Freedom of Information Act 2000 (FOIA)

Decision notice

Date:	**19 January 2022**
Public Authority:	**The Council of Imperial College of Science, Technology and Medicine**
Address:	**South Kensington Campus** **London** **SW7 2AZ**

Decision (including any steps ordered)

1. The complainant requested a copy of an investigation report. The Council of Imperial College of Science, Technology and Medicine ("the College") relied on section 40(2) of the FOIA (third party personal data) and section 36(2)(c) of the FOIA (prejudice to the effective conduct of public affairs) to withhold the information.

2. The Commissioner's decision is that not all of the withheld information is personal data and that only some of the withheld information that is personal data engages section 40(2) of the FOIA. Where the withheld information does not engage section 40(2), the Commissioner accepts that section 36 is engaged, but he considers that the public interest favours disclosure. As the College failed to issue its refusal notice within 20 working days, it also breached section 17 of the FOIA.

3. The Commissioner requires the College to take the following steps to ensure compliance with the legislation.

    - Disclose, to the complainant, the sections of the report identified in the Confidential Annex to this Notice.

4. The College must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 3 December 2020, the complainant requested information of the following description:

> *"Under the FOI rules I would like to request a copy of the report authored by Jane McNeill QC into allegations of bullying at Imperial College. For clarity, said report is the one confirmed to exist by the Department for Education in response to a written Commons question on 30 November."*

6. On 18 January 2021, the College responded. It refused to provide the requested information. It relied upon section 36(2)(b)(i), section 36(2)(c) and section 40(2) of the FOIA in order to do so.

7. The complainant requested an internal review on the same day. The College sent the outcome of its internal review on 17 March 2021. It accepted that section 36(2)(b)(i) would not apply to the requested information but maintained that the other exemptions applied.

Scope of the case

8. The complainant contacted the Commissioner on 22 March 2021 to complain about the way his request for information had been handled.

9. The Commissioner commenced his investigation with a letter to the College on 10 September 2021. He noted the sensitivity of the report and asked the College if it would prefer to be served with an Information Notice before sharing it with his office.

10. The College responded on 29 September 2021 to say that it would prefer to be served with an Information Notice before providing the withheld information and an Information Notice was duly served on the same day. The College finally provided the report (and its submission) on 29 October 2021.

11. The Commissioner considers that the scope of his investigation is to determine the extent to which the report engages the absolute exemption at section 40(2) of the FOIA. If some of the report does not engage that exemption, he will then go on to consider whether the qualified section 36 exemption is engaged.

Background

12. In 2020, the College asked an independent barrister (Jane McNeill QC) to conduct an investigation into allegations of bullying levelled at the University's President, Professor Alice Gast and its Chief Financial Officer, Muir Sanderson. The report concluded that Prof Gast had bullied a colleague and that Mr Sanderson had bullied two colleagues.

13. The College published the report's recommendations and the fact that allegations had been upheld. Both Prof Gast and Mr Sanderson have issued public apologies for their actions.[1]

Reasons for decision

Section 40 personal information

14. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

15. In this case the relevant condition is contained in section 40(3A)(a)[2]. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').

16. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.

17. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

[1] https://www.imperial.ac.uk/news/210693/independent-investigation-recommendations-action-plan-next/
[2] As amended by Schedule 19 Paragraph 58(3) DPA.

Is the information personal data?

18. Section 3(2) of the DPA defines personal data as:

> *"any information relating to an identified or identifiable living individual".*

19. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

20. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

21. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

22. Much of the report is the personal data of either Prof Gast, Mr Sanderson or both – as it describes actions they took or events they played a central role in.

23. However, having viewed the report, the Commissioner is also satisfied that parts of the report are, variously, the personal data of the people against whom the bullying was committed and of the witnesses that provided evidence to Ms McNeill QC.

24. Given the events described in the report, the Commissioner considers that, even with substantial redactions, it would still be possible to identify the individuals concerned. Whilst most members of the public may be unable to do so, those involved with the University (and particularly those at a relatively senior level) would be able to identify the individuals concerned and therefore deduce the evidence those individuals had provided.

25. However, the report also includes more general observations about management, leadership and organisational culture at the College. Some of these observations will still be the personal data of Prof Gast and Mr Sanderson, but some of these sections have insufficient connection to any individual to make them personal data. This is set out in more detail in the confidential annex.

26. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that much of this information both relates to and identifies Prof Gast, Mr Sanderson and the other

individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

27. The remaining information is not personal data and will be covered later in the Commissioner's section 36 analysis.

28. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

29. The most relevant DP principle in this case is principle (a). Article 5(1)(a) of the GDPR states that:

> *"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".*

30. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

31. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

32. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in the Article applies.

33. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

> *"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"*[3].

[3] Article 6(1) goes on to state that:-

> "*Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks*".

34. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

    i) **Legitimate interest test**: Whether a legitimate interest is being pursued in the request for information;

    ii) **Necessity test**: Whether disclosure of the information is necessary to meet the legitimate interest in question;

    iii) **Balancing test**: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

35. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

36. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. The interests may be public or personal, broad or narrow, compelling or trivial. However, the narrower and less compelling the interest, the less likely it is that such an interest will outweigh the rights of the data subjects.

37. In its internal review, the College noted that:

> *"The legitimate interest in disclosure in this case would be the general requirement for transparency in public life and the interest in promoting accountability in respect of the allegations made against senior College staff and the conclusions reached following Ms McNeill QC's investigation."*

38. In its submission, the College noted that:

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

> "*In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted*".

"The legitimate interest in disclosure in this case is the general requirement for transparency in public life, ensuring good management and governance within a public body, and the interest in promoting accountability in respect of the allegations made against senior College staff and the conclusions reached following Ms McNeill's investigation. Specifically, disclosure of the Report (and the personal data within it) could further public debate about the conduct of senior members of College staff, albeit the College believes that this interest can be served by the information already in the public domain and via other, more appropriate, means of accountability."

39. This particular case has already raised headlines in the national media and the College's Students' Union also raised concerns and asked for a redacted copy of the report.

40. The Commissioner recognises that there is a legitimate interest that would be served by disclosure of the withheld information. He has therefore gone on to consider the necessity test.

Necessity

41. The College argued that disclosure was not necessary to satisfy the legitimate interest in this case. It noted that:

"The College is of the view that there is not such a pressing need in this case and that the propriety of the actions of the senior College staff considered in the Report has been the subject of sufficient scrutiny which helps meet the relevant legitimate interests in a way which is less privacy intrusive:

1. *The actions of Professor Gast and Mr Sanderson were addressed through the College's disciplinary processes as described above.*

2. *Professor Gast and Mr Sanderson have both issued public apologies for their actions and their conduct has been the subject of significant commentary within the College and in the national media.*

3. *The College is working through implementing the recommendations in the Report – some action points have been completed; others are being worked through on an on-going basis (see the Chronology above and, in particular, the statement issued on 14 December 2020).*

4. *The OfS, which has powers to scrutinise whether members of senior university management are "fit and proper" to exercise*

their roles, has been informed and is investigating this matter; that investigation is on-going.

"Owing to the Parliamentary question, involvement of the student union and press coverage, this is not a case where absolute anonymity and privacy has been maintained (unlike what typically happens during whistle-blowing investigations and disciplinary procedures). In other words, private information about Professor Gast, Mr Sanderson and the matters considered in the Report are already in the public domain, satisfying the relevant legitimate interests. The College feels that there has already been a significant release of personal information in relation to this case and that any further disclosure would therefore be particularly harmful."

42. The Commissioner does not accept that disclosure is not necessary in this case. He also notes that it was some months after the report had been completed (and in particular after a Parliamentary Question was asked) that the College accepted that it was necessary to admit even the existence of the report.

43. Prof Gast is the most senior official at the College. Whilst she is accountable to the College Council, the fact that she is also a member of that same body makes it difficult for the College Council to carry out an investigation that is demonstrably independent. Individuals (such as the Head of Legal, Head of Human Resources – or their equivalents) who might normally be expected to carry out or oversee investigations into allegations of this nature would be unable to do so in this case as they would report (either directly or indirectly) to Prof Gast herself. The fact that the College sought an independent person to carry out the investigation shows that the College was aware that its ordinary disciplinary processes would not be sufficient – or, at least, would not be seen to be sufficient – in this case.

44. Whereas the Commissioner would, with more junior employees, take the view that a public authority's internal investigatory processes, coupled with independent oversight, is sufficient to meet any interest in disclosure, that is not the case here. The ordinary processes will not work properly here because there is no one else within the College with sufficient seniority to investigate Prof Gast – who would, in turn, be the only sufficiently senior person who could have investigated Mr Sanderson's behaviour.

45. Whilst the College has pointed to the involvement of the Office for Students (OfS), the Commissioner's understanding is that the OfS's remit is to consider whether the College's leadership meet the "Fit and Proper Person" test – rather than whether the particular allegations are

true. Whilst there will clearly be some overlap, the two processes are subtly different.

46. The Commissioner also notes that, on 4 December 2020, shortly before the College made its public statement on the matter, the Chair of the College Council emailed staff to inform them that:

> *"Although this has been an uncomfortable process, it is a willingness to confront the most difficult challenges that distinguishes great organisations. I am glad that Imperial was able, not only to conduct a full and impartial investigation into allegations about its most senior staff, but to come out of that process stronger and better equipped to meet its mission.*
>
> *"All staff should feel able to speak out if they are concerned by the behaviour of colleagues, and this experience demonstrates that those processes and protections are in place. We must all work to cultivate a culture that supports such challenges when they are necessary.*
>
> *"Following this process, I am more confident than ever that Imperial has the right leadership."*

47. Bullying is a very serious matter and, in this case, it has been found to be proven against two of the most senior leaders within the College. Whilst the Commissioner accepts that, at the time of the request, the College had provided general information about the nature of the request, there is a pressing social need to understand the extent of the situation and how it came about. Given the strong statement by the Council Chair, the Commissioner also considers that staff and students may wish to understand why, despite the proven allegations, the Council still has such confidence. The Commissioner is thus not satisfied that this legitimate interest can be met by less intrusive means and therefore disclosure is necessary.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

48. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

49. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that disclosure may cause;
- whether the information is already in the public domain;
- whether the information is already known to some individuals;
- whether the individual expressed concern to the disclosure; and
- the reasonable expectations of the individual.

50. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

51. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

52. The College argued that the information only related to Prof Gast and Mr Sanderson's public life "on a superficial level." It argued that there was

> *"not a complete and simple divide between work-life and private life, especially in cases involving accusations of bullying where the feelings and private relationships between individuals in a fairly tight-knit and high-pressure workplace environment were being considered.*
>
> *"Indeed, the Report relates to the conditions and social interactions within a workplace rather than to any individual's public duties."*

53. The Commissioner does not accept this argument in respect of Mr Sanderson and Prof Gast. The withheld information relates to their behaviour at work and their leadership of the College. Whilst these might not be "public-facing" duties, they are clearly duties that are associated with the individuals' roles at the College. The Commissioner has seen minimal references, in the withheld information, to the private life of either of these individuals.

54. The Commissioner does however accept that, in respect of the witnesses whose evidence was quoted in the report, there are some details that would relate to their private lives – including, in some cases, special category data.

55. The College was keen to stress the confidentiality of the disciplinary process and the assurances given to those that had taken part. It noted numerous references, within its internal policies, to such a process being confidential – as well as to common practice that such processes would be confidential. It also noted that the report's author had provided explicit assurances of confidentiality.

56. Having viewed the withheld information, the Commissioner considers that the position is much more nuanced than the College made out. Whilst Ms McNeill QC did provide reassurances, the withheld information indicates a general awareness among participants that the report may be disclosed in certain circumstances (although it is not clear whether disclosure under the FOIA was explicitly considered). Furthermore, the Commissioner notes from the withheld information that those witnesses that did express concerns appeared to have been more worried about internal reaction within the College rather than that their opinions might be more widely disseminated.

57. The Commissioner considers that it is arguable that disclosure to the world at large would provide a greater protection than a limited sharing amongst senior leadership – as any internal reaction would be more obvious to more people.

58. Nevertheless, the Commissioner recognises that there is an expectation – both in general and in the particular circumstances of this case – that the witnesses who provided evidence did so on the basis that their submissions were part of a confidential process. Disclosure of individual submissions (which, as the Commissioner has noted above, would identify the person who provided them) would be contrary to the reasonable expectations of those witnesses – especially those who had been on the receiving end of the alleged bullying. Their conduct was not, in general, the subject of the investigation or its recommendations.

59. The Commissioner therefore considers that, to the extent that the withheld information is the personal data of those other than Prof Gast and Mr Sanderson, the rights of those individuals outweigh any legitimate interests in disclosure.

60. The Commissioner must next consider the balancing exercise in respect of Mr Sanderson and Professor Gast.

61. During the course of the investigation, the Commissioner received a letter from Prof Gast in which she set out her own strong objections to the disclosure of her personal data.

62. Prof Gast noted that the report's recommendations had been published and that she had made a public apology. Further disclosure would "not add any insights" to the situation. She noted that female leaders accused of bullying were treated less generously than male leaders and drew parallels between her own case and that of Professor Kathleen Stock.

63. Prof Gast noted that she had been the target of considerable abuse via social media as well as having been attacked in the media. She noted

that this had a substantial effect on both her and her family – which further disclosure would exacerbate.

64. Finally, Prof Gast argued that there were "few, relatively minor, findings against me" and that she had "serious concerns" about the accuracy of some of the report. She had felt that, as the report was not to be published, it was better to accept the findings and move on. She emphasised the assurances that she had been provided with – as well as the general expectation that such processes were confidential.

65. The Commissioner is satisfied that Prof Gast has been the subject of online abuse. This clearly goes way beyond legitimate scrutiny and is unacceptable in a civilised society. The Commissioner also accepts that the process has had a detrimental effect on both Prof Gast and her family which disclosure would (at least in the short term) reignite – although the Commissioner notes he is required to consider the situation as it existed at the time the request was responded to and not as it exists now.

66. No evidence has been received in respect of Mr Sanderson's wishes (although the College noted that he had not actively consented to disclosure). The Commissioner sees no reason to consider that his position would be substantially different from that of Prof Gast.

67. That having been said, the Commissioner is required to consider two questions. Firstly, whilst the data subjects' expectations are clear, are they reasonable in the context of both their positions of seniority and the content of the withheld information? Secondly, does the withheld information provide a legitimate journalistic line of enquiry or requirement for accountability – even though some might choose to abuse it?

68. Having considered the matter carefully, the Commissioner does not consider that either Prof Gast or Mr Sanderson should reasonably expect that this information would not be disclosed.

69. Firstly, Prof Gast is, as has been noted, the most senior figure within the College and its public face. Mr Sanderson is also a very senior figure within the College and the withheld information illustrates the extent of the power that he exercised during the period in question. Their seniority means that they should expect to be subject to a much greater degree of scrutiny, accountability and transparency than their subordinates.

70. Secondly, the Commissioner has to consider both the seriousness of the allegations and the fact that accusations were found to have been proven by an independent investigator. He does not accept Prof Gast's

characterisation of the proven allegation as "relatively minor." Bullying is a serious matter and must not be lightly dismissed. The suffering of the alleged victims must also be taken into account.

71. This report does not deal with minor or vexatious allegations. They were sufficiently serious allegations to warrant an independent investigation and that investigation has found many (though not all) of them to have been proven. The Commissioner considers that disclosure of the report would add considerable insight into what these allegations were, how they came about and the role that these two individuals played in those events. The disciplinary process had already been completed at the point the request had been responded to and so there is no risk of prejudicing the right to a fair hearing.

72. The comparison with Prof Stock (who was forced to resign following a campaign against views she had previously expressed) was not an apposite one. That case involves balancing the right of academics to speak freely with the harm that offensive speech might cause. The issue of academic freedom did not arise here.

73. The Commissioner is therefore satisfied that the legitimate interests in disclosure of at least part of the report outweighs the rights of the data subjects in this case and therefore would not cause unwarranted distress.

74. Once the identifiable information has been removed, the Commissioner considers that large parts of the report (particularly those sections that set out the events that took place) would be rendered either unintelligible or, worse, misleading. He therefore considers that they should not be disclosed at all.

75. However, other sections of the report contain less specific summaries of events, require only minimal redactions to remove the identifiable data of witnesses and would therefore remain intelligible.

76. In the circumstances, the Commissioner therefore considers that there would be a lawful basis for the disclosure of this information

Fairness and transparency

77. Even though it has been demonstrated that disclosure of the requested information under the FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).

78. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.

79. The requirement for transparency is met because as a public authority, the College is subject to the FOIA.

The Commissioner's view

80. In this instance, the Commissioner has decided that the College has failed to demonstrate that the exemption at section 40(2) is fully engaged.

81. Since the end of the transition period following the UK's departure from the EU, the GDPR was replaced by the UK GDPR. As this request was received before the end of that transition period, the application of section 40(2) has been decided by reference to the GDPR. However the Commissioner is also satisfied that the disclosure of the personal data to which that exception was applied would not contravene the UK GDPR for exactly the same reasons.

82. The Commissioner must now consider whether the information that does not engage section 40(2) engages section 36(2)(c).

Section 36 – Prejudice to the Effective Conduct of Public Affairs

83. Section 36(1) states that this exemption can only apply to information to which section 35 does not apply.

84. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the Qualified Person, disclosure of the information:

> *(a) would, or would be likely to, prejudice—*
>
> *(i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or*
>
> *(ii) the work of the Executive Committee of the Northern Ireland Assembly, or*
>
> *(iii)* the work of the Cabinet of the Welsh Assembly Government.
>
> *(b) would, or would be likely to, inhibit—*
>
> *(i) the free and frank provision of advice, or*
>
> *(ii) the free and frank exchange of views for the purposes of deliberation, or*
>
> *(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.*
>
> *(3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable*

opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).

(4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".

85. Section 36 is a unique exemption within the FOIA in that it relies on a particular individual (the Qualified Person) within the public authority giving an opinion on the likelihood of prejudice occurring. It is not for the Commissioner to stand in the shoes of that individual and provide his own opinion. The Commissioner's role is to: establish that an opinion has been provided by the Qualified Person; to assure himself that that opinion is "reasonable" and; to make a determination as to whether there are public interest considerations which might outweigh any prejudice.

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

86. The College noted that its qualified person is Prof Gast herself and that it was thus obliged to seek an opinion from her in order to engage the exemption.

87. The Commissioner recognises that this places both the College and Prof Gast herself in the uncomfortable situation of having to provide an opinion on information discussing her own conduct. Clearly this is not an ideal situation. However, the legislation does not allow for this duty to be delegated or otherwise temporarily transferred – even in situations such as this. Prof Gast is the only person, authorised in law, to act as the Qualified Person, the only person whose opinion the College could seek in order to engage this exemption and therefore the only person whose opinion the Commissioner would be able to accept.

88. The Commissioner has seen an email sent by Prof Gast on 14 January 2021. In that email Prof Gast responds to say that she is satisfied that the exemptions apply on the basis of the submissions provided. A further opinion was sought at the internal review stage and Prof Gast again agreed with the submission on 15 March 2021. The Commissioner is therefore satisfied that the Qualified Person gave an opinion on 15 March 2021.

What was the opinion and was it reasonable?

89. It is not the role of the Commissioner to substitute his own opinion for that of the Qualified Person. The Qualified Person is best placed to know the circumstances of their organisation and the significance of the

information concerned. It thus follows that the bar for finding that an opinion is "reasonable" is not a high one.

90. A "reasonable" opinion need not be the most reasonable opinion available. It need only be within the spectrum of opinions that a reasonable person might hold and must not be irrational or absurd.

91. The Commissioner considers that an opinion is likely to be unreasonable if it fails to make out the grounds for the exemption or if the information is already in the public domain.

92. Particularly in relation to section 36(2)(c), the case law on this particular limb of the exemption makes clear that the prejudice must be some form of harm not envisaged by any other limb.

93. The opinion provided by the Qualified Person states that:

> *"Disclosure would inhibit employees of public authorities from fully co-operating and contributing to whistleblowing investigations. If interviewees felt that what they said was liable to be published, even on a non-attributable basis, they would be far less likely to be forthright. This would make such inquiries more difficult to carry out and would undermine their effectiveness.*
>
> *"There would, or would be likely to, be an adverse effect on the willingness of potential whistle-blowers to come forward in the future. This in turn would prevent concerns from being investigated.*
>
> *"Everyone who participated in or contributed to Ms McNeill's inquiry into the whistleblowing allegations and subsequent report (including its author) took part on the understanding that their contributions and the report itself would be treated in confidence and shared with only a limited number of people.*
>
> *"A requirement to publish reports of this type would, or would be likely to, discourage public authorities from commissioning independent inquiries into whistleblowing allegations. Public authorities would be more likely deal with such allegations internally and not seek external advice or scrutiny which would be damaging to effective governance in that they would lose the benefit of independent scrutiny and challenge.*
>
> *"The Office for Students are conducting an investigation into these matters. They need a safe space within which to conduct their enquiries.*

94. The Commissioner notes that the Qualified Person has a conflict of interest and he has considered this in deciding whether their opinion is

reasonable. Equally, he notes that submissions were prepared for the Qualified Person by individuals who were not connected with the process (although who also do not appear to have seen the withheld information) and the Qualified Person did not depart from those submissions.

95. In *Information Commissioner v Malnick & ACOBA* [2018] UKUT 72 (AAC), The Upper Tribunal ruled that, in order to be reasonable, the Qualified Person's opinion need only be objectively reasonable. The Qualified Person does not need to demonstrate that they have followed a reasonable procedure to arrive at their opinion.

96. Whilst the procedure that appears to have been followed in this case is somewhat less than desirable - an individual with a conflict of interest who had seen the report being advised by individuals who were independent but had not seen the report – in the particular circumstances, it is difficult to see what other process could have been followed and it does not, in itself, render the opinion unreasonable.

97. However, the Commissioner has concluded that, even taking into account the conflict of interest, it is not unreasonable to believe that individuals might be deterred from contributing to future enquiries if they believe that the evidence they provide may be published and possibly used against them in future. Investigations of this type rely on the willing cooperation of participants and it is not unreasonable to suppose that disclosure in this case may make such an investigation more difficult in future.

98. The Commissioner is therefore satisfied that the exemption is engaged and has gone on to consider the public interest test.

Public interest test

99. The College accepted that there was a public interest in scrutinising the conduct of senior public officials and in promoting accountability more generally. It also accepted that the increased scrutiny might impact positively on the issues raised in the report as well as furthering debate about the decisions taken by the College in response to the report.

100. However, the College argued that there was a stronger public interest in protecting the rights of individuals to bring forward complaints on a confidential basis and have them dealt with effectively. It argued that disclosure would undermine the integrity of the process, making it less useful in future. There was a strong public interest in having a robust process in place to deal with accusations and one which individuals would have confidence in engaging with.

101. Secondly, the College argued that there was sufficient information in the public domain to inform debate about the merits of the decision. It pointed, in particular, to its decision to publish a summary of the report's recommendations and press coverage.

102. Thirdly, the College noted that other means of scrutiny were available that did not involve disclosure – including the involvement of the OfS – and that it did not wish to conduct a "trial by media". It stated that its processes were adequate and that:

> *"There is no reason to doubt the quality of the Report (conducted by an experienced independent investigator), nor the appropriate oversight and accountability of the Council (as the College's governing body) in deciding on what actions to take and on implementation of the recommendations."*

103. Finally, it reiterated again that the report did not relate to the "public-facing duties" of the individuals concerned and that:

> *"It is not in the public interest for confidential personnel matters and information about interpersonal relationships to be put into the public domain."*

The Commissioner's view

104. The Commissioner considers that, in the particular circumstances of this case, the balance of the public interest favours disclosure of the information. His conclusion follows similar lines to those he took in the balancing test in respect of section 40(2) of the FOIA.

105. Even where the Qualified Person has identified that disclosure of information would be likely to cause prejudice, a public authority must still disclose that information unless it can demonstrate that the public interest favours maintaining the exemption.

106. Given that the Commissioner has accepted the possibility that disclosure might cause prejudice, there will always be an inherent public interest in preventing that from occurring. However, the weight that should be attached to that public interest will be determined by the severity of the prejudice and the likelihood of it occurring.

107. The Commissioner has accepted as reasonable that the lower bar of prejudice is engaged. This means that that the chance of prejudice occurring doesn't have to be more likely than not, but there must still be more than a remote or hypothetical chance. Whilst it is easier to demonstrate that the lower bar of likelihood is met, the weight to be attached to that prejudice is also lower.

108. The Commissioner recognises that there is a strong public interest in protecting the right of whistle-blowers to make valid complaints about impropriety or misconduct – as happened here. Those considering making a disclosure should not fear for their own career or even their own safety as a result of raising matters of public interest.

109. Equally, whistle-blowers do not generally come forward merely to have their views recorded. They do so because they have seen something go wrong and want it to be remedied. There is therefore some public interest in demonstrating that change can be brought about by this process – especially where the identity of the whistle-blower themselves can be kept secret.

110. Given that the Commissioner is now only dealing with information that does not identify either the witnesses or the victims of the behaviour, he is satisfied that disclosure of this information should not prevent such people from engaging in the process in future.

111. Furthermore, the Commissioner also repeats again that the allegations were made against two of the most senior leaders within the College. Whilst the report may not deal with their public-facing duties, providing leadership and managing colleagues is a key aspect of their influential and well-remunerated roles. There is thus a strong public interest in understanding a situation where these individuals not just fell short of the expected standards, but fell considerably short.

112. The College clearly felt that the allegations were sufficiently serious and had sufficient merit to warrant an independent investigation. That investigation concluded that bullying had taken place and the College's policy states that it has "zero tolerance" for bullying and harassment.[4]

113. Whilst the Commissioner notes that the College has placed some information into the public domain and that this does go some way towards satisfying the public interest, he considers that the sections of the report to which section 40(2) of the FOIA does not apply would add significantly to the public's understanding of events.

114. The Commissioner is not entirely clear what "press coverage" the College was referring to. Whilst there have been several news articles written about the investigation, a number of these have referred to either leaks of information or quotes from unnamed sources – which the Commissioner is assuming that the College does not wish to confirm as

[4] https://www.imperial.ac.uk/media/imperial-college/administration-and-support-services/equality/public/Imperial-EDI-Strategy-2018.pdf

accurate – as well as official statements from the College. Therefore the Commissioner has disregarded the reference to press coverage.

115. The College has made strong statements in support of its senior leaders. That is a judgement call for the College to make, but given the published findings of the report and the College's published policies, the Commissioner considers that there is a stronger than usual public interest in disclosing more of the report so that staff and students at the College can decide for themselves.

116. The Commissioner agrees with the College that there should usually be an expectation that disciplinary matters should be dealt with confidentially – especially when allegations are not found to be proven. However in the unique and exceptional circumstances of this case and given the content of the withheld information, the Commissioner is satisfied that the balance of the public interest favours disclosure of those parts of the report that do not engage section 40(2) of the FOIA.

Section 17 – Refusal Notice

117. Section 17(1) of the FOIA states that when a public authority wishes to withhold information or to neither confirm nor deny holding information it must:

> *within the time for complying with section 1(1), give the applicant a notice which—*
>
> *(a) states that fact,*
>
> *(b) specifies the exemption in question, and*
>
> *(c) states (if that would not otherwise be apparent) why the exemption applies.*

118. Even allowing for the bank holidays over the Christmas break, the College took in excess of 20 working days to issue its refusal notice. It therefore breached section 17 of the FOIA.

Other matters

119. The Commissioner feels obliged to note the fact that Ms McNeill made a specific recommendation in relation to record-keeping. The withheld information provides more information about why such a recommendation was necessary.

120. The Commissioner would remind the College (and indeed all public authorities) about the importance of good record-keeping. This not only aids good governance, but allows public authorities to demonstrate that the decisions they make have been well-considered and are made for sound reasons.

Right of appeal

121. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

122. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

123. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed .....

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