



**Tribunals Service**  
Information Tribunal

Appeal Number: EA/2007/0135

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

**Papers Alone Hearing**

In the matter of an Appeal to the Information Tribunal

**BEFORE**

**INFORMATION TRIBUNAL DEPUTY CHAIRMAN**

**DAVID MARKS**

**And**

**LAY MEMBERS**

**STEVEN SHAW**

**MICHAEL HAKE**

**Between**

**ROGER SALMON**

**Appellant**

**And**

**INFORMATION COMMISSIONER**

**Respondent**

**And**

**KING'S COLLEGE CAMBRIDGE**

**Additional Party**

**Decision**

1. The Tribunal allows the Appeal in part and substitutes a Decision Notice for the Decision Notice dated 20 November 2007 which substituted Notice provides as follows, namely:

- (1) Section 36(2)(b) of the Freedom of Information Act 2000 is not engaged as there was no qualified person capable of forming the reasonable opinion within the meaning of section 36(5) and (6) of the said Act;
  - (2) The requested information is subject to the absolute exemption contained in and provided by section 40(2) of the said Act to the extent the said information contains or otherwise represents the content and/or terms of any and all termination or similar agreements made between Dame Judith Mayhew Jonas and the Additional Party and to the extent that the said requested information is otherwise disclosed the same shall be redacted in respect of any and all proper names contained in the said information and in respect of any other information contained therein whereby individuals or other named parties can otherwise be identified, the redaction to be effected and disclosure to be made within 30 days of the date of this Decision Notice as amended.
2. There shall be a stay on the operation of the amended Decision Notice issued by the Tribunal in accordance with paragraph 1 herein in the terms of the final paragraph of this Judgment.

### **General**

1. This Appeal raises issues in relation to two sections of the Freedom of Information Act 2000 ("FOIA") namely sections 36 and 40(2). The former section deals with the provision of information which may be treated as exempt if in the reasonable opinion of a party who is described as a qualified person, the disclosure of the information in the words of section 36(2):
  - "(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 ..."
2. In subsection (5) of section 36 the term "qualified person" is defined for present purposes as:
  - " (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown."

Subsection (6) goes on to provide that:

- "(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.”

3. Paragraph 53(1) of Part IV of Schedule 1 of FOIA includes as public authorities within the education sector:

“(1) The governing body of –

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- (b) a university receiving financial support under section 65 of the Further and Higher Education Act 1992,

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- (e) any college, school, hall or other institution of a university which falls within paragraph (b).”

4. In the present case the Additional Party which was joined in the wake of directions made during this appeal is King’s College, Cambridge. That institution clearly falls within paragraph 53(1)(e), and not within paragraph 53(1)(b).

5. Section 40 of FOIA provides as follows, namely:

“(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if –

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.

(3) The first condition is –

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene –

- (i) any of the data protection principles ...

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- (6) In this section –
- “the data protection principles” means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act; ...”
6. Section 1(1) of the Data Protection Act 1998 (“the DPA”) provides *inter alia* as follows, namely:

“In this Act, unless the context otherwise requires –

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“personal data” means data which relate to a living individual who can be identified –

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;”

Part I of Schedule 1 to the DPA provides as follows, namely:

“The Principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
- (a) at least one of the conditions in Schedule 2 is met ...”

Schedule 2 of the DPA which is entitled “Conditions relevant for the purposes of the First Principle: Processing of any personal data” provides as follows, namely:

“6(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedom or legitimate interest in the data subject ...”

7. The circumstances in which the initial and relevant request was made are somewhat unusual, not only because they deal with a well known establishment of higher learning, but also since the information requested partakes more of a financial flavour than matters

which are purely of an educational nature. The Tribunal is also struck by the fact that the individual making the request in this case is himself a former employee of the public authority of whom the request is made. As indicated above, King's College has been joined as the Additional Party. It has not contributed to the submissions put before the Tribunal on the hearing of this appeal which has been determined on the papers alone. It has, however, been able to provide the disclosable materials which have been considered by the members of the Tribunal on a closed basis. The Tribunal is grateful to the submissions which have been made on paper by the Appellant on the one hand, and by the Information Commissioner ("the Commissioner") on the other.

### **The Request**

8. By a letter dated 21 April 2006, the Appellant who is it seems a former Bursar of the College which is the Additional Party, made a number of requests with regard to the then recent resignation of Dame Judith Mayhew Jonas ("Dame Judith") as Provost of the College by seeking disclosure of the following information, namely:

"All papers and minutes of the Council and Governing Body relating to the resignation of Dame Judith Mayhew Jonas as Provost, including the final agreement(s) reached with her.

All papers and minutes of the Council and Governing Body relating to my suspension and dismissal that I have not already been provided [*sic*] and including the record of the report to the Governing Body of the settlement and statement agreed on 8 July 2004.

Any other papers and minutes of the Council and Governing Body since my suspension that refer to me.

The 2005 Report of the Inspectors of Accounts."

9. As will be seen, the only request which has been the subject matter of this appeal is the first of these four specific requests.
10. The College, as the public authority, responded by letter to the Appellant dated 8 May 2006. It referred to the fact that the College had received the Opinion of Leading Counsel as to the qualified person who was able to apply the exemption set out in section 36 of FOIA, referring to the said Opinion as being substantially "a matter of public record", but nonetheless attracting the qualified exemption otherwise contained in section 42 of FOIA dealing with legal professional privilege. The Tribunal is not concerned with the latter aspect in any way in this appeal. With regard to the first request, namely the

papers and minutes relating to Dame Judith's resignation, the College claimed that it held information relevant to that request adding the following, namely:

"(1) Any publishable minutes and papers of the Council and Governing Body are exempt under section 21 the FOIA, "information reasonable [*sic*] accessible by other means". You will be familiar with this procedure – an appointment with the Archive Centre during the normal working hours will allow you access to these papers.

The College considers that the exemption under 36(2)(b) of the FOIA applies to the sensitive (closed) business minutes. The relevant "qualified person" – the Acting Provost – considers that the disclosure of these documents would, or would be likely to inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation.

The information you are seeking relates to the discussion at College meetings of a senior named College Officer. Preparing papers for discussion for the part of the meeting where matters proceeding on a closed rather than an open basis of this nature are discussed, is undertaken to encourage those attending the meeting to consider the issues and then express themselves freely without fear that their views will come into the public domain. It is also likely to encourage those who are unable to be present at the meeting to understand the matters that were discussed and to contribute their own views in due course. Similar considerations apply in respect of the minutes that are circulated on a closed basis. Disclosure of the material that you seek is likely to inhibit frankness in the provision of advice and the exchange of views."

11. The College then went on to set out the factors which it recognised as favouring disclosure. In short order they can be categorised as first, the furthering of the understanding of and participation in public debate about the issues of the day which the College regarded as being of "very limited relevance". The second was the promotion of accountability and transparency and the improvement of the quality of decision-making as to which the College also accepted that such aims were desirable but the weight to be afforded to this or these elements had to vary, dependent upon on the type of public authority in question. Therefore it claimed that such factors carried more weight in the case of a body that was directly accountable to elected representatives, e.g. a local authority, than they might do in the case of a Cambridge College. The third factor which had been advanced, or considered, was the promotion of accountability and transparency in spending public money. Here, the College accepted that this was relevant to a limited

- degree, but given the fact that the College received only some public money with the great bulk of its income coming from non-public funds, that factor was again of limited value. Fourthly, it considered the argument that disclosure might allow individuals and companies to understand decisions made by public authorities, but again responded with the contention that the information here did not, in the College's view, have "a wide impact on the general public". Finally, it did not consider that any element of the information sought touched or concerned public health and safety.
12. The College also dealt with section 40 and maintained that the information requested was personal data relating to Dame Judith. Disclosure would therefore constitute "processing" and would contravene the first data protection principle which has been set out above unless one of the conditions for lawful processing was satisfied. It stated that Dame Judith had not consented to disclosure of the information but the College accepted that the Appellant had a legitimate interest, both as a previous officer of the College and as a member of the public, in knowing how the College's money was spent. This was, however, outweighed in their view by the interest of Dame Judith in maintaining the confidentiality of her personal financial and contractual information. There had been a severance package, having been agreed upon on a confidential basis, and this in turn invoked the exemption from disclosure under the provisions of section 41 of FOIA which provisions again are not relevant to this appeal since they deal with information provided in confidence.
  13. The Appellant responded by letter dated 13 May 2006 to the then Acting Provost of the College. In his letter he referred to an official statement which the College had put out in 2005 which had recorded that at a Congregation of the College Fellows held on 15 July 2005, Dame Judith had announced that she was taking up her entitlement to sabbatical leave, informing the College that she would be stepping down from her position as Provost of the College on 31 August 2006. The Appellant referred to the fact that the accounts of the College for the year ending 2005 had recorded "aggregate and unidentified termination payments" of £770,000 which he regarded and described as "an enormous sum for King's College". He added that he believed the great bulk of this sum might relate to Dame Judith, adding "in which event it seems the public statement may have been seriously misleading." He pointed out that such a payment, if true, would represent some ten times her annual stipend which he said "is extraordinary for any termination". The other arguments raised by him in his letter can be dealt with subsequently in this judgment. The Tribunal pauses here to note that not only did Dame Judith not consent to disclosure of the terms of her termination agreement and arrangements but according to a later letter from the College to the Commissioner dated

2 April 2007 the College stated that she was not willing to give her permission. As to the figure of £770,000 put forward by the Appellant, the Tribunal has not received any independent information or confirmation as to the accuracy of that figure save for the reference to the accounts made by the Appellant and more importantly it has not received any evidence as to the breakdown or rationale of that figure or indeed any other figure. The fact remains that the Appellant's comments on the stated level of termination payment have not been responded to by either the College or by the Commissioner.

14. The College responded by letter dated 6 June 2006. First it pointed out that not only had it sought legal advice to which reference will be made below in respect of section 36(2)(b) of FOIA, but it had also "asked for advice from the Department of Constitutional Affairs" the ("DCA"). It added that that department, namely the DCA as it then was, advised the College that in the case of universities:

"... it is normally expected that the qualified person will be the Vice Chancellor, but also that this will not apply in the case of independent colleges like King's College."

The writer of that letter who was the then Acting Provost, Dr Tess Adkins, added that she had undertaken to act as the qualified person for the College on the basis of the legal advice that the College had received and in the absence of a determination from the DCA. As such qualified person, she claimed that she had to make a decision as to whether the interests of public disclosure were outweighed by the interests of free and frank advice and exchange of views and in the present case, she had decided the qualified exemption in section 36 did apply "after consideration of the arguments on both sides". With regard to the Appellant's request for sight of the final agreement with Dame Judith, she reiterated the view formerly expressed by the College as to the arguments advanced in respect of not only section 40, but also sections 41 and 43 of FOIA, thereby upholding the public authority's previous decision. The Tribunal again pauses to observe that the letter on any basis demonstrated considerable uncertainty as to whether the Acting Provost felt that she was a qualified person to make the decision she was being called upon to make. This issue will be revisited in further detail below.

#### **Exchanges between the Commissioner and the Public Authority**

15. The Appellant sought a review on the part of the Commissioner with regard to the College's application of the exemptions which have been highlighted above. In a letter dated 9 May 2007, the Commissioner quite properly raised the question as to whether for section 36(2)(b) of the FOIA to be relied upon it had to be determined "if a Minister of the Crown had authorised the College in line with section 36(5)(o)(ii) or any officer or employee of the college in line with section 36(5)(o)(iii) for the purposes of section 36". In



- those circumstances, the Commissioner asked first for a copy of an authorisation which had previously been signed by Mr Derek Twigg MP being the responsible Minister should the College have a copy of the same, and secondly confirmation of whether a reply about section 36 was received from the DCA and if it was, a copy of the same. In addition the Commissioner asked for further arguments which the College wished to put forward with regard to the applicability of section 40(2).
16. The College responded to the Commissioner by letter dated 2 July 2007. With regard to section 36(2)(b), it pointed out that it had to be determined whether a Minister of the Crown had authorised the College in line with the relevant sub-subsections of section 36(5) already referred to. A copy of an undated list of qualified persons (subsequently said to have been dated on 21 December 2004) has been shown to the Tribunal and indeed it was enclosed with the College's letter just referred to. It contained a list of specific institutions which related to the education and skills sector and included in particular the subheading "Universities" adding under that rubric the phrase "Vice-chancellor or Chief Executive (depending on title used)". There was no other subcategory or heading whether similar to the term "Universities" or otherwise which specifically addressed the particular case of a Cambridge college such as King's College. Insofar as confirmation from the DCA was concerned, the College confirmed that it did seek such confirmation but that the only reply about section 36 that it did receive was what it called a "holding reply". Again, it enclosed the email correspondence. What this correspondence showed was that the DCA had received a query from the College and that it undertook to forward the query to a policy adviser whose name has been redacted being the person who was at that time responsible for the matters relating to section 36 "qualified person".
17. Pausing here, the Tribunal has been shown, as indeed has the Appellant, a copy of an extract from the Leading Counsel's Opinion which has been referred to above. It is material to set out the relevant passage here when it deals with the question as to whether, and if so to what extent, Kings College could be viewed as a "University" for the purpose of the designation which has been referred to. It should perhaps be added here that Mr Twigg, at the relevant time was Parliamentary Under-Secretary of State at the Department for Education and Skills. The Opinion read in relevant part as follows, namely:
- "3. The question that arises is which institutions count as "Universities" for the purposes of this designation. Clearly the University of Cambridge would be one such institution, and so in relation to the information held by the University, the Vice-chancellor would be the qualified person. The Vice-chancellor cannot be the

qualified person in respect of King's College, however, as he is not an officer or employee of King's College (see section 36(5)(o), making it clear that the qualified person must be an officer or employee of the public authority in question).

4. Is the College itself a "University" within the meaning of the designation? The designation does not define the term "University". In our view, the designation must be read in conjunction with the Act itself, and in particular in conjunction with Schedule 1, Part IV, paragraph 53, which lists the bodies concerned with further and higher education that are intended to count as "public authorities" for the purposes of the Act as follows:

*The governing body of –*

- (a) an institution within the further education sector,*
- (b) a university receiving financial support under section 65 of the Further High Education Act 1992,*
- (c) an institution conducted by a higher education corporation*
- (d) a designated institution for the purposes of Part II of the Further Higher Education Act 1992, as defined by section 72(3) of that Act, or*
- (e) any college, school, hall or institution of a university which falls within paragraph (b).*

King's College may potentially fall within paragraph 53(1)(b) or (e), (clearly it does not fall within any of the other three subparagraphs at paragraph 53). In our view King's College does not fall within paragraph 53(1)(b); but it does fall within paragraph 53(1)(e). Does this mean that it is a "University" within the meaning of the designation?

5. We do not consider that this is an easy question. One possible reading of the designation is that the term "University" is used to refer only to institutions falling within paragraph 53(1)(b). Although this is a more natural reading of the language of the designation, it does lead to a surprising consequence: namely, that no qualified person has been designated in respect of the institution in paragraphs 53(1)(c), (d) or (e). In other respects the designation appears to be intended to cover the education and skills sector in a comprehensive way; it would be curious for the institutions in paragraphs 53(1)(c), (d) and (e) to have been omitted. Hence we consider that the better reading of the designation is that the term "University" is used in that document so as to extend to all institutions falling within paragraphs

53(1)(b) – (e): we consider that this is a permissible reading in linguistic terms, and that it should be adopted as being the reading that makes better sense of the designation as a whole. It follows that in our view, the “Vice-chancellor or Chief Executive” of King’s College is the qualified person who has been designated for the purposes of section 36. Of course, there is no employee or officer of King’s College who bears that specific title; but we consider that the “Chief Executive” of King’s College for these purposes would be the Provost. In other words we consider that the designation is intended to apply to the individual who carries out the function of Chief Executive, whatever might be the title of that individual’s office or post. For the time being, we consider that the qualified person in respect of King’s College would be whoever is carrying out Dame Judith’s functions in her absence on sabbatical leave.”

18. In connection with section 40(2), the College as the public authority confirmed that a press release as above referred to had been issued and a copy of this was provided to the Commissioner. The College also referred to a Decision Notice previously issued by the Commissioner bearing the reference number FS50068239 in which the Commissioner had concluded the following in relation to a FOIA request made to the Denbighshire County Council that the section 40 exemption should be upheld and had referred to the reasonable expectations of privacy held by employees of a public authority. This was in support of the College’s view that Dame Judith had a reasonable expectation of privacy in relation to the information requested and had been given specific guarantees that this information would remain confidential.
19. The Commissioner sent a further letter dated 25 July 2007 to the College. The Commissioner sought in particular the reasons why, in the view of the College and the purported qualified person being the Acting Provost, it was considered that the exemption in section 36(2)(b) had been applied correctly. The Commissioner reminded the College that this involved a two-stage process, namely the establishment of prejudice which meant establishing that the opinion of the qualified person was reasonable and thereafter the establishment of whether the public interest favoured maintenance of the exemption. In particular, the College was asked to provide reasons why the qualified person considered that the disclosure of the information in question would, or would be likely to inhibit the free and frank provision of advice or the free and frank exchange of views for the purpose of deliberation and secondly, why the public interest was considered to favour maintenance of the exemption.
20. The College responded initially by letter dated 2 August 2007 confirming that Dame Judith had not been willing to give her permission to disclosure of the Council and

Governing Body minutes. By further letter of 8 August 2007, the College dealt with these queries by making two arguments. The first was in response to the question as to why the qualified person had considered that the disclosure of information would be likely to inhibit free and frank provision of advice and was that already advanced in the College's exchange with the Appellant of 6 June 2006, namely that matters had proceeded on a closed basis and therefore members of the meeting were encouraged to consider the issues and express themselves freely without fear of disclosure. The stated reasons as to why the public interest was considered to favour maintenance of the exemption have been touched on. In particular it was stated that erosion of confidence in the system would result in actions being taken without committee discussion or sanction, thereby inhibiting College governance or disclosure might lead to undocumented decisions, both of which courses would be contrary to the public interest. This argument is commonly referred to as the need "to enjoy a safe space" in the deliberation and resolution of issues debated within public authorities.

#### **Decision Notice**

21. The Decision Notice is dated 20 November 2007. Much of the preceding chronology is set out in the Notice, but out of fairness to the issues canvassed by the public authority, the Commissioner revisited further arguments regarding the balance of public interest over and above the two principal arguments which had been advanced by the public authority, namely that non-elected representatives attract a lesser degree of accountability and transparency than public authorities in which such representatives are elected, and secondly that the element of public interest was correspondingly reduced when the majority of the authority's income did not emanate from public funds.
  
22. In effect, the Commissioner summarised in paragraph 34 of the Notice five further factors which had been mooted by the public authority in this case. First, there was the argument that the ability to engage self-governance could be prejudiced through disclosure since confidential committee deliberation would be at risk or otherwise upset; secondly Guidance Notes produced by the DCA on the disclosure of committee minutes stated that if committee meetings were not properly recorded, this would be counter to the public interest; thirdly the Guidance Notes by the DCA stressed the safe space notion already referred to; fourthly, there would be inhibition of debate within the deliberative process should disclosure follow and finally, the knock-on effect of disclosure meant that nothing would be committed to paper. Much of these arguments are self-evidently overlapping. As to the last of these contentions the Tribunal is not persuaded at least in the absence of the clearest evidence to such effect that disclosure in this case would necessarily lead to a position in which nothing would ever be committed to paper.

However, the conclusion formed by the public authority, as is perhaps clear from the above, is that on the above analysis and as confirmed by a legal opinion from Counsel on the balance of the public interest, it was regarded as being reasonable to conclude that the balance of public interest favoured a maintenance of the exemption. The Tribunal has not been shown a copy of that opinion.

### **Grounds of Appeal**

23. The Appellant lodged extensive grounds of appeal under cover of a notice of appeal dated 14 December 2007. Much, if not all, of the substantial points raised by him in the grounds of appeal have in effect been revisited in suitably extensive written submissions provided by him in the wake of the Tribunal's directions in the Appeal. However, in short terms the arguments raised by the Appellant with regard to section 36(2)(b) are subdivided into five sub issues. The first is whether the acting Provost was a qualified person at the time of the request. Secondly, the sub issue was whether the right to protect advice and views could be extended "automatically to a wide class of business" in this case all so called reserved business. Thirdly, the question was whether the view of the qualified person was objectively reasonable, fourthly, whether the right to protect advice and views extended to the factual information which underpinned the advice and views and finally, the resolution of the respective balancing test regarding the public interest.
24. The written submissions provided by the Appellant deal with the sub issues in the following manner. First, he claims that there is a clear distinction in the FOIA legislation especially in paragraph 53 of Schedule 1 between universities and colleges within the University. It is common ground that the College is not a University. Equally there can be no dispute but that the College in effect is a separate legal entity from the University. It is also unquestionably a separate public authority for the purposes of FOIA. The evidence in this case is sufficient to demonstrate that it is governed by a Provost and Fellows who together constitute its Governing Body. The Provost is clearly charged with the responsibility for overseeing the College's affairs. Its Council is no doubt drawn from the senior members within the College and is charged with the administration and management of the College's affairs and oversight of the College's educational work save no doubt where such powers are held by or otherwise reserved to the Governing Body. To be fair to the Appellant at the time of his drafting his written submissions he had not seen all the legal advice from which the lengthy quotation which is set out above at paragraph 17 is taken, although the Tribunal notes that he would at that time have had access to a redacted extract of the advice. Instead he took issue with the Reply put in by the Information Commissioner to the effect that "it would be surprising if no QP had been

- designated (in a designation purporting to cover “the education and skills sector”) in respect of institutions falling within paragraphs 53(1)(c), (d) or (e) of schedule 1, Part IV of FOIA.” The Commissioner’s contention was that the better reading of the designation dated 21 December 2004 signed by Mr Twigg was that it included all the institutions falling within paragraph 53(b) to (e) on the basis that the College was an institution falling within paragraph 53(1)(e). To be fair to the Appellant the attitude adopted by the Commissioner is no more than a shorthand description of the views expressed by Leading Counsel in the Opinion which has been cited at length above.
25. The Appellant points in particular to another contention made by the Commissioner in the Commissioner’s Reply. This contention is that when the College asked the DCA for advice on the point the DCA advised the College that in the case of Universities it was normally to be expected that the qualified person would be the Vice Chancellor but that the same would not apply in the case of independent colleges such as the College itself. This contention appears in the letter dated 6 June 2006 from the College to the Appellant. The Tribunal has not seen the material which forms the basis of that contention in the Commissioner’s Reply but if correct it would mean that no matter how generous the reading which is afforded to the term “University” in the list of qualified persons signed by Mr Twigg a sub entity of the University (as would be the case with the College in the present case) would simply not be covered. The matter is confirmed by the fact that at the relevant date of the request there simply was no qualified person appointed with regard to an institution, albeit one within a university, in the form of a college such as the College in this case.
26. The second argument was to the effect that by taking into account the closed nature of certain minutes and papers the College in effect applied a blanket exemption, ie an absolute exemption as distinct from a qualified one which section 36 otherwise purports to be. In effect the Appellant took issue with the fact that the Decision Notice on this point purported to rule and thereby apply a blanket exemption “for any matter which was properly considered initially in closed session”. (Appellant’s written submissions paragraph 19).
27. The third issue raised within this area of the Appeal is whether the view of the qualified person, if there was a qualified person, was objectively reasonable. The heart of the contention made by the Appellant is that governing bodies of colleges such as the present College are almost always made up of academic members. As the Appellant puts it “academics are notoriously robust in their views”. This led to the subsequent contention that were any views to have been particularly sensitive in the way they were recorded, then the identity of the contributors could always “be redacted or omitted from

the minutes". The Appellant added that the normal practice of the College, at least presumably in his experience, had been to produce what he called "minimalist minutes" where speakers were not identified and views not recorded save by a specific request and only the decisions themselves were recorded. He went on to suppose that had that practice been followed in the present case it was "particularly difficult to understand how publication of papers and minutes would inhibit future discussions". With regard to the absence of evidence as to these allegations and alleged practices, the Tribunal is entirely free to take its own view given the failure of the College itself to provide any evidence contradicting the Appellant's assertions. The question for the Tribunal, and this seems to be agreed by both principal parties, is that section 36 entails showing that there is a degree of likelihood being more than 50% on the balance of probabilities that the free and frank exchange of views for the purposes of deliberation would be inhibited by disclosure. In this connection and turning to the third sub issue the Appellant maintains that issues of confidentiality with particular reference to personnel and employment matters are sufficiently "well protected by section 40", there being no need to cite section 36 "as a reason to protect such committee discussions". The fourth issue addresses the unnecessary need to protect factual information as distinct from the advice and views which that factual information gives rise to.

28. Fifthly and finally, the balance of public interest is addressed. Here the Appellant revisits his contention that the press release already referred to was "seriously misleading". This he says necessarily leads to the public interest in the record being put straight. Of more importance perhaps is his contention that the amount of money awarded to the outgoing Provost was "outside all norms" such as to make it a matter of "considerable public interest". This is coupled with the further contention that if anything the College is adopting a stance which is more suggestive of some protection from embarrassment than any other more legitimate stance.
29. The second limb of the Appellant's Grounds of Appeal deals with section 40(2). As to the first sub issue under this limb, the Appellant initially maintained that none of the disputed information could be regarded as personal data, but he has since, quite properly in the Tribunal's view, resiled from that position. He therefore deals as a so called preliminary issue with the question of whether the Commissioner was entitled to take into account the express guarantees of confidentiality imposed on the former Provost and also on the College. In effect the Appellant contends that to impose, albeit by consent, a right of confidentiality is, in the Appellant's view, tantamount to allowing a public authority to "contract out of or at least modify" its obligations under FOIA and thereby the DPA.

Reliance is also placed on the Commissioner's Awareness Guidance No 2 where the following passage appears, namely:

"When entering into contracts public authorities should refuse to include contractual terms which purport to restrict the disclosure of information held by the authority and relating to the contract beyond the restrictions permitted by the Act. Public authorities cannot "contract out" of their obligations under the Act. Unless an exemption provided for under the Act is applicable in relation to any particular information, a public authority will be obliged to disclose that information in response to a request, regardless of the terms of any contract."

30. The Tribunal of course fully agrees with the contention that no contracting out of the basic obligations safeguarded by FOIA can be permissible. The question however here is to what extent the confidentiality assented to by both parties impacts upon the balance to be struck under Schedule 2 of the DPA paragraph 6(1) which entails a consideration of whether the processing is "necessary for the purposes of legitimate interests pursued by the data controller" given what are called "the rights and freedoms or legitimate interests of the data subject".
31. The next sub issue raised by the Appellant and what he calls the "key" issue is whether it is "fair" to publish the agreement struck between the College and Dame Judith in full or at least in part. Here he does have regard to the terms of Schedule 2, paragraph 6(1) which have just been referred to.
32. As was said by the Tribunal in *Corporate Officer of the House of Commons v Information Commissioner and Norman Baker* EA/2006/0015 and 0016 at paragraph 90; the balance to be struck between the relevant elements enshrined in Schedule 2 paragraph 6(1) is comparable but not identical to the balance that applies under the public interest test for qualified exemptions under FOIA as a whole. The Tribunal was there careful to point out, however, that because the processing must be "necessary" for the legitimate interests of members of the public to apply, it is only where first the public interest considerations outweigh or are greater than the prejudices as to the rights and freedoms and interests of the data subject that personal data should be disclosed. In this respect the Appellant again stresses the amount of the compensation paid to the former Provost drawing attention to the case of listed companies where normally compensation would generally be restricted to paying out no more than 12 months' compensation although the Tribunal has not been given any direct evidence of such practices. In the *Baker* case the Tribunal noted at paragraph 78 that in the case of public officials, ie those holding elective office or spending public funds there should be an expectation that those officials' public actions



- be subject to greater scrutiny than they otherwise would be in the case of their private lives. Not unnaturally the Appellant again draws a firm analogy between payment to a Provost in the case of a Cambridge College and the position of departing high level executives in listed companies.
33. The Tribunal is reluctant to draw any direct analogy between the position of the head of an Oxbridge College or similar College on the one hand and listed company chief executives or leading executives on the other. On any basis the two sets of relevant backgrounds are completely different. If nothing else in the case of public companies there is a statutory and regulatory obligation to make full disclosure of details of such arrangements as termination packages etc.
34. Finally, the Appellant again draws attention to the so called misleading content of the press release issued by the College. Quite where the degree of misrepresentation lies is not entirely clear to the Tribunal over and above the fact that the Appellant is clearly unhappy at the fact that very little, if any, detail has been released to the public about the circumstances surrounding the departure of Dame Judith.

#### **The Commissioner's Submissions**

35. The Commissioner deals first with the grounds advanced in respect of section 36(2)(b) of FOIA. At the heart of the Commissioner's contention is that the July 2007 designation which followed the date of the request in this case and which clarified the position of a college such as the College itself was intended "merely in order to put the matter beyond even prima facie doubt". The Tribunal is less than convinced by this argument and is troubled by the designation which was sent on 27 July 2007 by Mr Lammy, the then Permanent Under Secretary of State for Skills which specifically listed "Colleges within collegiate Universities – Head of College by whatever title used" as a heading under the generalised description of qualified persons in this domain, namely "Qualified Person for Certain Universities, s 36 prejudice to effective conduct of public affairs" drawn attention to in the Commissioner's reply at paragraph 30. The Tribunal has not seen this document but feels that it is not been necessary to do so. Neither has it received evidence as to the reasons for its issue. The Tribunal therefore with respect rejects the contention made on the part of the Additional Party and as voiced by the Legal Opinion recited above that it would be surprising if the original designation did not subsume institutions of Universities under the heading of the term "University" itself. Even on the most generous linguistic basis this seems a step too far for the Tribunal. It is not as if there was never at the time of the request any Qualified Person at all, as seems to be the logic behind Leading Counsel's Opinion. There was at all times the relevant Minister and

- in addition by virtue of the 2004 designation the Vice-Chancellor or “Chief Executive”. It follows that in the Tribunal's judgment section 36(2)(b) was never engaged. The Tribunal will go on to consider the position that would have applied had a qualified person been duly designated at the relevant time.
36. On the assumption that the acting Provost at the time of the request was a qualified person the Tribunal would respectfully agree that section 36 would otherwise be engaged. The Tribunal rejects the Appellant's contention that in taking into account the so called closed nature of certain minutes and papers there was in effect the application of a blanket exemption in this case. There is no doubt when looking at the Decision Notice that the Commissioner reached his decision by specific reference to the facts of this case and to the content of the disputed information which the Tribunal has also seen. The Tribunal also endorses the contention made by the Commissioner that as is reflected in paragraph 44 of the Decision Notice the Commissioner notes that he would have concluded otherwise had it appeared the business had been conducted on a closed basis unnecessarily.
37. The third ground turns to the basis on which the opinion of the person purporting to act as a qualified person was or could be treated as being objectively reasonable.
38. Again the Tribunal respectfully agrees with the Commissioner and the contentions made on his behalf that with regard to paragraphs 43 to 45 of the Decision which ruled on the objective reasonableness of the Opinion, he clearly took into account and referred only to the particular circumstances of this case. The Tribunal rejects any suggestion that the minutes which it has seen do anything other than record the views of the Governing Body and the Council. The Tribunal is not satisfied that the Commissioner committed an error of law when viewing the disputed information and when considering the same as related and set out in the Decision Notice. In particular the Tribunal endorses the specific finding in the Decision Notice at paragraph 54 that the fact that the public authority is not wholly subsidised and funded by public money is not a valid argument in support of the view that transparency about the spending of public funds is necessarily thereby reduced. The test adumbrated in the *Guardian Newspapers and Brooke v Information Commissioner* decision is a double one, namely that the Commissioner has to consider first whether the opinion was a objectively unreasonable and secondly, whether it was reasonably arrived at. The fact that this Tribunal may disagree with the qualified person's opinion does not of itself mean that the qualified person's opinion was not a reasonable one for the purposes of section 36: see eg *Evans v Information Commissioner and Ministry of Defence* EA/2006/0064 26 October 2007 at paragraph 21.

39. The letter of 6 June 2006 sent by the Acting Provost to the Appellant referred to above at paragraph 14 shows that the writer of the letter considered all the arguments which were in play at that time by reviewing the earlier letter of 8 May and confirming that the contents of that earlier letter were sound. The Tribunal has no reason to regard the Commissioner's decision on that assessment to be in any way impeachable.
40. The fourth ground and sub issue within the realm of section 36 deals with an invitation in effect to the Commissioner and to this Tribunal to entertain some degree of redaction. Having seen the disclosable material, the Tribunal finds that use of redaction would not of itself deal satisfactorily or at all with the requirements imposed by section 36. The aim of section 36 is to ensure that in the properly held view of a duly qualified person, there can be both a free and frank provision of advice or a similar exchange of views for the purposes of deliberation. In this respect the Tribunal wishes to stress the importance of the chronology. Information was first sought in November 2005 and subsequently formulated in an attempted request in April 2006. Both those dates fell within the time scale covered by the arrangements which have been entered into by the College and Dame Judith. From the College's point of view it is quite understandable how release of the information sought at the time would have greatly inhibited the process. For the avoidance of doubt the Tribunal agrees with the Commissioner that all the disclosable information otherwise requested is caught by his finding that section 36(2)(b) is properly engaged.
41. The fifth and final sub issue on this ground addresses the public interest engendered by the sheer level of the compensation involved. The Tribunal again finds that in this respect the Commissioner's Decision Notice cannot be faulted. As has already been made clear above, the Commissioner discounted the fact that only a small proportion of funding emanates from the public purse and in those circumstances the Commissioner upheld the outcome of the balancing test previously adopted by the purported qualified person.
42. However, for the reasons stated the Tribunal does not find that at the relevant time, ie the time of the request there was a qualified person able to engage the operation of section 36 in the way contended for and found by the Commissioner.
43. With regard to section 40(2), however, not only is it clear now it seems by consent on the part of the Appellant, that personal data was contained and/or reflected in the information requested but it is also apparent that the Commissioner was fully entitled to take into account the guarantees of confidentiality which had been referred to.

44. As pointed out above, the recent decision of *Corporate Officer of the House of Commons* shows that there is a sliding scale in this respect dependent on where the data subject stands with regard to his or her carrying out public functions. To quote from the Decision Notice mentioned above in relation to the Denbighshire County Council Reference No. FS50068239 the Decision Notice being dated 27 July 2006 at paragraph 4.13 the Tribunal endorses the view there expressed by the Commissioner in the following terms namely that: "The Commissioner believes that the right to access official information and the right to reach an equitable compromise in private in employment disputes are not mutually exclusive. However, a balance has to be struck between the public authority's duty to be transparent and accountable about how and why it decided to spend public money in a particular way and the public authority's duty to respect their employees' reasonable expectations of privacy." See also a Decision Notice FS50074995 with regard to the Calderdale Council at paragraph 34 where a similar principle is expounded. The Tribunal suggests that in this case Dame Judith could have been expected to seek independent legal advice and perhaps financial advice with regard to the termination of her employment.
45. The Tribunal begins with the consideration of the legislation itself. Section 40(2) embodies an absolute exemption. However, paragraph 6(1) of Schedule 2 to the DPA entails an examination of the balance to be struck between the legitimate interests as pursued by the Appellant in this case against the prejudice to the rights and freedoms or legitimate interests of Dame Judith as the data subject on the other.
46. The factors which the Tribunal takes into account are the following with regard to the Appellant's position, namely:
- (1) his reliance on the seniority and "public facing role" of Dame Judith;
  - (2) what can for present purposes be called the size of the package;
  - (3) the information, albeit said to be misleading, publicly provided at the time of her departure from the College;
  - (4) his reliance on the Statement of Recommended Practice relating to accounts in higher education otherwise known as a SORP which would justify the disclosure of at least the bulk of the package;
  - (5) his reliance on the fact that even though some personal data might be included in the information requested, this did not of itself necessarily lead to exclusion of the whole of such information; and

- (6) in relation to (2) his reliance on what he perceived to be the normal position of remuneration and compensation details for board members and chief executives both in the public and private sectors.
47. Against these factors the Commissioner draws attention to the following matters, namely:
- (1) termination and similar packages can readily and often contain personal data;
  - (2) the key issue is whether disclosure would be fair or unfair and as such in accordance with the first data protection principle;
  - (3) in relation to (1) the personal data can well extend to financial information regarding an individual's remuneration; and
  - (4) account could properly be taken in this case of the existence of express guarantees of confidentiality and as indicated above Dame Judith as the data subject had a "reasonable and legitimate expectation" that the termination agreement would not be disclosed; indeed the Tribunal has been shown material to show that her insistence and that of the College went to such an extent that the Commissioner had to issue an Information Notice to seek release of the information requested.
48. The Commissioner noted that redaction was not practicable with regard to the termination agreement. Having seen that agreement the Tribunal respectfully agrees.
49. The Commissioner agrees that there are strong legitimate interests in favour of disclosure. However, he considered and again the Tribunal respectfully agrees that the rights of the data subject in particular her claim to enjoy privacy as to her personal data outweighed those legitimate interests which militated in favour of disclosure.
50. In relation to the package in the sense that the same refers to the agreement struck between the parties here surrounding the Provosts departure the Tribunal agrees that on balance it would be unfair to disclose the contents of that package including but not limited to the agreement. That finding is strengthened in the Tribunal's view by reference to the timing of the request occurring as it did during the process which attached to Dame Judith's departure as already mentioned above.
51. However, the Tribunal finds it difficult if not impossible to reach the same conclusion with regard to other materials otherwise sought as part of the request and which do not on any view form part of the package in the sense described above. If nothing else in the absence of clearly incorporated personal data within College "papers and minutes" non disclosure of such information would be impermissible. The Tribunal has considered

these additional materials as requested in this case and has come to the firm conclusion that they should be disclosed subject to the redaction of any and all names and identities otherwise referable to stated individuals and other parties. It follows that all the materials requested be disclosed save for the terms and conditions of any agreement reached regarding the termination of her employment between Dame Judith and the College.

## **Conclusions**

52. For the reasons stated the Tribunal takes the view that the Decision Notice originally issued in this case should be altered in the way described at the outset of this Judgment and it will allow the appeal in relation to the Commissioner's finding regarding section 36(2)(b) on the basis that that section was not engaged, there being no qualified person being capable of giving a reasonable opinion within the meaning of section 36(2) and in particular section 36(5) of FOIA at the relevant time. In relation to the Commissioner's finding with regard to section 40(2) the Tribunal again respectfully amends the Decision Notice to allow disclosure of all materials save for the termination agreement or other document or documents containing or referring to the terms and conditions of the termination of Dame Judith's employment save that all proper names and identified individuals referred to in such additional documentation or information should be redacted.
53. It follows that there will be a stay on the implementation of this amended Decision Notice pending the lodging and resolution of any appeal from this Decision.

Signed:

David Marks  
Deputy Chairman  
17 July 2008