional nature of this case, if the requested material is disclosed.

38. Our views on these public interest issues, therefore, are also applicable to our consideration of the QP's opinion on the likelihood of prejudice if the withheld information is disclosed.

39. The one other factor taken into account by the QP was the potential effect on disclosure on the prosecution of the individual's brother and the wider public inquiry which was due to start shortly after the request was made. In relation to the prosecution, it is hard to see how disclosure could affect the prosecution of another person (especially as that person was already convicted). We have no evidence at all that disclosure would (or would be likely to) prejudice the conduct of public affairs so far as this would affect the inquiry. It does not appear that UCAS made any steps to find out if this would be the case, and the information had not been requested by the inquiry so that it would be covered by the exception in s32(2) FOIA.

40. Thus, although we accept that the prejudice feared by the QP is significant, we would differ from the QP's opinion that such prejudice is likely. The QP's opinion on likelihood is not

unreasonable, but, as we make clear above, it is not one which this Tribunal would have reached on the evidence available.

41. Thus, even having given appropriate weight to the QP's opinion on the likelihood of prejudice, the Tribunal is of the view that the public interest in this case is in favour of disclosure of the information.

42. The only exception to our decision on disclosure is in relation to any personal data of third parties which is included in the UCAS form, and we note the Appellant has not made a case for disclosure of this. Therefore, pursuant to section 40(2) FOIA all the personal data of the referee should be redacted (name, email, telephone). In the reference itself, all identifiers with respect to the referee should be removed.

43. On that basis, and subject to the s40(2) FOIA issue in the previous paragraph, this appeal is allowed and we substitute a decision notice to the effect that UCAS must disclosure the requested information within 35 days.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 20 January 2022.

Promulgated: 24 January 2022.