

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 April 2020

Public Authority: The University Council
Address: University College London
Gower Street
London
WC1E 6BT

Decision (including any steps ordered)

1. The complainant has requested email correspondence between a law firm and University College London (UCL) about an academic at UCL. UCL has disclosed some relevant information and has withheld the remainder under section 36 (prejudice to the effective conduct of public affairs) and section 41 (information provided in confidence) of the FOIA. UCL had originally considered section 42 (legal professional privilege) was engaged but withdrew its reliance on this exemption in the course of the Commissioner's investigation.
2. The Commissioner's decision is as follows:
 - The information UCL is withholding can be categorised as information provided in confidence and so can be withheld under section 41(1) of the FOIA.
3. The Commissioner does not require UCL to take any remedial steps.

Request and response

4. On 1 July 2019 the Guardian newspaper reported that, in response to an FOIA request, UCL had released reports into two separate misconduct investigations in 2014 and 2015 into a UCL laboratory - the Institute for Child Health - run by Professor David Latchman. The article said that the reports showed that an allegation of research misconduct against Professor Latchman had been upheld. In a statement, UCL responded that it had found there were insufficient grounds for dismissing Professor Latchman. A disciplinary hearing in 2018 had decided that no formal action would be taken against Professor Latchman but that he no longer supervises research.
5. On 11 July 2019 the complainant, a journalist for BuzzFeed News, wrote to UCL and requested information in the following terms:

"All email communications between the law firm Mishcon de Reya (domain: mishcon.com) and UCL email addresses (domain: ucl.ac.uk) from December 2013 until present concerning allegations of misconduct involving research conducted in the research group of Prof David S. Latchman."
6. UCL responded on 9 August 2019. It withheld the information it confirmed it holds, citing section 36(2)(c) of the FOIA, and advised that it considered the public interest favoured maintaining this exemption.
7. Following an internal review UCL wrote to the complainant on 1 October 2019. It released some information it had previously withheld. However, UCL maintained its reliance on section 36(2)(c) regarding the remainder of the information and said that section 41 and section 42 were also engaged, with the public interest favouring maintaining the section 42 exemption. UCL subsequently withdrew its reliance on the latter.
8. To address a concern the complainant has about UCL's internal review, reviews are an opportunity for an authority to reconsider its original response to a request. On reconsideration, an authority may decide to release information it had previously withheld, or it may decide it is satisfied with its response. An authority may also decide at the point of a review that information engages new exemptions. That happened in this case and the Commissioner has no concerns about that situation.

Scope of the case

9. The complainant contacted the Commissioner on 16 October 2019 to complain about the way his request for information had been handled.
10. In the first instance, the Commissioner has considered whether UCL can withhold the information the complainant has requested under section 41(1) of the FOIA. If necessary, she has been prepared to consider whether section 36 is engaged, and the balance of the public interest.

Reasons for decision

Section 41 – information provided in confidence

11. Section 41(1) provides that information is exempt if, under subsection (a) the public authority obtained it from any other person and, under subsection (b), disclosure would constitute a breach of confidence actionable by that person or any other person. This exemption is absolute and therefore not subject to a public interest test, as such.
12. The information in this case is correspondence between Mishcon de Reya, a legal firm representing Professor Latchman, and UCL. The withheld material dates from 15 February 2016 to 10 January 2019, with Mishcon de Reya having initiated the correspondence.
13. In its submission to the Commissioner, UCL has said that it considers this exemption applies to information provided to UCL by a third party namely Mishcon de Reya, acting on behalf of Professor Latchman ('the Mishcon Letters').

Was the information obtained from another person?

14. UCL's submission goes on to discuss the second element of the section 41 exemption – whether disclosure would constitute a breach of confidence – but it has not fully discussed the first element; whether the information was obtained from another person. The Commissioner understands that UCL's position is that all the correspondence, both incoming and outgoing, is exempt information under section 41.
15. Part of the information being withheld was generated by UCL; it is correspondence from UCL to the law firm. It could therefore be thought that UCL did not obtain that particular information from another person.
16. However, in her published guidance on section 41, the Commissioner advises that an authority must consider whether disclosing the information it created would reveal the content of the information it

obtained from the other person. If it would, then the exemption may also cover the material it generated itself.

17. UCL's correspondence to Mishcon de Reya responds to matters raised by the legal firm. As such UCL's correspondence can also be considered to constitute a record of information provided to it by Mishcon de Reya – its comments in the correspondence are very specific to the information it received from Mishcon de Reya. If only UCL's side of the correspondence was to be released, it would nonetheless be apparent what the matters were that UCL discussed with Mishcon de Reya. As such, the Commissioner considers that, in this case, section 41(1)(a) is engaged and that the information that comprises email correspondence from UCL to Mishcon de Reya was obtained by UCL from another person.
18. The remaining information is email correspondence from Mishcon de Reya to UCL, including attachments. This information was more obviously obtained from another person and the Commissioner is therefore satisfied that this, and all the withheld information, engages section 41(1)(a). She has gone on to consider section 41(1)(b) with regard to the information.

Would disclosure constitute an actionable breach of confidence?

19. In considering whether disclosing the information constitutes an actionable breach of confidence the Commissioner considers the following:
 - whether the information has the necessary quality of confidence
 - whether the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider.
20. **Necessary quality of confidence:** The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
21. In its submission UCL has noted that the Mishcon Letters are from Mishcon de Reya acting on behalf of Professor David Latchman. UCL has described this information to the Commissioner and she has viewed it herself. She does not intend to detail its contents in this notice. UCL says these communications between it and Mishcon de Reya are not otherwise accessible and contain information that is of great importance to Professor Latchman, Mishcon De Reya's client. As such, the information is more than trivial.

22. The Commissioner is satisfied that the correspondence from Mishcon De Reya to UCL has the necessary quality of confidence because it is not trivial information and is not information that would otherwise be available to the public.
23. **Circumstances importing an obligation of confidence:** In its submission UCL argues that the Mishcon Letters contain sensitive communications because of Mishcon de Reya's role, representing Professor Latchman. The substance of these communications contain reference to information which UCL considers should not be made public in response to a Freedom of Information request. In UCL's view this information was communicated in circumstances importing an obligation of confidence.
24. The Commissioner has considered UCL's position and the nature of the requested information, which the Commissioner agrees is sensitive. She is satisfied that the other person – Mishcon de Reya on behalf of Professor Latchman - would expect that the information they provided to UCL will remain private and confidential and will not be disclosed to the general public as a result of an FOIA request. She is therefore satisfied that the withheld information was imparted in circumstances which give rise to a duty of confidence.
25. **Detriment to the confider:** UCL has noted the focus of the Mishcon Letters, which the Commissioner has advised she does not intend to detail here. UCL says that the nature of the matters discussed in the correspondence mean that disclosing the Mishcon Letters would cause a detriment to Professor Latchman, as they contain information which he considers to be confidential and which he believes should not be in the public domain.
26. The Commissioner has established that the information that another person – Mishcon De Reya - provided to UCL in this case constitutes information of a confidential nature. Its release may well therefore cause Professor Latchman, represented by Mishcon De Reya, a degree of damage or distress. So, it is not necessary for there to be any detriment to the confider in terms of tangible loss, for this information to be protected by the law of confidence. The Commissioner accepts UCL's position and has not considered this issue further.
27. As has been noted, section 41 of the FOIA is an absolute exemption and therefore not subject to the public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under the FOIA).

28. In its submission to the Commissioner, UCL has said that it considers that where the interests of a private person are protected by a duty of confidence, the public interest in scrutiny of related information is unlikely to override that duty. UCL argues that public authorities must have regard to the interests of the person to whom the duty of confidence is owed. In this case, the Mishcon Letters were provided in confidence to UCL and they contain sensitive information about Professor Latchman. UCL's argument is that, therefore, there is not a public interest defence to a claim of breach of confidentiality.
29. In his request for an internal review, the complainant reminded UCL that when he had submitted his request, he had advised that his request was part of a public interest journalism project. The project sought to examine the research misconduct that occurred, who was responsible for this misconduct, whether UCL handled the matter appropriately, and whether there had been any attempt to redact information from public disclosures so as to conceal the extent and nature of any misconduct or any deficiencies in UCL's handling of these matters.
30. With regard to UCL's reliance on section 36, the complainant had argued that there is a general public interest in transparency. He considered that the public have a right to know how public authorities communicate with regard to controversial matters. The complainant also considered that disclosing the information would contribute to a more open and knowledgeable debate concerning the subject matter under discussion.
31. Regarding UCL's reliance on section 41, in his complaint to the Commissioner, the complainant has said that because his request concerns allegations of misconduct, there is a public interest in disclosure that outweighs any duty of confidentiality.
32. The Commissioner does not consider UCL's argument to be strong, but she does not consider the complainant's section 41 argument to be particularly strong either. On 1 July 2019 the Guardian reported on misconduct investigations into Professor Latchman that had occurred in 2014 and 2015, and UCL had noted that a disciplinary hearing concerning Professor Latchman had taken place in September 2018. Those matters had therefore been concluded before the Guardian's article: the former some four and five years previously, the latter 10 months previously.
33. The concerns associated with Professor Latchman's laboratory were serious and how UCL managed these concerns therefore had significant public interest. However, those matters had been brought into the open through the Guardian's article. The complainant has not raised any new concerns about the laboratory or any specific concerns about how UCL managed the misconduct investigations or disciplinary hearing – such

concerns may also have had a public interest in the Commissioner's view. The request, submitted shortly after the Guardian's article was published, could be interpreted as being an attempt to uncover whether or not there had been any shortcomings in UCL's handling of those matters ie something of a 'fishing exercise'.

34. The Commissioner considers that the public interest has been met through the Guardian article, which will have prompted debate, the fact that misconduct and disciplinary hearings associated with Professor Latchman have taken place and are concluded, and through UCL having disclosed some information within the scope of the complainant's request. Such public interest as there is in the information being withheld is not, in the Commissioner's view, sufficient to override maintaining the duty of confidence in this case.
35. The Commissioner is satisfied that disclosing the withheld information would be an actionable breach of confidence under section 41(1)(b). It is therefore exempt information under section 41(1) of the FOIA. Because she has found that section 41 is engaged, it has not been necessary for the Commissioner to consider whether section 36 is also engaged.

Right of appeal

36. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals
PO Box 9300
LEICESTER
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

37. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
38. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Pamela Clements
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