



Neutral citation number: [2024] UKFTT 00801 (GRC)

Case Reference: FT/EA/2024/0063

**First-tier Tribunal
General Regulatory Chamber
Information Rights
IC-260179-Y0S3**

Heard by: CVP

Heard on: 23 July 2024

Decision given on: 19th September 2024

Before

**TRIBUNAL JUDGE CHRIS HUGHES
TRIBUNAL MEMBER SUZANNE COSGRAVE
TRIBUNAL MEMBER AIMEE GASSTON**

Between

DOCTOR JESUS ANTONIO SILLER FARFAN

Appellant

and

INFORMATION COMMISSIONER

Respondent(s)

Representation:

For the Appellant: in person

For the Respondent: did not appear

Decision: The appeal is Allowed

Substituted Decision Notice: Queen's University Belfast
Address: University Road
Belfast

BT7 1NN

Shall disclose the requested information by 24 October 2024

REASONS

1. On 11 July 2023 the Appellant sought a copy of an agreement to which Queen's University Belfast (QUB) was a party – the University and College Employers Association, which guides Universities collectively in their negotiations with staff:-

“Under the provisions of the FOI 2000 Act, I would like a copy of the so-called ‘UCEA Code for Participating Employers’.

For the avoidance of doubt, I refer to the document explained in this link: <https://www.ucea.ac.uk/news-releases/11jul23/> ”

2. QUB replied on 3 August 2023 stating. It stated that the “UCEA Code for Participating Members” is not provided as this information is considered exempt under section 36(2) of FOIA. The University maintained that position on internal review and the Information Commissioner, following his investigation upheld that position.
3. The section 36 exemptions are unusual in FOIA since in addition to the circumstances of the information requested there additionally needs to be a judgement (the qualified person's opinion), by a senior official of the public authority that disclosure would be prejudicial. During the course of the investigation the Appellant has asked for the evidence relating to that opinion. In this case the core issue in dispute is whether the exemption to disclosure provided by s36 was available to QUB.
4. The s36 exemption provides (so far as is relevant):

“Prejudice to effective conduct of public affairs.

36 (1) This section applies to—

(a) information which is held by a government department or by the Welsh Assembly Government and is not exempt information by virtue of section 35, and

(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—

(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.

.....”

5. S36 then provides for the appointment of the qualified person in a range of different public authorities:-

(5) In subsections (2) and (3) “qualified person”-

.....

(l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means—

- (i) the public authority, or
- (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,

6. S36 then makes provision for the authorisation of a qualified person (“QP”):

- (6) Any authorisation for the purposes of this section—
- (a) may relate to a specified person or to persons falling within a specified class,
 - (b) may be general or limited to particular classes of case, and
 - (c) may be granted subject to conditions.

7. The issue of the identity of the qualified person was raised by the requester with QUB in seeking an internal review and challenging the validity of the qualified person’s opinion on 3 August 2023:

“1.- A challenge against the University Secretary acting as a qualified person for the purposes of Section 36 of the Act. The aforementioned person is neither consistent with ICO's decision notice IC-75540-P8H1 or previous orders of Ministers of the Crown, who would delegate that responsibility, respectively, to the Registrar or the Vice Chancellor.”

8. The arguments of the parties and the position adopted by QUB and endorsed by the Information Commissioner (forming the foundation for the application of s36) is summarised in paragraph 14 of the decision notice:

14 The complainant, in their internal review request, argued against the University Secretary acting as a 'qualified person' for the purposes of section 36(5) of FOIA. The University explained to the complainant the new position of University Secretary as described in the above paragraph 13. In its response to the Commissioner, the University affirmed that whilst the University Secretary has not directly replaced the role of Registrar, this role has absorbed some of the responsibilities including that of 'qualified person' as defined by FOI provisions. The University supplied the Commissioner with a document showing leadership structure, this demonstrated the University Secretary's significant position within the University.

15. The University also directed the Commissioner to a link to a communication published on its website, this refers to the University Secretary's membership of the University Management Board which includes the Vice Chancellor. It said "this is the highest-level of operational decision-making within the University; therefore, the University Secretary is well-placed to make decisions on the appropriateness of section 36 of FOIA." The University provided the Commissioner with further evidence that the University Secretary's qualified opinion was obtained in this case.

.....

17. The Commissioner is satisfied that the University Secretary is authorised as the qualified person under section 36(5) of FOIA.

9. However, while the University Secretary was clearly well-qualified to discharge this role; the issue is rather does an authorisation under s36(6) cover the University Secretary. To determine this, it is necessary to examine the terms of the authorisation issued by the First Minister and deputy First Minister.
10. The Appellant sought this from the Commissioner on 29 November 2023:

The main point of contention is the overall validity of the QP's opinion, which enables engagement of s36.

*I would be most grateful if the ICO specifically queries the existence of an authorisation issued by the First Minister and deputy First Minister under 36(5)(l) of the FOIA 2000. This applies (as opposed to 36(5)(o)) because QUB is a NI public authority. And, as I argued at large on my main skeleton, **if such authorization does not exist or is issued in favor of the Registrar and Chief Operating***

Officer, it is self-evident that the University Secretary is not a QP. (Tribunal's emphasis.)

11. In the reply to the Commissioners response to the appeal (bundle page A140), the Appellant stated:

d. In an exchange between the Jenny Roe (representing the IC) and myself (see pages 5 to 7 of this Reply), I point-blank asked her:

Did the IC ask the Public Authority (Queen's University Belfast, QUB) for documentary evidence of a 'qualified person' (QP) authorisation, in favour of any officer or employee of QUB, issued by "the First Minister and deputy First Minister in Northern Ireland acting jointly"? Refer to s36(5)(l)(ii) of the FOIA 2000 if helpful to understand the exact nature of the document I am referring to. For the avoidance of doubt, I am looking for a proper certificate and not an Archived/Deprecated webpage from The National Archives.

e. She replied "No" to that and other questions around similar lines.

12. In a previous Information Commissioner's decision concerning QUB FS50155365 of 18 December 2008 the Commissioner found at paragraph 17:

17. Section 36(2)(c) provides that information is exempt if, in the reasonable opinion of a qualified person, disclosure of the information would prejudice, or be likely to prejudice, the effective conduct of public affairs. The "qualified person" is set out in section 36(5) of the Act. The University confirmed to the Commissioner that the "qualified person" in this instance was the Registrar and Chief Operating Officer (the 'Registrar'). ...

13. Historically a university registrar has been the most senior officer of a university who does not hold an academic post and is responsible for the administration of the university under the supervision of the Senate and Vice-Chancellor.

14. While QUB have implied that there is no real difference between the former position of Registrar and Chief Operating Officer (identified in the 2008 decision as the qualified person) and University Secretary now, the Vice-Chancellor in a message to the University of 22 November 2022 said:-

The role of Registrar and Chief Operating Officer will not be directly replaced. Rather, we are distributing the very large number of reports and responsibilities across Vice President/Chief Officer positions, who will be responsible for cognate areas.

15. The position is therefore clear. A qualified person in a public authority in Northern Ireland is set out in s36(5)(l) and is either (i) the public authority itself (which is not relied on in this case) or (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly.

16. The next subsection s36(6) provides a framework for the terms of an authorisation:

(a) may relate to a specified person or to persons falling within a specified class,

...

17. The Commissioner has not produced any material to show that the authorisation is to “persons falling within a specified class” and in a previous decision stated that the authorisation was to “Registrar and Chief Operating Officer” which would be considered an authorisation to an individual who held that post; however, the Vice-Chancellor has confirmed that the post no longer exists.

18. The statutory language is clear. Until such time as a new authorisation is made, in order to rely on the s36 exemptions QUB must form its opinion as a public authority, not through a postholder where the post no longer exists or has not been filled. The latest guidance (18 August 2023) from the Information Commissioner states: “If the qualified person is the public authority itself rather than a specific post, this means the authority’s highest decision-making body”.

19. The tribunal is therefore satisfied that QUB did not comply with the procedural requirements of the exemption. No other exemptions were relied upon by the Commissioner or QUB. The Commissioner’s decision is wrong in law and the appeal must succeed.

Signed Hughes

Date: 23 August 2024

Amended under slip rule on 26 September 2024