Case Reference: EA/2021/0288

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: on the papers
Heard on: 8 June 2022
Decision given on: 15 June 2022

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY

TRIBUNAL MEMBER MARION SAUNDERS

TRIBUNAL MEMBER PAUL TAYLOR

Between

RICHARD GOODALL

Appellant

and

(1) THE INFORMATION COMMISSIONER

(2) THE UNIVERSITY OF BIRMINGHAM

Respondents

Decision: The appeal is dismissed.

REASONS

Introduction

1. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.

2. This is an appeal against the Commissioner's decision notice IC-86739-N5N2 of 7 September 2021 which held that the Second Respondent (the University) was entitled to rely on s 40 and s 42 of the Freedom of Information Act 2000 (FOIA). The Commissioner held that the University breached s 17. The Commissioner did not require the University to take any steps.

Factual background to the appeal

3. The University informed the appellant on 1 July 2020 that he was being investigated for misconduct as a result of a post on his Facebook page. The appellant read the University regulations governing the proposed investigation and 'was concerned, inter alia, that it made no provision for a student to be found innocent. Instead, if a student denied wrongdoing, they would then be subject to a more serious level of disciplinary process where there was a risk that they would be excluded from the University'.

4. The appellant made two Stage 1 complaints to the University. One was a complaint that the individual who had initiated his case had discriminated against him ('the first Stage 1 complaint'). The first Stage 1 complaint is not in issue in this appeal. Following the first Stage 1 complaint the investigation was not pursued.

5. On 21 August 2020 the appellant made a further Stage 1 complaint ('the second Stage 1 complaint') that the University disciplinary system was unlawful in that:

    1. It failed to presume innocence
    2. It does not take account of a student's other rights including, in particular, the right to free expression
    3. It has no safeguards against discriminatory behaviour by the administrators of the disciplinary system
    4. The "Disciplinary Offences" are not defined to an objective standard.
    5. It accepts unevidenced anonymous complaints
    6. It is imposed on students without making clear what it means in practice
    7. It is unfair and unreasonable

6. On 29 October 2020 the investigating officer wrote to the complainant to inform him that the second Stage 1 complaint had not been upheld. The investigating officer wrote:

> With regards your complaint as outlined above that certain Regulations are unfair, unreasonable and in breach of the University's statutory and regulatory obligations, I

sought legal advice to understand the process followed in the drafting and review of said Regulations.

On the basis of the information provided to me in response to my above request I am satisfied that the process followed ensures continued compliance with the University's statutory and regulatory obligations, through a robust process of review, consultation and approval.

In addition, with regards your complaint relating to the individuals who implement the Regulations I am confident that the University ensures that the implementation of such Regulations is done in a manner consistent with legal obligations via the regular training and development of relevant staff.

All University staff complete mandatory Equality and Diversity training, which must be refreshed every 3 years. Staff who work in the area of Student Conduct, Complaints and Appeals also attend external training delivered by the Office of the Independent Adjudicator for Higher Education (OIA) and education law specialists on issues relating to case management and implementation of misconduct proceedings.

Through this combined approach of regulatory review and staff training and development, I am confident that the University ensures that the Regulations referred to in your complaint and policies directing implementation are compliant with all relevant obligations.

In summary, on considering the legal advice received and following investigation I am satisfied that the aforementioned University Regulations (Section 1) were robustly developed and do not contravene the University's relevant obligations under the referenced UK laws, Acts, Regulations and assumptions as outlined in Sections 2 and 3. Furthermore, I am satisfied that the University staff are competently trained and fully followed all relevant University regulations; I therefore conclude that your complaint is not upheld.

7. The appellant has requested a copy of the legal advice in order to understand the reasons for his complaint not being withheld.

8. On 23 November 2020 the appellant made a Stage 2 complaint to the University about a failure to give reasons for not upholding the second Stage 1 complaint. The University dealt with both Stage 1 complaints together at Stage 2.

9. On 14 April 2021 the Senate Review Panel upheld part of the complaint:

> The Panel was concerned about both your complaint and the response you then received […] the Panel did not feel that the response was satisfactory: it may be that the issues you had identified had been addressed to the satisfaction of the Investigating Officer but there was a reasonable expectation that you should have received some explanation of why this was the case.
>
> The Panel therefore upholds in part the second complaint. In consequence of this, I have been asked by the Panel to contact Legal Services regarding the advice provided and enquire as to whether it would be appropriate to release this to you.

…
Recommendation: The Panel recommends that a review of legislation relating to misconduct be undertaken in order to clarify that the purpose of an initial meeting with the Investigating Officer is to explore the issues of concern and to state explicitly that one outcome of such a meeting is that the Student Conduct Officer may recommend that no further action is necessary.

10. On 25 May 2021 a member of the University's registry wrote to the appellant and stated that:

> As you know, I was instructed by the Senate Review Panel to ask Legal Services that their advice to the Investigating Officer be made available.
>
> I have now been informed by Legal Services that legal advice, including that which is provided by Legal Services at the University to internal clients, is protected by legal professional privilege, which protects communications between a lawyer and their client from disclosure. It would therefore not be appropriate to disclose such advice to you.
>
> I have further been advised that the Director of Legal Services wrote to you on 1st April 2021, confirming to you this position.

Request, Decision Notice and appeal

The request

11. This appeal concerns the following request made on 17 November 2020:

> Please supply me with all correspondence and documentation associated with the attached document.
>
> In particular please supply the 'legal advice' upon which [*name redacted*] claims to have relied and any other information which [*name redacted*] says were provided to me in response to my above request.

The response

12. The University dealt with this as a Subject Access Request (SAR). On 17 December 2020 it provided some information but withheld the advice which it stated would engage Legal Professional Privilege.

13. The appellant wrote to the University on 21 January 2021. He stated that privilege had been waived.

14. The appellant referred the matter to the Commissioner on the 2 February 2021

15. On 1 April 2021 the University informed the appellant that it did not consider that privilege had been waived.

16. On 25th June 2021, in response to a request from the Commissioner, the University provided a response under FOIA. It refused to provide the information under s 40(1) and s 42.

The decision notice

S 40(1) – personal data

17. In a decision notice dated 7 September 2021 the Commissioner decided that the Council had correctly applied s 40(1) and s 42 FOIA for the following reasons.

18. Having viewed the withheld information the Commissioner was not persuaded that the second part of the withheld memo has sufficient connection to the appellant to make it his personal data. It reveals nothing of biological significance about him and does not affect his privacy in any way. It is not 'obviously about' the appellant nor does it affect his rights and freedoms in any significant sense. The Commissioner was not persuaded that the contents of the memo were intended to 'influence' a decision affecting the complainant. The memo focusses on the University's policies. The advisor's view as to legality would not be determined by the grounds of complaint.

19. The Commissioner concluded that the final four paragraphs of the memo were not the complainant's personal data. The rest of the document was the appellant's personal data and covered by s 40(1).

S 42 – Legal professional privilege

20. The memo was written by one of its legal advisors for the sole purposes of providing advice to the officer on the legality of the University's regulations and BUDS. The Commissioner was satisfied that the document attracted legal advice privilege.

21. The Commissioner did not accept that privilege had been waived. The statement by the officer does not confirm explicitly what the legal advice said. The first part of the statement refers to the fact that advice had been sought. The second part states:

> On the basis of the information provided to me in response to my above request I am satisfied that the process followed ensures continued compliance with the University's statutory and regulatory obligations, through a robust process of review, consultation and approval.

22. The wording of the statement makes clear that, although informed by the information provided, the Officer is giving their own opinion. It does not amount to the disclosure of even a summary of the legal advice provided and even if it had, the Commissioner did not consider that informing a person of the overall outcome

of legal advice amounts to having waived privilege over the entire contents of that advice.

23. The Commissioner was satisfied that the withheld information engages section 42 of the FOIA.

24. The Commissioner did not consider there was any appreciable wider public interest in understanding the grounds of the complainant's complaint or the university's handling of it. Further the memo says little about either.

25. The Commissioner recognised that there is some public interest in understanding whether the University's policies and regulations are fit for purpose. The withheld information does not add much of significance to that debate.

26. The fact that one legal adviser considers a particular course of action to be legal or illegal does not make it so. The advice does not appear to be stale and the number of people who are potentially affected by its contents is not particularly large. The Commissioner did not consider that the university had in any way misrepresented the advice.

27. The Commissioner concluded that the public interest in disclosure of this information was weak, whereas there is a very strong public interest in protecting the principle of legal professional privilege. She was satisfied that the balance of public interest favours maintaining the exemption.

S 17 – time for compliance

28. As the University failed to issue a refusal notice relying on s 42 within 20 working days the University breached s 17 FOIA.

Notice of Appeal

29. The tribunal has read and taken account of the grounds of appeal in full. In essence the appellant asserts that the Commissioner was wrong to conclude that the withheld information was covered by legal professional privilege and wrong to conclude that the public interest favoured maintaining the exemption.

30. The appellant makes the following criticisms of the decision notice:
    30.1. The Commissioner made factual errors.
    30.2. The Commissioner's conclusions were inconsistent.
    30.3. The Commissioner failed to consider if the memo was confidential.
    30.4. The Commissioner failed to consider who the client was or erred when considering who the client was. The client was the Senate, as represented by the Senate Review Panel. The 14 April letter makes clear that the client considered that natural justice and the need for reasons to be provided

overruled legal professional privilege and indicated that they wished the memo to be disclosed.

30.5. The Commissioner erred in suggesting that because the investigating officer prefaced her disclosure of the substance of the memo with 'I am satisfied that', this excused the breach of confidentiality.

30.6. Either the disclosure is an opinion that does not reveal the substance of the memo or it is an accurate representation of the contents of the memo and confidentiality has been breached.

30.7. It is not for the Commissioner to make a judgement on whether the withheld information adds much of significance to the debate on whether the universities policies and regulations are fit for purpose. Other opinions are that it is essential to call out universities that inhibit their students' free speech which requires that complaints procedures, inter alia, give reasons for their rulings so that those reasons can be challenged. The appellant cannot challenge the university's rejection of his complaint without the reasons.

30.8. The Commissioner did not take account of the following in the public interest balance: transparency, furthering public debate, the large number of people affected, the prior lack of transparency in the public authority's actions (as admitted by the authority) and the absence of litigation.

30.9. Given the view of the Senate Panel, where the client itself is accepting that it has not been transparent and should be, this matter should follow **Mersey Tunnel Users Association v Information Commissioner and Mersey Tunnel** where disclosure was ordered because of the lack of transparency in the authority's actions and reasons.

31. In relation to the public interest in disclosure the appellant states as follows:

> The public interest in disclosure of the legal advice upon which Birmingham relied to reject [*the appellant's*] claim that its rules and procedures were unlawful is strong. The argument revolves around two fundamental human rights: the Article 6 right to a fair trial which requires that reasons be given for any ruling and the Article 10 right to freedom of expression. While the Education (No 2) Act section 43, under the heading: Freedom of speech in universities, polytechnics and colleges already provides that: "*Every individual and body of persons concerned in the government of any establishment to which this section applies shall take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students* [..]" widespread breach of that principle by universities has lead to the government bringing forward a new Higher Education (Freedom of Speech) Bill. Establishing and publicly disclosing how [*the University*] justifies its rules and regulations against this political backdrop is therefore of significant public interest, as is its refusal to give reasons for its findings in a complaint against itself.
>
> In this political environment of strong public interest in free speech matters, especially within universities, there is a strong public interest in disclosure of the memo at issue in this case.

32. The appellant asks for disclosure of the whole memo, including the part which is his personal data.

The Commissioner's response

Confidentiality, waiver and client

33. The withheld information is marked as legally privileged and confidential. The commissioner has no reason to doubt the University's submissions and there is no evidence to suggest that the advice has been disseminated widely internally without restriction/confidentiality or has been made publicly available so as to remove that confidentiality.

34. The commissioner accepts that the correspondence sent to the appellant on 29 October 2020 does not constitute a waiver of privilege. The correspondence was restricted to the appellant. The letter does not give any confirmation as to what the legal advice actually was.

35. The letter to the appellant from the University Senate dated 14 April 2021 [*erroneously referred to in the response as the letter of 25 May 2021*] is not an instruction to waive privilege in the withheld advice.

Public interest

36. The Commissioner notes the Appellant's submissions regarding the public interest. However, having considered the withheld information, she submits that the Appellant's grounds and submissions in respect of the public interest test are insufficient to override the in-built, and strong, public interest in preserving legal privilege for the reasons set out in her Decision Notice.

The University's response

Confidentiality, waiver and client

37. The University confirms that the Legal Services department only provided the withheld information to the Senate Review Panel and it was not more widely disseminated. The privilege and confidentiality attached to the document was not therefore waived in the way suggested by the Appellant (or at all).

38. The University relies on the fact that the only disclosure that may have occurred was a restricted disclosure to the Appellant in the letter to him of 29 October 2020 of the mere fact that advice had been received. In a freedom of information context, legal professional privilege will only have been lost if there has been a previous disclosure to the world at large and the information can therefore no longer be considered to be privileged. That is not the case here.

39. The letter of 14 April 2021 does not contain, as suggested by the Appellant, a positive instruction that privilege should be waived and that the withheld information should be disclosed. The letter simply says that the Legal Services department should consider whether it would be appropriate to release the withheld information to the Appellant. Due consideration was given by the Legal Services department as to whether the withheld information should be disclosed and it was decided that privilege should be maintained and the document would not be released.

40. The Senate is not an independent legal entity. At all times it was acting as part of the University, which was the client recipient of the legal advice and it did not have the power on its own to determine whether privilege should be waived.

Public interest

41. The general public interest in safeguarding the openness of communications between client and lawyer directly applies to the University's employees and its Legal Services department.

42. In relation to the first two of those reasons transparency and furthering public debate, the general public interest in disclosing the withheld information to the public as against the arguments for keeping it confidential as set out above was considered. The conclusion was reached that the University's governing documents, including the Regulations, are publicly available on its website and there was not any additional public benefit to releasing advice regarding the review and implementation of this legislation in relation to the specifics of the Appellant's complaint.

43. In relation to the number of people affected by disclosure, the University relies on the case of **Tim Crook v Information Commission and another** (EA/2019/0191), in which the FTT held that the public interest balance favoured maintaining legal privilege, recognising that the strength of public interest in the subject matter does not of itself outweigh the considerable weight to be afforded to legal profession privilege and the section 42 exemption.

44. In relation to the alleged breach of natural justice caused by the University's alleged failure to give reasons, the University respectfully notes that it is not within the FTT's jurisdiction in this case to determine whether or not the University did provide sufficient reasons. In any event, the University considers any breach of natural justice to be an individual concern about the University's handling of the Appellant's complaint, and does not extend to privilege.

45. The appellant refers to the ongoing public conversation about freedom of speech on university campuses and the Higher Education (Freedom of Speech) Bill currently being debated in Parliament. It is unclear to the University the point that

the appellant is trying to make by referring to this issue, or the relevance that it has to the public interest in legal professional privilege.

The appellant's reply

46. The Commissioner has not responded to the appellant's grounds of appeal in relation to factual error and internal inconsistency. The Commissioner has only engaged with the 'Untenable conclusions' part of the grounds of appeal.

47. The Commissioner's acceptance of the University's say-so as to the privileged status of the memo is a mere acceptance of a bare assertion.

48. The Commissioner does not consider at all who was the client for the purposes of the memo and appears, for instance at its paragraph 17, to conflate the university with its Senate. In fact, the Senate was the 'client', not the university.

49. The Commissioner has overlooked the letter of 14 April and does not specify whether it made enquiries of the Senate as to its wishes.

50. The disclosed substance of the memo is not considered by the Commissioner. The dilemma identified in the grounds of appeal is ignored. Further, the Commissioner asserts that the appellant still does not know what advice was received, which is at odds with its assertion that the memo was a correct expression of that advice. Either the memo was a correct representation, in which case any privilege was waived, or it was not and the Commissioner's finding on that point was wrong.

51. The purpose of privilege is to protect clients, not their advisers and in this case the client – the Senate – was plainly relaxed about waiving privilege in circumstances where it felt that the appellant had been poorly served and was entitled to reasons as to the rejection of his complaint.

52. If the Senate lacked its own power to waive privilege, the enquiry as to whether privilege ought to be waived is curious.

53. If the Senate changed its mind about disclosure, then it changed its mind about the appellant's entitlement to an explanation. If, on the other hand, Legal Services made the final decision further to withhold disclosure, then this was a decision outside its power and one suggestive that privilege is here being used to protect the lawyers rather than the client.

54. The general public interest in upholding privilege is conflated by the respondents with the specific circumstances of this case in a way which obscures the facts that:

    a) the disclosure sought concerns the lawfulness of the university's policies, not legal advice about the conduct of individuals;

b) if the conduct of individuals does turn out to be at issue, then the university's refusal to make further disclosure amounts to little more than concealment of poor performance;

c) it cannot be correct that disclosure of legal advice as to the lawfulness of the university's policies or conduct will diminish the willingness of staff to seek such advice;

d) the actual client – the Senate – was, as previously noted, relaxed about further disclosure and felt no need of protection.

55. In the context of the appellant's complaint, the University exercised para-judicial roles combining investigatory, prosecutorial and judgment-making capacities. It must give reasons why an investigation comes to an end.

56. By explicitly conflating the legal advice with the reasons to which the appellant was entitled, the respondent created a problem where none needed to exist.

57. The Senate's own recommendation in its letter of 14 April endorses the appellant's desire to scrutinise the University's misconduct legislation such that it cannot be said that the appellant's request for further disclosure is wilful or frivolous.

58. Given the para-judicial nature of its function here, the advice it received is akin to that publicly articulated in open court by the legal adviser to magistrates, where there is no question of advice being given in secret.

59. Transparency is of particular gravity where, as here, the appellant had been subjected to disciplinary procedures by virtue of doing no more than saying/writing something that someone did not like, and then demanded to know how it was lawful that he might be investigated for so doing. If a public interest argument is to be determinative, then the tribunal must look not only to the interest in upholding privilege, but also to the interest in ensuring that institutions of learning and of enquiry are places of the free exchange of words rather than their suppression cloaked in institutional indifference.

Evidence

60. We have read and taken account of an open and a closed bundle of documents.

61. It is necessary that the documents in the closed bundle are not revealed to the appellant because to do otherwise would defeat the purpose of the proceedings. The tribunal accepts that in accordance with the guidance given by the Court of Appeal in **Browning** we are required to disclose as much as possible about the closed bundle when writing our decision.

62. In accordance with the guidance in Browning, the tribunal records that the closed bundle consists of the withheld memo.

Legal framework

S 40(1) – Personal data.

Personal data

63. S 40(1) FOIA provides:

> (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.

64. Personal data is defined in s 3(2) of the Data Protection Act 2018 (DPA) as:

> Any information relating to an identified or identifiable living individual

65. The definition of "personal data" consists of two limbs:
i) Whether the data in question relates to a living individual and
ii) Whether the individual is identified or identifiable, directly or indirectly, from those data.

S 42 – Legal Professional Privilege.

66. Section 42(1) provides that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.

67. For our purposes, information is exempt where (a) it satisfies the exemption in s.42(1) FOIA; and (b) "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information". (See s.2(2)(b) FOIA - referred to here as the 'public interest test').

68. Legal professional privilege comprises two limbs, legal advice privilege and 'litigation privilege'. We are concerned in this appeal with legal advice privilege: confidential communications between lawyer and client for the purpose of giving or receiving legal advice or assistance.

69. The rationale behind the principle of legal advice privilege is set out in the Supreme Court's decision in Three Rivers District Council and Others v Governor and Company of the Bank of England (No 6) [2004] UKHL 48 ('Three Rivers (No 6)') at paragraph 34. After summarising the relevant authorities, Lord Scott said:

> None of these judicial dicta tie the justification for legal advice privilege to the conduct of litigation. They recognise that in the complex world in which we live

> there are a multitude of reasons why individuals, whether humble or powerful, or corporations, whether large or small, may need to seek the advice or assistance of lawyers in connection with their affairs; they recognise that the seeking and giving of this advice so that the clients may achieve an orderly arrangement of their affairs is strongly in the public interest; they recognise that in order for the advice to bring about that desirable result it is essential that the full and complete facts are placed before the lawyers who are to give it; and they recognise that unless the clients can be assured that what they tell their lawyers will not be disclosed by the lawyers without their (the clients') consent, there will be cases in which the requisite candour will be absent. It is obviously true that in very many cases clients would have no inhibitions in providing their lawyers with all the facts and information the lawyers might need whether or not there were the absolute assurance of non-disclosure that the present law of privilege provides. But the dicta to which I have referred all have in common the idea that it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their (the clients') affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busybodies or anyone else (see also paras 15.8 to 15.10 of Zuckerman's Civil Procedure (2003) where the author refers to the rationale underlying legal advice privilege as "the rule of law rationale"). I, for my part, subscribe to this idea. It justifies, in my opinion, the retention of legal advice privilege in our law, notwithstanding that as a result cases may sometimes have to be decided in ignorance of relevant probative material.

70. The Court of Appeal in Three Rivers District Council v Governor and Company of the Bank of England (No.5) ('Three Rivers (No.5)')2003] EWCA Civ 474 limits the range of employees of a company whose communications with the company's lawyers are covered by legal advice privilege. Only employees who are acting as 'the client' will be covered. In Three Rivers No.5 the Bank had created a separate entity that was specifically responsible for seeking the advice in question, which was held by the Court of Appeal to be the client for the purposes of legal advice privilege.

71. In AB v Ministry of Justice [2014] EWHC 1847 (QB) the High Court considered the question of the identity of the client in a situation where advice was sought from in-house lawyers. At para 43, Baker J said that the Court of Appeal in Three Rivers (No.5) was dealing with 'a markedly different set of circumstances'. There was no separate entity specifically responsible for seeking the legal advice in question in AB v Ministry of Justice. Further, in the absence of any evidential challenge that the employee in question (head of the Coroner's Section of the department) lacked authority to seek legal advice of the nature and extent that he did from the Department's in-house lawyer, Baker J held that in that capacity it was implicit that he had authority to seek such advice.

72. In Menon, Menon and Autumn Days Care Limited v Herefordshire Council [2015] EWHC 2165 (QB) the in-house lawyers, 'provided legal advice to all officers and staff working for and on behalf of it, on all matters as and when necessary, pursuant to the work they are carrying on for and on behalf of the Defendant' and all officers and staff were entitled to use its services. On that basis Lewis J held that:

> …the employees in the present case were authorised to obtain legal advice from the Defendant's in house lawyers in connection with the discharge by them in the course of their work of functions on behalf of the Defendant. In those circumstances, the employees in question were clients for the purposes of legal advice privilege.

73. S 42 is a qualified exemption, so that the public interest test has to be applied. It is recognised that there is a significant 'in-built' interest in the maintenance of legal professional privilege (DBERR v O'Brien and Information Commissioner [2009] EWHC 164), due to the importance in principle of safeguarding openness in communications between a legal adviser and a client, to ensure that there can be access to full and frank legal advice, which is fundamental to the administration of justice. The tribunal recognises that "although a heavy weight is to be accorded to the exemption, it must not be so heavy that it is in effect elevated into an absolute exemption" (DCLG v IC and WR [2012] AACR 43 at [44]) and the weight will vary according to the specific facts of each case.

74. We adopt the approach as set out in DBERR v O'Brien and Information Commissioner:

> ...the proper approach for the tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non- disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least.

The role of the tribunal

75. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

Issues

76. The issues for the tribunal to determine are:

1. *Personal data*
   1.1. Is any of the requested information personal data?

2. *Legal professional privilege*

2.1. Is the information within the scope of legal advice privilege, i.e. confidential communications between lawyer and client for the purpose of giving or receiving legal advice or assistance or has any such privilege been waived or confidentiality lost?
2.2. Does the public interest in withholding the information outweigh the public interest in disclosure?

Discussion and conclusions

Preliminary points

77. As the tribunal carries out a full merits review, we do not need to make findings, for example, on whether the Commissioner made factual errors nor on whether the Commissioner's conclusions were inconsistent.

78. We do not need to determine if the Commissioner failed to consider relevant evidence or if she failed to make certain findings that were necessary to support her conclusions. We will take into account all the matters which we consider to be relevant and make the findings that we consider necessary.

Personal data

79. It appears from the last paragraph of the grounds of appeal that the appellant does not challenge the Commissioner's finding that part of the requested information is his personal data. The tribunal has, in any event, reviewed the withheld information and concludes that it is the appellant's personal data – he is identifiable, and it relates to him.

80. The appellant asks the tribunal to consider ordering the release of the personal data in any event, because 'as it is personal to [*the appellant*] there should be no issue with releasing that information to him, in accordance with the provisions pertaining to a Subject Access Request'.

81. S 40(1) is an absolute exemption. Once the information is personal data, we cannot order its release.

82. To the extent that there is any appeal of the Commissioner's findings on s 40(1) we dismiss that part of the appeal.

Legal professional privilege

Who is the client?

83. The University has an in-house Legal Services department. In the absence of any evidence to the contrary, we infer that its purpose is the same as that in Menon i.e to provide legal advice to all officers and staff working for and on behalf of it, on

all matters as and when necessary, pursuant to the work they are carrying on for and on behalf of the University. Therefore we imply that as the withheld information consists of a communication for the purpose of giving or receiving legal advice or assistance between in-house lawyers and a University employee, that employee had the authority to obtain legal advice from the in-house lawyers and therefore was the client for the purposes of any internal legal advice.

Is the information covered by legal professional privilege?

84. The tribunal has considered the withheld information. Applying the above principles we conclude that it is covered by legal advice privilege because it falls into the following category: Confidential communications for the purpose of giving or receiving legal advice or assistance between a lawyer and a client.

85. We conclude that the communication is confidential. It is marked 'legally privileged and confidential'. There is no evidence before us that it has been treated in any way that is inconsistent with that confidentiality. There is no evidence that it has been disclosed more widely.

86. We have considered whether the reference to the legal advice in the letter sent to the appellant on 29 October 2020 either resulted in the advice no longer having the necessary quality of confidence, or resulted in the privilege being waived, such that it was no longer protected by legal professional privilege.

87. The investigating officer wrote:

> With regards your complaint as outlined above that certain Regulations are unfair, unreasonable and in breach of the University's statutory and regulatory obligations, I sought legal advice to understand the process followed in the drafting and review of said Regulations.
>
> On the basis of the information provided to me in response to my above request I am satisfied that the process followed ensures continued compliance with the University's statutory and regulatory obligations, through a robust process of review, consultation and approval.
>
> In addition, with regards your complaint relating to the individuals who implement the Regulations I am confident that the University ensures that the implementation of such Regulations is done in a manner consistent with legal obligations via the regular training and development of relevant staff.
>
> All University staff complete mandatory Equality and Diversity training, which must be refreshed every 3 years. Staff who work in the area of Student Conduct, Complaints and Appeals also attend external training delivered by the Office of the Independent Adjudicator for Higher Education (OIA) and education law specialists on issues relating to case management and implementation of misconduct proceedings.

> Through this combined approach of regulatory review and staff training and development, I am confident that the University ensures that the Regulations referred to in your complaint and policies directing implementation are compliant with all relevant obligations.
>
> In summary, on considering the legal advice received and following investigation I am satisfied that the aforementioned University Regulations (Section 1) where robustly developed and do not contravene the University's relevant obligations under the referenced UK laws, Acts, Regulations and assumptions as outlined in Sections 2 and 3. Furthermore, I am satisfied that the University staff are competently trained and fully followed all relevant University regulations; I therefore conclude that your complaint is not upheld.

88. The appellant highlights what he states is an inconsistency between the following findings of the Commissioner:

> 30. …The Commissioner does not accept that privilege has been waived in this case. The Officer's statement does not confirm exactly what the legal advice said. The first part of their statement merely refers to the fact that advice had been sought. The second part states:
>
> > *On the basis of the information provided to me in response to my above request* ***I am satisfied*** *that the process followed ensures obligations, through a robust process of review, consultation and approval [emphasis added]*
>
> 31. The wording of the statement makes clear that, although informed by the information provided, the Officer is giving their own opinion. It does not amount to the disclosure of even a summary of the legal advice provided.
> …
> The Commissioner does not consider that the University has in any way misrepresented the advice contained in the withheld information (para 37)

89. The appellant argues that either the letter was a correct representation of the advice, in which case any privilege was waived, or it was not and the Commissioner's finding in para 37 that the Commissioner has not misrepresented the advice is wrong.

90. This argument is flawed. The Commissioner did not find that the statement of the officer 'correctly represented the advice', or that it was an 'accurate representation of the contents of the memo' or that it was 'a correct expression of the advice' or that it was a 'correct representation'. Her finding was that she did not 'consider that the University has in any way misrepresented the advice contained in the withheld information'.

91. It is perfectly possible to make a statement which does not include a summary of legal advice and which also does not misrepresent that legal advice, simply by not including any representation of the legal advice. The statement from the legal officer set out above did not contain a representation of the legal advice, or an

expression of the advice, or a representation of the contents of the memo, whether correct or incorrect.

92. The tribunal's view is that the reference to the legal advice in the letter sent to the appellant on 29 October 2020 did not result in the advice no longer having the necessary quality of confidence, nor did it result in a waiver of legal professional privilege for the following reasons, supplemented by some reasoning set out in the closed annex.

93. The investigating officer sets out the purpose of seeking legal advice, 'I sought legal advice to understand the process followed in the drafting and review of said Regulations'. This does not reveal any of the content of the advice, and in our view does not affect the confidentiality of that advice.

94. Further, we agree with the Commissioner that the statement of the investigating officer that she was satisfied that 'the process followed ensures obligations, through a robust process of review, consultation and approval' is a statement of the investigating officer's opinion and does not amount to the disclosure of even a summary of the legal advice provided.

95. We do not form this view on the basis that the investigation officer "prefaced her disclosure of the substance of the memo with: 'I am satisfied that'" as the appellant asserts in para 60 of the grounds of appeal. We form this view on the basis that having viewed the withheld information we can see that the investigating officer did not in that statement, as a matter of fact, disclose the substance of the advice on the processes followed in the drafting and review of the regulations. It is not a disclosure expressed as an opinion, it is simply not a disclosure of the contents of the advice on the processes followed in the drafting and review of the regulations.

96. Further, even if part of the substance of the advice was disclosed in this correspondence, we would have found that this would not have resulted in a loss of confidentiality or a waiver for the rest of the advice, because the correspondence was addressed to one individual as part of the outcome of that individual's complaint. FOIA is disclosure to the world and applicant blind and therefore the fact that the appellant is that individual is irrelevant. Further, unless the University had 'cherry picked' the favourable parts of the advice it would not be unfair for the University to assert privilege over the remainder despite having disclosed some of the advice.

97. We have set out some additional reasoning in a closed annex.

98. The appellant makes a further argument on waiver. He states that the Senate, the principal academic body of the University, in the form of the appointed panel, was the client for the purposes of the legal advice, and that the Senate Panel was happy for the advice to be disclosed to the appellant.

99. We reject this argument. First, the tribunal has concluded that the relevant client was the investigating officer. Second, the decision of the Senate Panel was recorded in the outcome letter of 14 April 2021 as follows:

> I have been asked by the Panel to contact Legal Services regarding the advice provided and enquire as to whether it would be appropriate to release this to you.

100. This clearly does not amount to a waiver of privilege or a loss of confidentiality, even if the Senate Panel were the client and/or had the power to waive privilege. It was not a decision to release the advice. It was a decision to ask Legal Services whether it would be appropriate to release the advice.

101. The following extract from the subsequent letter dated 25 May 2021 has to be read in the light of the letter of 14 April:

> As you know, I was instructed by the Senate Review Panel to ask Legal Services that their advice to the Investigating Officer be made available.
>
> I have now been informed by Legal Services that legal advice, including that which is provided by Legal Services at the University to internal clients, is protected by legal professional privilege, which protects communications between a lawyer and their client from disclosure. It would therefore not be appropriate to disclose such advice to you.
>
> I have further been advised that the Director of Legal Services wrote to you on 1st April 2021, confirming to you this position.

102. Although the first sentence refers to being 'instructed by the Senate Review Panel to ask Legal Services that their advice be made available', this is clearly a reference back to the letter of 14 April and must be interpreted in that light, i.e. the instruction was to ask Legal Services *if it would be appropriate* to release the advice. This is clear from the following paragraph, which sets out why it would not be appropriate to release the advice.

103. None of this correspondence amounts to a waiver of privilege or any loss of confidentiality in the advice.

104. For those reasons we find that the withheld information is covered by legal advice privilege and s 42 is engaged.

Public interest

105. We accept that there is a strong public interest in encouraging full and frank communication between the University and its lawyers, and that this is fundamental to the administration of justice. There is a significant public interest in public authorities being fully informed and therefore acting lawfully. There is a significant 'in-built' interest in the maintenance of legal professional privilege.

Legal professional privilege is 'a fundamental condition on which the administration of justice as a whole rests' (R v Derby Magistrates exp P [1996] 1 AC).

106. The very strong public interest in maintaining this exemption for legal advice privilege does not rest on there being a real possibility of litigation and we take account of the rationale for legal advice privilege set out in para 34 of Three Rivers No.6 .

107. We accept that there is a general public interest in transparency in relation to the legal advice received by an investigating officer before dismissing a complaint about the lawfulness of the University's disciplinary procedures. This weight of this general public interest is increased in this particular case, because the investigating officer was criticised for failing to explain her decision sufficiently. We accept that this is an important aspect of procedural fairness, which makes a decision more difficult to challenge. We note that the Senate Panel did not feel that the response was satisfactory and had decided to ask Legal Services if it would be appropriate to disclose the advice. In their view, although it might have been that the issues the appellant had identified had been addressed to the satisfaction of the Investigating Officer there was a reasonable expectation that the appellant should have received some explanation of why this was the case.

108. We do not accept that the article 6 right to a fair trial under the European Convention of Human Rights requires that reasons be given for 'any ruling', and it does not require that reasons be given in relation to a complaint against the University.

109. The University has not misrepresented the legal advice or disclosed favourable aspects and withheld unfavourable aspects. This would have increased the public interest in disclosure.

110. The question of whether or not the University's disciplinary polices are compliant with the law in relation to freedom of expression rights was a matter of significant public interest at the relevant time. We accept that the issue of whether or not English universities are fulfilling their duties under the Education (No. 2) Act 1986 to protect free speech was a matter of general public interest at the relevant time. Further, when the University provided its substantive response under FOIA on 25th June 2021, the Higher Education (Freedom of Speech) Bill 2021 had been introduced in parliament. We accept this general issue engages Article 10 of the European Convention on Human Rights. We accept that this was a matter of significant public interest at the relevant time.

111. However, we do not accept that the disclosure of the withheld information serves these significant public interests. First, as a matter of principle, legal advice is simply advice. It is one lawyer's opinion, and not a definitive statement of the law. This limits its value to the public. It limits its value to contributing to or informing

any public debate on the issues outlined above. Second, as set out in the letter of 29 October 2020, the purpose of seeking the legal advice was to 'understand the **process followed in the drafting and review** of said Regulations'. Having reviewed the withheld information its disclosure would provide minimal, if any, contribution or information to public debate on these issues and minimal, if any, information relevant to the question of whether or not the University's disciplinary polices are compliant with the law in relation to freedom of expression rights or otherwise.

112. Taking all these matters into account, we accept that there is a public interest in the disclosure of this information, with increased weight particularly because of the findings of the Senate Panel on the adequacy of the reasoning provided by the investigating officer. However we find that this is not sufficient to outweigh the strong and weighty public interest in maintaining the fundamental principle of legal professional privilege.

113. On this basis we agree with the Commissioner's conclusion on s 42 and the appeal is dismissed.

Signed Sophie Buckley Date: 13 June 2022

Judge of the First-tier Tribunal

Promulgated Date: 15 June 2022