

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 28 October 2021

**Public Authority:** Board of Governors of Staffordshire University  
**Address:** College Road  
Stoke-on-Trent  
Staffordshire  
ST4 2DE

#### **Decision (including any steps ordered)**

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1. The complainant requested the names of external examiners and an evaluation report associated with particular courses of study. The Board of Governors of Staffordshire University ("the University") relied on section 40(2) of the FOIA (third party personal data) to withhold the names of the external examiners and sections 36 (prejudice to the effective conduct of public affairs) and 43 (commercial interests) of the FOIA to withhold the report.
2. The Commissioner's decision is that the report engages section 36(2)(b)(ii) of the FOIA and that the public interest favours maintaining the exemption. Whilst she accepts that the identities of external examiners are their personal data, she considers that there is a lawful basis for processing this data and therefore the University is not entitled to rely on section 40(2) of the FOIA to withhold the information.
3. The Commissioner requires the University to take the following steps to ensure compliance with the legislation.
  - Disclose, to the complainant, the list of external examiners
4. The University 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

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5. On 8 January 2021, the complainant wrote to the University and requested information in the following terms:

*"I understand that Staffordshire University draws on loans on behalf of a certain undisclosed number of students and then subcontracts out all their teaching and accreditation to LMA (Liverpool Media Academy Limited). The LMA's website and prospectus currently lists some 29 BA (Hons) Courses "Awarded by Staffordshire University"...*

*"...Under the Freedom of Information Act, please can I be sent:*

- (1) The list of external examiners who are assigned to each of the 29 or so courses currently active at the LMA (paragraph 72.5). This list should include their name, job title and organizations they represent. For example, "Dr Smith, Senior Lecturer, Anglia University".*
- (2) A copy of the most recent Partnership Review Process report conducted for the LMA."*

6. The University responded on 5 February 2021. In respect of the list of external examiners it relied on section 40(2) to withhold the information. In respect of the Partnership Review Process report, it relied on section 36(2)(b)(ii), section 36(2)(c) and section 43 of the FOIA to withhold the requested information.
7. Following an internal review the University wrote to the complainant on 5 March 2021. It upheld its original position.

## Scope of the case

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8. The complainant contacted the Commissioner on 13 March 2021 to complain about the way his request for information had been handled.
9. The Commissioner considers that the scope of her investigation is to determine whether or not the Partnership Review Process report engages either section 36 or section 43 of the FOIA. She will then decide whether the list of external examiners engages section 40(2) of the FOIA.

## Reasons for decision

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## Section 36 – Prejudice to the Effective Conduct of Public Affairs

10. Section 36(1) states that this exemption can only apply to information to which section 35 does not apply.
11. 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".*
12. 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 her own opinion. The Commissioner's role is to: establish that an opinion has been provided by the Qualified Person; to assure herself 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?*

13. As is customary in cases involving the use of the section 36 exemption, the Commissioner sought, from the University, a copy of the Qualified Person's opinion. She also asked the University to explain when the opinion was provided and what information made available to the Qualified Person to inform that opinion.

14. The University responded to say that:

*"This request was considered at a meeting of the University Executive board attended by the Vice Chancellor (as the qualified person) on the 3rd February 2021."*

15. The University confirmed that the Qualified Person had had access to both the withheld information and the request. It informed the Commissioner that:

*"The qualified person considered whether it was appropriate to disclose the Review Report in the interests of transparency and accountability but concluded that those objectives were outweighed by the inhibiting effect that disclosure was likely to have on those contributing to review processes. The Review Report provided at the relevant time an assessment of the matters under scrutiny i.e., an assessment of the current state of the partnership arrangement between LMA and the University, including assessing resources and identifying areas for development or improvement. The review relied for its efficacy on the co-operation and openness of the participants, which included a number of students, as well as LMA staff and an external member of the review panel. That was reinforced by the fact that the process was conducted in the expectation that it would be confidential to the University and to LMA for the purposes of eliciting candid and open responses, and the Review Report was issued to the parties in the expectation that it would be kept confidential. The qualified person was satisfied that disclosure would be likely to have the relevant prejudicial effects i.e., inhibiting the free and frank exchange of views for the purpose of deliberation and prejudicing the University's wider objectives as those of widening participation and achieving positive outcomes for students."*

16. The initial submission from the University did not, in the Commissioner's view, provide a sufficiently definitive view of exactly what the Qualified Person's opinion was. What the University provided appeared to be, at best, a second-hand account of a meeting attended by the Qualified Person with no contemporary written record to support it.

17. As the Commissioner has noted above, the operation of section 36 revolves around the opinion of the Qualified Person and the caselaw

requires that opinion to be afforded a considerable margin of appreciation. Given the centrality of the opinion, the Commissioner must therefore be certain of exactly what the Qualified Person's opinion was.

18. The Commissioner therefore asked the University to provide a copy of the minutes of the meeting referred to, or any correspondence with the Qualified Person or their private office which would provide a definitive record of their opinion.
19. The University responded to say that the Qualified Person had, at the meeting in question, approved a particular response to be sent out to the complainant, however it noted that the Qualified Person had not signed or otherwise authorised a definitive record of their opinion.
20. The University instead provided a letter, signed by Professor Liz Barnes CBE and dated 22 October 2021, in which Prof Barnes states that she considers that the exemption would have been engaged at the time of the request. Prof Barnes also expressed the view that she considered that the exemption would still be engaged.
21. Prof Barnes is the University's Vice Chancellor and therefore entitled to act as its Qualified Person for the purposes of section 36(5) of the FOIA.
22. The Tribunal in *O'Hanlon v Information Commissioner* (EA/2015/0120), ruled that a public authority may seek (and rely on) a fresh opinion from its Qualified Person up to and during an appeal to the First Tier Tribunal – providing that opinion is reasonable.
23. In view of the uncertainty surrounding exactly what opinion the Qualified Person gave at the time of the request, the Commissioner considers the letter of 22 October 2021 to constitute the Qualified Person's opinion for the purposes of the analysis that follows.

*What was the Qualified Person's opinion and was it reasonable?*

24. In her letter of 22 October, the Qualified Person states that disclosure would be likely to inhibit the free and frank exchange of views of the purposes of deliberation because:

*"It is important for the University to scrutinise its academic partnerships in order to: ensure that there is strategic compatibility between the partner and the University; gain a clear insight into current operations to identify good practice and to address areas that require improvement; maintain the integrity and quality of the University's awards; and assess the suitability of resources deployed. The reviews, which are conducted by a panel of University staff together with an external member, involve a series*

*of interviews with the partner, the details of which and the related conclusions are set out in the Report.*

*"Partnership reviews depend significantly on the exchange of views between the University and the partner, in this case Liverpool Media Academy (LMA), and their success is contingent on those views being candid and honest. It is imperative therefore that the partner and panel can set out their views comprehensively and critically in respect of each aspect of the collaborative arrangement and that the partner can comprehensively respond to any questions and address any criticisms in order that a properly informed assessment can be made by the University.*

*"If the participants in the reviews such as this have any intimation that the Report would be put into the public domain, there would be a real and significant risk that they would be much more circumspect in their participation in the review process. The result is that the University would not be properly appraised of the performance of the partner and therefore could not make a proper assessment of the efficacy of the collaborative arrangement.*

*"It goes without saying that such openness is fundamental to any future deliberation in a collaborative partnership of the kind entered into with LMA. The prospect of public scrutiny would have presented a real risk of inhibition thereby limiting the effectiveness of any future comparable deliberation processes and, ultimately, diminishing the value of a resulting report."*

25. As has been noted above, the Commissioner is not required to decide whether the Qualified Person's opinion is the one she herself would have given – or even one she agrees with. She need only decide whether it falls within the spectrum of opinions that a reasonable person might hold and is not irrational or absurd.
26. The Commissioner considers it reasonable to suppose that individuals may be less likely to contribute to reports of this kind in the future if they consider that the final report, containing their opinions, will be made public. She also considers it reasonable to suppose that both the University and its subcontractor may be less willing to be frank and candid in their assessments if they fear that such candour may subsequently be held against them.
27. The Commissioner is therefore satisfied that section 36(2)(b)(ii) of the FOIA is engaged and has gone on to consider the public interest test.

*Public interest test*

28. Even though the Qualified Person has identified prejudice which might result from disclosure, the information must still be disclosed unless the public interest favours maintaining the exemption.
29. 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.
30. The Qualified Person has stated – and the Commissioner accepts as reasonable – that the lower bar of prejudice (“would be likely to 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.
31. The complainant stated that the public interest in disclosure of the information was “overwhelming” and pointed to what he felt was a lack of oversight of such arrangements. The University pointed to a general interest in transparency and accountability for the use of public funds.
32. In explaining why the public interest should favour maintaining the exemption, the University explained that:

*"The public interest in transparency and accountability for use of public funds is already fulfilled by the significant volume of information available to students about courses, including methods of delivery, the fees charged and qualifications awarded on successful completion. The University's accounts are also published on its website.*

*"Further, the regulatory oversight by the OfS [Office for Students] seeks to ensure, inter alia, that the University achieves positive outcomes for students, provides value for money, widens participation by those who do not come from a tradition of higher education and ensures that the qualifications it confers on students hold their value. The University is accountable to the OfS for its collaborative provision with LMA in the same way as it accountable for education that it delivers direct and the University's continued registration with the OfS satisfies the public interests outlined above.*

*"These are the many effective means of satisfying the public interest without the prejudice that disclosure of the Review Report would cause."*

33. Having considered the opposing submissions and considered the withheld information herself, the Commissioner is satisfied that, in the circumstances of this case, the balance of the public interest favours maintaining the exemption.
34. The withheld information comprises of a report which reflects a review event that the University carried out. The event involved representatives of the University and the sub-contractor, as well as student representatives. The aim of the event was to reflect on the relationship between the two organisations and suggest ways in which it might be improved.
35. The Commissioner recognises that the report reflects a process in which the University, its sub-contractor and others met to discuss the performance of the sub-contractor. As might be expected, the report looks at the elements of the relationship that are working well, the elements that are not and makes suggestions about how the overall experience could be improved.
36. Those who participated in the review did so on the understanding that they were contributing to an internal report for the University – not a report that would be published. The Commissioner considers it reasonable to assume that some of those who participated in the review would be less willing to do so in future if they considered that their views would be published – and the result would be a lower quality of reviews.
37. Equally, if the report had been prepared with a view to publication, it is likely that the sub-contractor in particular would have shaped its responses in order to protect its reputational and legal position – rather than being candid. Once again, the value of the report arises from the openness and candour with which the participants in the review engage. A progress evaluation report which only reflects a corporate narrative is one which is of little use.
38. The Commissioner is not aware of any widespread concern about the model the University has adopted to deliver its courses or about the particular sub-contractor that is the subject of this request.
39. Any concerns that students have about this provider can be raised either with the Office for Students or the Office of the Independent Adjudicator for Higher Education.



40. The Commissioner therefore considers that the public interest in disclosure of this particular information is not particularly strong – whereas there is a strong public interest in the University being able to carry out a frank evaluation of the performance of its sub-contractor.
41. The Commissioner is therefore satisfied that the University is entitled to rely on Regulation 36(2)(b)(ii) of the FOIA to withhold the information.

### **Section 40(2) – personal data**

42. 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.
43. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. 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 UK General Data Protection Regulation ('UK GDPR').
44. 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.
45. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

*Is the information personal data?*

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

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

47. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
48. 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

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

49. 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.
50. The Commissioner is satisfied that the University's list of external examiners will contain the personal data of the examiners concerned. Whilst their names are likely to be in the public domain through association with their host institutions, the fact that they act as external examiners (and external examiners for the University in particular) is not. Therefore disclosure would reveal something about those individuals (who are clearly identifiable from their names) not previously in the public domain.
51. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
52. 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.
53. The most relevant DP principle in this case is principle (a).

*Would disclosure contravene principle (a)?*

54. Article 5(1)(a) of the UK GDPR states that:

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

55. 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.
56. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.
57. Article 6(1) of the UK 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.
58. 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"<sup>2</sup>.*

59. In considering the application of Article 6(1)(f) of the UK 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.
60. 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*

61. 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.

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<sup>2</sup> 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".*

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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".*

62. The University stated that it was unable to identify a legitimate interest in disclosure of the identity of its internal examiners and that:

*"the public has a legitimate interest in knowing that the University has procedures in place for ensuring the quality and standards of its academic awards, including for its collaborative partnership provision, to fulfil the broad principles of accountability and transparency. That includes knowing that in common with other universities and in accordance with the UK Quality Code for Higher Education which identifies a need for using external expertise, the University deploys a system of external-examiner scrutiny as one element in its internal quality-assurance processes."*

63. The Commissioner considers that, whilst knowing the names of external examiners does not, in itself, satisfy any possible interest in transparency or accountability, she nevertheless considers that it is part of that process.
64. The University already makes the identity of its external examiners known to students when they embark on a course of study – which suggests that there is a legitimate interest in students themselves having access to this information.
65. The Commissioner also notes that, by making the names of external examiners available to the world at large, individuals are able to spot any potential conflicts of interest a particular examiner might have.
66. These external examiners are not the only guardians of the integrity of the University's degrees, but they remain an important part of that process – which means that there is a legitimate interest in knowing who they are.
67. The Commissioner is therefore satisfied that disclosure would satisfy a legitimate interest and has gone on to consider the necessity test.

*Is disclosure necessary?*

68. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
69. Unsurprisingly, as the University was unable to identify a legitimate interest, it was of the view that disclosure was unnecessary. It pointed out that transparency and accountability was already achieved via its

regulation by the Office for Students, publication of information relating to the courses offered and of its external examiners policy.

70. Given that the Commissioner has concluded that there is a legitimate interest in knowing the identities of the individuals in question, this legitimate interest cannot be met by less intrusive means. She has therefore concluded that the necessity test is met and has gone on to carry out a balancing exercise.

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

71. 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.

72. 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.

73. 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.

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

75. The University explained that publication of the identities of external examiners was "not common" in the higher education section:

*"The reason is to protect the external examiners and the integrity of assessment processes from undue influence and interference. Further, the external examiner policy, which comprises the contractual arrangement between the University and the external examiners, provides that external examiners' names and the names of their home institution for each course will be provided in the*

*course/apprenticeship handbooks, which are not publicly-available documents. It also makes clear that students will be advised that they must not make direct contact with external examiners. External examiners therefore have no reasonable expectation that their personal data (i.e. their identities as external examiners for the University) would be put into the wider public domain.*

76. The University noted that this "non-contact" requirement was important because:

*"While the University is able to enforce the non-contact requirement in respect of students by means of the University's disciplinary process, it has no power to prevent anyone else from communicating with external examiners. There would be concerns about individuals who may have ideological or policy-related objections to the University's assessment or quality-assurance processes, or, for example, parents who are simply unwilling to accept a son's or daughter's marks. External examiners could be vulnerable to attempts to influence them, harassment, and abuse or to challenges by members of the public when ultimately it is the University, and not the external examiner, who is accountable for such matters. Such exposure would fulfil no proper purpose and disclosure would be unwarranted in the circumstances."*

77. When asked by the Commissioner what assessment it had made of the reasonable expectations of the external examiners and to explain how it had arrived at such an assessment, the University noted that it had consulted the individuals concerned, but did not consider that they had adequately consented to the disclosure.
78. When pressed by the Commissioner as to the nature of these contacts, the University accepted that it had informed the individuals that it had received a request and asked if they were willing for their association with the University to be disclosed. None of the external examiners had objected. However the University maintained its position that this did not amount to "informed consent" because it did not consider that the examiners were properly aware of the possibility that they could be contacted.

#### *The Commissioner's view*

79. In the circumstances of this particular case, the Commissioner considers that the legitimate interests outweigh the rights of the data subjects.
80. The personal data that would be disclosed relates to the professional life of the individuals concerned. It does not reveal anything about their personal or private life.

81. Whilst the Commissioner accepts that identifying external examiners may not be common in the sector, neither is it unheard of: the University of Leicester publishes such information<sup>3</sup>, as does Cardiff University.<sup>4</sup>
82. The University has made much of the issue of consent – however, this is not the lawful basis on which the personal data would be processed. The Commissioner has not investigated whether or not the University had the consent of the examiners concerned at the time of responding (although, arguably, it did), rather, the Commissioner has been seeking to establish what the reasonable expectations of the examiners were and whether disclosure would be contrary to those reasonable expectations. If it would not be, the legitimate interest in the information is likely to override the rights and freedoms of the data subjects.
83. It seems apparent from the nature of the correspondence that the University has had with the examiners that none of the individuals involved had serious concerns about the possibility of disclosure. The University made plain to each examiner that it had received a Freedom of Information request. Each of the examiners is likely to be a reasonably senior figure within academia, they should be easily capable of understanding the possible consequences of disclosure and objecting if they considered it necessary.
84. The fact that none of examiners objected to the University disclosing the information suggests that disclosure would not cause damage or distress to the individuals concerned.
85. Furthermore, the Commissioner considers that individuals who volunteer and are chosen to act as external examiners should be robust individuals who are not easily subjected to outside influences. Even if such an approach were to be made, they should be well capable of dealing with it.
86. The University has drawn attention to the possibility of disgruntled students or parents subjecting the external examiners to harassment. It notes that it is able to deal with current students via its disciplinary procedures but wider dissemination of the information would enable

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<sup>3</sup> <https://www2.le.ac.uk/offices/sas2/assessments/external/current-undergraduate>

<sup>4</sup> <https://www.cardiff.ac.uk/public-information/quality-and-standards/external-examiner-reports/law/law-and-politics-external-examiner-reports-2016-2018>

those, against whom it cannot threaten sanction, to make a nuisance of themselves.

87. Firstly, the Commissioner notes that the University has not put forward any evidence to suggest it has an issue with current students (who have access to the information already) harassing external examiners and therefore there must be doubts about whether others (who would be less invested in the process than the students themselves) would seek to carry out such behaviour.
88. Secondly, the Commissioner notes that ex-students and parents of current students most probably already have access to this information. Ex-students may retain papers from their studies; parents may have access to their child's papers. The University has not demonstrated that this presents a current problem and it is difficult to see why anyone with any less investment in the process than this would wish to contact an external examiner.
89. In summary, the Commissioner considers that the identity of the external examiners is an important part of the process of ensuring the integrity of academic qualifications. She considers that the information, whilst not publicly available, is still widely available amongst the group of people most likely to make use of it. She is not convinced that disclosure would be contrary to the reasonable expectations of the data subjects – or that the data subjects are likely to suffer damage or distress as a result of disclosure.
90. The Commissioner is therefore satisfied that, in the circumstances of this case, there is sufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. There is therefore an Article 6 basis for processing this personal data and it would thus be lawful.

#### *Fairness and transparency*

91. 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).
92. 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.
93. The requirement for transparency is met because as a public authority, the University is subject to the FOIA.
94. The Commissioner has therefore decided that the information in question does not engage section 40(2) of the FOIA.



## **Other matters**

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95. The Commissioner would like to stress the importance of making an accurate, contemporary, written, record of the Qualified Person's opinion in cases where a public authority wishes to engage section 36. This is important when demonstrating to the Commissioner why the exemption is engaged.
96. The most common and efficient way of doing so would be in the form of a document or letter, signed by the Qualified Person. The Commissioner would recommend that all public use her dedicated template for recording the Qualified Person's Opinion.<sup>5</sup>

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<sup>5</sup> <https://ico.org.uk/media/for-organisations/documents/2260004/record-of-the-qualified-persons-opinion.doc>

## Right of appeal

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97. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

98. 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.
99. 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**