

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

### **Decision notice**

**Date:** 14 March 2023

**Public Authority:** The Governing Body of Staffordshire University

**Address:** College Road  
University Quarter  
Stoke-on-Trent  
ST4 2DE

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

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1. The Commissioner's decision is that Staffordshire University ('the University') correctly applied section 36(2)(b)(i) of FOIA to the requested health and safety report as disclosing the report would be likely to inhibit the free and frank provision of advice. To the degree that any information in the report is environmental information, regulation 12(4)(e) of the EIR is engaged, which concerns internal communications. However, for both section 36(2)(b)(i) and regulation 12(4)(e) at the time of the request the public interest favoured disclosing the report.
2. The Commissioner requires the University to take the following steps to ensure compliance with the legislation:
  - Disclose the inspection report that falls within scope of the complainant's request, with any personal data redacted as appropriate.
3. 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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4. By way of background, the University commissioned its own internal health and safety assessment of three accommodation blocks at Stafford Court provided by a third-party provider, New Beacon Group (NBG), following complaints from the University's students who resided there. The University also met with the students to discuss their concerns and gave them the opportunity to terminate their accommodation agreements. All the students had vacated the premises by 27 August 2022.
5. The complainant made the following information request to the University on 18 October 2022:

"The request is. The health and safety review of Stafford court. that was conducted by the head of health and safety at staffs uni during august.

The reasoning to why we want this report is I feel that Stafford court residents are entitled to see what unsafe living conditions they were subjected to at their time at Stafford court."
6. The University's final position was to withhold the report in scope of the request under section 36(2)(b)(i) of FOIA.
7. As a result of the complaint, the Commissioner asked the University to consider whether any of the requested information could be categorised as environmental information which would be caught by the EIR, rather than FOIA.
8. The University explained that when it first handled the request, it had considered that the majority of the content of the report's content concerned the state of various equipment, fixtures and fittings, (such as light bulbs, fire extinguishers, sockets, doors, windows, sink/shower plugs, ventilation units, wall tiles, ceilings). The report also discussed other matters such as the accessibility of security staff. In the University's view this did not amount to environmental information and so it handled the request under FOIA.
9. On reconsideration the University acknowledges that some of the information in the report, such as information about water hygiene, odours and a reference to some noise emitting from a fire alarm, is environmental information, as defined under regulation 2(1)(a) with regulations 2(1)(b) and (c).
10. The University confirmed that it considered the environmental information in the report is excepted from disclosure under regulation 12(4)(e) of the EIR.

## Reasons for decision

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11. This reasoning covers the University's application of section 36(2)(b)(i) of FOIA and regulation 12(4)(e) of the EIR to the requested report.

### **Section 36 – prejudice to the effective conduct of public affairs**

12. Section 36(2)(b)(i) of FOIA says that information is exempt information if, in the reasonable opinion of a qualified person, disclosing the information would inhibit, or would be likely to inhibit, the free and frank provision of advice.
13. To determine, first, whether the University correctly applied this exemption, the Commissioner must consider the Qualified Person's opinion as well as the reasoning that informed the opinion.
14. Therefore, in order to establish whether the exemption has been applied correctly the Commissioner must:
- ascertain who was the qualified person or persons
  - establish that an opinion was given by the qualified person
  - ascertain when the opinion was given; and
  - consider whether the opinion was reasonable.
15. In this case, the Qualified Person (QP) was Professor Martin Jones, the University's Vice Chancellor. The Commissioner is satisfied that, under sub-section 36(5)(o)(ii) of FOIA, Professor Jones was the appropriate QP.
16. The University has provided the Commissioner with a copy of the submission it sent to the QP.
17. The submission seeks the QP's opinion on the University's proposed approach to the complainant's request and discusses the section 36(2)(b)(i) exemption.
18. The QP submission shows that the QP confirmed that, in his opinion, disclosing the withheld information would be likely to have the effect set out under section 36(2)(b)(i). The Commissioner is therefore satisfied that the QP gave an opinion.
19. The request was submitted on 18 October 2022 and the University issued its refusal notice on 15 November 2022. The QP's opinion in the submission is signed and dated 8 November 2022. The Commissioner is therefore satisfied that the QP gave an opinion about section 36(2)(b)(i) at an appropriate time.

20. The Commissioner has gone on to consider whether the opinion regarding section 36(2)(b)(i) is reasonable. It is important to note that 'reasonableness' is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it to be a reasonable opinion, and not necessarily the most reasonable opinion.
21. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, he must find that the exemption is engaged.
22. The QP's opinion in this case is that the prejudice envisioned under the section 36(2)(b)(i) exemption would be likely to occur if the University disclosed the withheld information. 'Would be likely' imposes a less strong evidential burden than the higher threshold of 'would occur'.
23. In order for the QP's opinion to be reasonable, it must be clear as to precisely how the inhibition may arise. In his published guidance on section 36 the Commissioner notes that it is in public authority's interests to provide him with all the evidence and arguments that led to the opinion, in order to show that it was reasonable. If this is not done, then there is a greater risk that the Commissioner may find that the opinion is not reasonable.
24. In the submission that the University provided to the QP, the University included: a description of the section 36(2)(b)(i) exemption and request, and a copy of the withheld information.
25. The QP explains himself in the submission that he has been briefed on the background and context of the request and provides the following reasoning behind his decision.
26. The University inspected the student residence – Stafford Court - on 17 August 2022. The request is for the health and safety report that resulted from the inspection. The QP says that he understands all student residents were given the opportunity to end their accommodation contracts early. By 27 August 2022, all of the students had vacated the premises.
27. The University undertook the inspection voluntarily in response to health and safety concerns that Stafford Court's student residents raised. The purpose of the report was to let the University itself and NBG know how accurate those concerns were and any remedial action that NBG needed to take. The report identified health and safety matters that needed immediate attention and those matters that were less serious but should be remedied in the near future.

28. The report's author, who was not acting in a statutory or regulatory capacity, does not have the power to compel a third party to act. To be effective therefore, the QP considered that a report of this kind needs a high degree of candour and frankness in order to achieve its purpose. They said that the author would have produced a much more guarded and limited assessment if the report were to be disclosed to the public at large, which is the consequence of disclosing information under FOIA [and the EIR]. Providing partial information would have rendered the report ineffective and neither NBG nor the University would have been properly appraised of the problems and of the remedial steps that NBG should take.
29. The QP considered that disclosing the findings, "would inhibit the candid provision of advice in similar circumstances in future, and the loss of candour would damage the quality of advice and lead to impaired decision-making by the University in particular in relation to placing students with third party accommodation providers."
30. The Commissioner is satisfied that the QP had sufficient appropriate information about the request and the section 36(2)(b)(i) exemption to form an opinion on the matter of whether reliance on that exemption with regard to the withheld information was appropriate.
31. The Commissioner has noted the evidence at paragraph 24 to 25 and, since he is satisfied that the remaining points at paragraph 14 have also been addressed, he must accept that the QP's opinion about withholding the information is one a reasonable person might hold. He therefore finds that the University was entitled to rely on section 36(2)(b)(i) to withhold the report. The Commissioner will go on to consider the University's application of regulation 12(4)(e) of the EIR to any environmental information in the report.

### **Regulation 12(4)(e) – internal communications**

32. Under regulation 12(4)(e) of the EIR, a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. This exception covers all internal communications and the sensitivity of the information is not a consideration for the exception to be engaged.
33. In its submission to the Commissioner the University has confirmed that it commissioned the report internally in response to concerns raised by its students. It was produced by a member of University staff; the Head of Health, Safety and Wellbeing. The University has noted that it had stated in its response to the complainant (and it was noted by the QP) that the report would provide information to both the University and NBG about the remedial action needed. However, neither the report nor any part of its contents was in fact shared with NGB or any third party.

It remained exclusively an internal, University communication and as such falls within the scope of regulation 12(4)(e).

34. The Commissioner is satisfied that disclosing any environmental information in the report would involve disclosing internal communications and that this information therefore engages the regulation 12(4)(e) exception.
35. The Commissioner will go on to consider the public interest test associated with both section 36 and regulation 12(4)(e).

### **Public interest test**

36. In its refusal of the request, the University acknowledged the public interest in transparency and accountability. It said this is particularly so for the decisions University made about the accommodation it provides to students via third-party providers. The University said that it had also considered the public interest in protecting the general public's health and safety, and the University's students in particular.
37. Regarding section 36(2)(b)(i) the University confirmed its view that the balance of the public interest lies in preserving the University's ability to enquire into matters that give it cause for concern. This is so that it can take appropriate remedial steps within its control with regard to its students. The prospect of publication would be very likely to compromise its ability to investigate concerns. This comes with the attendant risk to safety. The University says that protecting its students' safety is of paramount importance.
38. Regarding regulation 12(4)(e), the University says that the public-interest considerations are similar to those already discussed in relation to section 36(2)(b)(i).
39. The University notes that the report refers to matters assessed on 17 August 2022. That assessment may not reflect the current the state of the accommodation nor its state at the date of the request. Disclosing the report would therefore be likely to give a misleading impression.
40. In addition, the University argues that the volume of environmental information is small and includes an unanswered question regarding water quality, which is repeated three times. The University does not consider that disclosing the environmental content would provide substantive information to the public and would not fulfil the public interest in transparency.
41. The University considers that the balance of public interest lies in preserving its ability to enquire into matters giving cause for concern and to report findings internally. This is so that it can make appropriate decisions in future regarding the choice of third-party [accommodation]

provider. The prospect of publication would, the University says, very likely compromise its ability to make a proper assessment and ultimately to make informed choices regarding accommodation providers. The public interest in maintaining the exception therefore outweighs the public interest disclosing the report, in the University's view.

42. As is usual, the Commissioner will consider the circumstances as they were at the time of the request in October 2022 and up to the University's initial refusal.
43. The University subsequently confirmed to the Commissioner that the inspection report was prepared on 17 August 2022 (the same day as the inspection) and that, other than some minor amendments made to it on 19 August 2022, this was the final report. The University also said that it, "... did not take any action in relation to the property in response to the report." [Which does not quite align with the QP's statement that the report identified health and safety matters that needed immediate attention.] Finally the University told the Commissioner that the outcome of communications it had had with NGB in March 2022 was that its accommodation agreement with NGB would not be renewed after 27 August 2022.
44. The University has stated that the public interest favours withholding the report so that it can look into matters that give it cause for concern and take any remedial steps to make sure students are safe. It considers that publishing the report would be likely to compromise the University's ability to investigate those concerns.
45. However, the Commissioner notes that at the time of the request in October 2022 the future of NGB's agreement with NGB had been agreed, the property had been inspected, the inspection report had been drafted and finalised, apparently no actions were necessary in relation to the property (and so no remedial actions would have been ongoing), and the students had all vacated the property.
46. From the circumstances described to him in this case, it appears to the Commissioner that by the time of the request the University had already investigated concerns. Moreover, there were no students living in the property in question and so students could not therefore have been at risk from the property at that point.
47. The Commissioner considers each complaint on a case-by-case basis. In this case, he does not find that the University has presented a compelling public interest argument for withholding the information under section 36(2)(b)(i) of FOIA. The Commissioner has accepted that the QP's opinion about the inhibition envisioned was reasonable and he gives weight to that opinion. However, because the concerns about the

property – and the associated inspection and report - were no longer live matters he does not consider the inhibition could be severe in this specific case. This is because at the time of the request and the University's refusal advice about the property (the inspection report) had already been given to the University, the University had considered the advice and had proceeded as it considered appropriate.

48. For the same reason, the Commissioner does not consider that the University has made a compelling public interest argument for withholding the information that can be categorised as internal communications under regulation 12(4)(e) of the EIR. There is also an inherent presumption in favour of disclosure under regulation 12(2).
49. The Commissioner therefore finds that, on balance, the public interest did not favour maintaining the section 36(2)(b)(i) exemption or regulation 12(4)(e) exception.

## Right of appeal

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50. 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)

51. 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.

52. 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

**Cressida Woodall**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**