

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 30 March 2009

Public Authority: University of Central Lancashire
Address: Preston
PR1 2HE

Summary

The complainant requested copies of the course materials issued to undergraduate students for the BSc (Hons) in Homeopathy. The public authority withheld the requested information by virtue of the exemptions contained in sections 21, 43(2), 41, and 36(2)(c). The Commissioner found section 41 was engaged in respect of specific portions of the course materials but that none of the other exemptions were engaged, and ordered the disclosure of the requested information apart from the portions withheld under section 41. He also found the public authority in breach of sections 1(1)(b), 10(1), and 17(1).

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 24 July 2006, the complainant requested the following information:

'copies of the course material...given to undergraduates on your course code B251 (BSc (Hons) Homeopathic Medicine)...(including) course notes....PowerPoint presentations....list of the textbooks recommended for this course.'

'copies of the correspondence and the committee meetings that led to the validation of this course as appropriate for a BSc (Hons) degree.'

3. The public authority responded on 21 August 2006. It disclosed information in relation to the second part of the request (i.e. validation documents), as well as

- a reading list for two specific modules (HP1000 and HP1001) which are disclosed to students prior to enrolment.
4. It however withheld copies of the course materials provided to undergraduates for the course in homeopathy as well as a list of the recommended textbooks by virtue of the exemption contained in section 43(2) of the Act.
 5. On 23 August 2006, the complainant requested an internal review of the public authority's decision to withhold the course materials.
 6. It would appear the review was conducted in two stages, one on 14 September 2006, and the other on 04 October 2006.
 7. Both reviews upheld the application of section 43(2), and additionally relied on the exemption contained in section 21 because it considered the course materials as information '*that is reasonably accessible to applicants by other means (upon the payment of a fee)....i.e. by enrolling on the course....*'

The Investigation

Scope of the case

8. On 21 October 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the application of section 43(2) to the course materials he had requested. The main thrust of his argument in this regard was that the public authority could not be considered a 'commercial organisation' for the purposes of the Act, and that the public authority had confused 'commercial interests' with 'financial interests'. He however added that if the Commissioner decided section 43(2) was correctly engaged, then it was in the public interest to order disclosure.
9. As the reading lists for HP1001 and 1002 as well as the validation documents had already been disclosed, the Commissioner's investigation therefore covered the remaining course materials and list of recommended text books. In addition, although the complainant did not specifically raise any arguments in respect of the application of section 21, the Commissioner nonetheless considered its application as part of the investigation.

Chronology

10. On 02 May 2008, the Commissioner wrote to the complainant outlining the scope of the investigation and inviting him to write back if he disagreed with the scope.
11. The complainant wrote back on 21 May 2008. He did not question the scope of investigation but provided additional arguments to support his position that the public authority incorrectly applied section 43(2). He however informed the Commissioner that he intended to narrow down the scope of his complaint to

- specific modules rather than for all the course materials. To this end, he had requested lecture timetables from the public authority to enable him specify the particular modules he was interested in, and was happy for the investigation to be delayed as a result.
12. On 13 August 2008, the complainant provided the Commissioner with a copy of the particular modules he wanted considered under the investigation.
 13. On 14 August 2008, the Commissioner wrote to the public authority inviting its comments on the application of section 43(2) in relation to the course materials for the specific modules referred to by the complainant.
 14. On 09 September 2008, the public authority wrote back informing the Commissioner that it would like all the course materials originally requested rather than part of it considered by the investigation because the Commissioner may not be able to reach an informed decision in respect of its application of exemptions to the original request if only a limited amount of information was considered.
 15. As the complainant had agreed to narrow his complaint, the Commissioner did not consider this would pose any problems but in order not to delay the investigation any further, he decided to consider the case on the basis of the complainant's original request.
 16. On 12 September 2008, the Commissioner asked the public authority to provide copies of all the course materials requested by the complainant on 24 July 2006 as well as a full and detailed explanation as to why it considered them exempt from disclosure by virtue of the exemptions contained in sections 21 and 43(2) of the Act.
 17. The public authority responded on 29 September 2008. It provided copies of all the course materials withheld. However, in addition to the exemptions contained in sections 21 and 43(2), it explained that specific parts of the course materials (i.e. case studies) were exempt by virtue of section 41, and that it considered the exemption at section 36(2)(c) was also engaged in respect of all the course materials.

Analysis

Procedural Matters

18. Under section 17(1) of the Act, a public must issue refusal a notice within 20 working days stating the fact, the exemption(s) in question, and reasoning behind the application of the exemption(s).
19. A full text of section 17 is available in the Legal Annex at the end of this Notice.

20. The Commissioner finds the public authority in breach of section 17(1) because it failed to include sections 41 and 36(2) (c) in its refusal notice.

Exemptions

Section 21

21. By virtue of sub sections 1 and 2(a) of the above section, information is exempt from access under the Act if it is reasonably accessible to the applicant by other means even where payment is required.
22. Sub section 2(b) further provides that information may be taken as 'reasonably accessible' to an applicant if it is;
- '.....information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.'*
23. Sub section (3) further provides that;
- '.....information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in accordance with, the scheme.'*
24. A full text of section 21 is available in the Legal Annex at the end of this Notice.
25. The public authority argued that the course materials were reasonably accessible to the complainant by virtue of the fact that in line with the Higher Education Act 2004, he could enrol on the course and therefore have access to teaching materials as other students enrolled on the course. According to the public authority, this payment constitutes the fees for the BSc (Hons) in Homeopathic medicine. The payment contributes to the *'cost of tuition, (including) the development of course materials (including the development of examination papers) by its academic staff, in addition to the provision of tuition and services.'* The annual fee for full time study is £3,145.
26. According to the public authority, there are no fee remissions for full time study on the course but a fee remission for only the tuition element is available to a part time student in receipt of a benefit studying a maximum of two and half modules.
27. However an individual could enrol on the course on a part time basis and would pay on a yearly basis in accordance with the number of modules taken in the particular year. The public authority provided a breakdown of the current part time fees rates as follows;

*'The course consists of 14 modules and 4 clinical modules.
The fees in relation to Modules HP2115 and HP2116 are £500 each.
The fee in relation to Module HP3010 is £1000.
The fees in relation to the other Modules are £250 each.'*

28. The public authority therefore concluded that; *'It is open to (the complainant) to apply to enrol on the course in the next academic year in which it is offered: otherwise, the University considers that in this case a reasonable price for the materials would be a sum equal to the course fees....'*

Reasonably Accessible to the Applicant

29. In determining whether or not the public authority correctly relied on section 21 in this instance, the Commissioner considered whether the course materials could be accurately described as information which was reasonably accessible to the applicant as envisaged by section 21.
30. As noted above, the payment of a charge is not itself enough to render information inaccessible to an applicant outside the Act. The Commissioner was however guided by the charging regime imposed by the Act in determining whether the tuition fees could be considered a reasonable charge for providing the complainant with the course materials outside the Act.
31. Under section 9 of the Act, a public authority may impose a charge for complying with section 1(1) in accordance with regulations made by the secretary of state.
32. A full text of section 9 is available in the Legal Annex at the end of this Notice.
33. Section 6 of the Fees regulations¹ provides that a fee charged pursuant to section 9 should not exceed the total costs a public authority expects to incur in informing an applicant whether it holds the information, and communicating it to the applicant. It further provides that the costs to be taken into account include, the costs of communicating the information in the format required, reproducing any document containing the information, and of postage or other forms of transmitting the information.
34. The public authority's argument suggests that the requested information is reasonably accessible to the complainant if he enrolls as a student on the course, and is therefore not accessible to him by any other means outside the Act unless he decides to make a total payment of £9,345 as a combined payment of three years tuition fees.
35. The Commissioner is not persuaded that the requested information is reasonably accessible to the complainant as the fee charged by the public authority cannot be considered reasonable in light of the fees which may be charged by public authorities for complying with a request under the Act. The Commissioner's guidance on charging for information in publication schemes also gives useful guidance on charges which could be considered reasonable. In terms of

¹ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004

commercial publications, the Commissioner is of the view that charges could cover a range of circumstances such as; the need to charge in order to guarantee the continued collection and publication of the information, the time and skill required to collect and analyse the information, and information which is normally made available on commercial terms as part of the public authority's trading activities.² The fee charged by the public authority does not reflect the need to carry out the above activities, and in any event as explained below, the public authority does not, in the Commissioner's view, have a commercial interest in the provision of higher education, the course materials would not therefore constitute commercial information.

36. The Commissioner however also considered whether the tuition fees could in fact be considered as payment for the requested information.
37. As noted above, sub section (2)(b) considers information as reasonably accessible to an applicant if a public authority is obliged by or under any enactment to disclose it to members of the public on request free of charge or on payment of a fee.
38. As already noted by the public authority, the fees imposed by the Higher Education Act 2004 are the overall payments made toward the study of a particular discipline as well as the subsequent qualification attained as a result. The fees are not simply for the course materials provided as part of the qualification process. The requested information is specifically the course materials provided to undergraduates enrolled on the BSc in Homeopathy. It is not available to members of the public on request by virtue of any enactment, and is therefore not reasonably accessible to the applicant as envisaged by section 21(2)(b).
39. Where information does not fall under section 21(2)(b), then under section 21(3), it may not be regarded as reasonably accessible merely because the information itself is available on request if it is not included in the public authority's publication scheme. At the time of drafting this Notice, paragraph 7 of the public authority's publication scheme³ which covers Teaching and Learning did not include course or teaching materials. This scheme was the approved one in place at the time the request was made.
40. The Commissioner therefore finds that the public authority incorrectly applied the exemption contained at section 21 of the Act.

Section 41

41. Information is exempt from disclosure under section 41 if it was provided to a public authority in confidence by any other person, and its disclosure outside of the Act would constitute an actionable breach of confidence.

² The guidance is available online at;

http://www.ico.gov.uk/Home/what_we_cover/freedom_of_information/publication_schemes/charging_for_information.aspx

³ Available online at; http://www.uclan.ac.uk/old/other/sds/fois/docs/Publication_Scheme.doc

42. A full text of section 41 is available in the Legal Annex at the end of this Notice.
43. The public authority provided the Commissioner with a list of specific course materials containing the information it considered exempt by virtue of section 41.
44. The list is reproduced in Annex A at the end of this Notice.
45. Broadly speaking, the course materials which are anonymised case studies, describe patients' symptoms, diagnosis, and in some cases the treatment administered. According to the public authority, these are specific cases '*which individual University lecturers have dealt (with) in their own practice environments.*' They are only used by the lecturers/practitioners as part of their teaching and research after a patient's consent has been obtained for that sole purpose. The public authority provided the Commissioner with a sample copy of a patient consent form.
46. This portion of the course materials was provided by the patients to the lecturers/practitioners in their role as medical practitioners and consequently used by them in their teaching upon obtaining a patient's consent. Therefore, this information could be accurately described as part of the patients' medical records provided to individuals in a position of trust.
47. There are two components to section 41; the information must have been obtained by the public authority from another person, and its disclosure would give rise to an actionable breach of confidence. A person may be an individual, a company, a local authority, or any other legal entity. The exemption does not cover information generated by the public authority but may cover such information to the extent that it was generated from confidential information provided by a third party, and disclosing it would also reveal the confidential material provided by the third party.
48. The Commissioner is satisfied that the case studies in question were provided to the public authority and therefore falls within the definition of information obtained by a public authority as contemplated by section 41.
49. Whether or not a breach of confidence is itself actionable is dependant on a number of factors which were referred to by Megarry J in *Coco v A N Clark (Engineers) Limited* (1968) FSR 415 (*Coco v Clark*) and cited by the Information Tribunal (Tribunal) in *Bluck v The Information Commissioner & Epsom St. Helier University NHS Trust* (EA/2006/0090). According to Megarry J:

'....three elements are normally required, if apart from contract, a case of breach of confidence is to succeed. First, the information itself must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of the information to the detriment of the party communicating it...' (See paragraph 7 of the Tribunal's decision).

50. The Commissioner was provided with an extract from the course handbook which explicitly imposes a duty of confidentiality on students in relation to case studies as well as an acknowledgement letter which they have to sign in recognition of their professional responsibilities.
51. After considering the case studies in question as well the documents imposing a duty of confidentiality on the students, the Commissioner is satisfied that the case studies possess the necessary quality of confidence and were imparted in circumstances importing an obligation of confidentiality. In the issue of detriment the Commissioner has taken into account Lord Keith of Kinkel in the same case of *Coco v Clark* (referred to above);

'.....I would think it a sufficient detriment to the confider that information given in confidence is not to be disclosed to persons to whom he would prefer not to know of it, even though the disclosure would not be harmful to him in any positive way.'
(Paragraph 8, *Bluck v Information Commissioner & Epsom St. Helier University NHS Trust*).

Would the public authority have a defence to a breach of confidence claim because the public interest in disclosure would outweigh the public interest in maintaining the exemption?

52. Although section 41 is an absolute exemption, the law of confidence does contain its own inbuilt public interest in that one defence to an action for breach of confidence is that the disclosure is in the public interest. The Commissioner therefore also considered whether the public authority could rely on a public interest defence in an action for breach of confidence in the event of disclosure.
53. Although the public authority did not specify any public interest arguments, in the Commissioner's view, there is a public interest in preserving the flow of case study information to the public authority to assist in the delivery of practical based modules. Without the assurance that what is essentially part of an individual's medical record would not be disclosed, patients are unlikely to consent to their cases being used for educational purposes. There is a public interest in preserving the flow of case study information to the public authority to assist in the delivery of practical based modules as this will improve the quality of training and ultimately therefore the quality of homeopathy practitioners available to the members of the public.
54. In addition, there is a public interest in maintaining the complete confidentiality of medical records and the Tribunal extended this to the medical records of a deceased in *Bluck v Information Commissioner & Epsom & St. Helier University NHS Trust* (see paragraph 13). As noted above, the case studies are part of the medical records of the subjects of the case studies.
55. Therefore, to rely on a public interest defence against an action for breach of confidence, the public authority would have to provide arguments that outweigh the public interest in maintaining the obligation of confidence in this case. The Commissioner recognises that there can be in some cases arguments which could override the duty of confidentiality such as issues surrounding transparency

and accountability of the BSc course in question. However, he is not satisfied this is the case here, and therefore finds that the public interest in maintaining the relationship of trust between the lecturers/practitioners and their patients outweigh the countervailing public interest arguments that could be advanced in the circumstances of this case.

56. The Commissioner therefore finds the public authority correctly applied the exemption contained at section 41 to the case studies listed in Annex A. In the Commissioner's view, even though the patients would not be identifiable if the case studies were disclosed, this disclosure would still be actionable by the patients.

Section 43(2)

57. The Commissioner next considered whether the remaining course materials (i.e. excluding the case studies) were correctly withheld by virtue of the above exemption.

58. Information is exempt from disclosure under section 43(2) if its disclosure would, or would be likely to, prejudice the commercial interests of any person.

59. A full text of section 43 is available in the Legal Annex at the end of this notice.

60. Therefore in order for this exemption to apply, the test is whether or not the commercial interests of a third party or the public authority would or would be likely to be prejudiced by disclosure.

61. In the Commissioner's view, 'would prejudice' places a much stronger evidential burden on the public authority, and the possibility of prejudice must be at least more probable than not. On the other hand, 'would be likely to prejudice' means that the possibility of prejudice should be real and significant, and certainly more than remote.

62. The public authority was not very clear on the level of prejudice anticipated, and explained that from its understanding of section 43(2), '*it is not necessary to distinguish what "would" or "would be likely to" prejudice the University's commercial interests...*' Based on the nature of the public authority's arguments as well as the Tribunal's comments in *Mcintyre v The Information Commissioner & Ministry of Defence* (in relation to the application of section 36(2) (c)), the Commissioner relied on the lower threshold of prejudice in reaching a decision. According to the Tribunal;

'We consider that where the qualified person does not designate the level of prejudice, Parliament still intended that the reasonableness of the opinion should be assessed by the Commissioner but in the absence of designation as to level of prejudice that the lower threshold applies, unless there is other clear evidence that it should be at the higher level.' (paragraph 45)

63. On the likelihood of prejudice, the Tribunal also noted in *John Connor Press Associates Ltd v Information Commissioner* (EA/2005/0005) that the '*the chance*

of prejudice being suffered should be more than a hypothetical possibility, there must be real and significant risk.' (See paragraph 15).

64. According to the public authority, very few universities in the UK offer courses in homeopathy. However, there are a considerable number of private courses available in the field not just in the UK but worldwide, and it had concerns in the past that similar courses offered by overseas providers were using details of its course content in their own course provision. Therefore;

'...disclosure would be likely to prejudice the University's position in what is a competitive market for student recruitment...loss of student income would have a deleterious effect on the University's finances and ability to resource its existing and future operations.....'

65. It further argued;

'The University values its portfolio of intellectual property rights: while the release to students of copies of documents in which the University owns the copyright does create a risk of unauthorised copying, that risk is limited. Unlimited availability of any course materials at no cost or at a fee which is not realistic may lead to the risk of widespread unauthorised copying (and of the material being treated as of little or no value by the recipient); neither would be in the public interest.....'

66. The Commissioner first considered whether the public authority was correct to conclude that it had a 'commercial interest' to protect in relation to the course materials requested.

67. In the Commissioner's view, a commercial interest relates to person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services.

68. Universities and Colleges are funded by public money distributed by the Higher Education Council for England (HEFCE). The introduction of tuition fees has not altered the fact that they are still publicly funded institutions as there is no requirement for fees to be paid up-front. Instead, fees can be deferred until a graduate reaches the earning threshold to be able make monthly repayments.

69. Their funding is tied to among other things the number of students they are able to recruit. The number and quality of students they are able to recruit is also very much largely dependant on the type of courses offered, quality of teaching, research profile, profile of the university etc.

70. While a University may have a financial interest in the provision of higher education, the Commissioner is not persuaded that it also has a 'commercial interest' as envisaged by section 43(2). In providing higher education, its survival is not dependant on the ability to generate its own funding and therefore the need to be commercially competitive is not a paramount consideration in the sense one would expect of a privately funded organisation. The ability to recruit students no doubt has an effect on its finances but that is in contrast to a commercial interest.

The public authority is, broadly speaking, not a profit making organisation, the provision of higher education as a public service (albeit for a fee) is its underlying motive.

71. The Commissioner therefore finds that the section 43(2) was incorrectly engaged by virtue of the fact that the public authority's ability to recruit students is not a commercial interest within the contemplation of section 43(2).
72. Notwithstanding the above finding, the Commissioner considered it appropriate in this case to make a determination on the likelihood of prejudice on an assumption that the public authority has a 'commercial interest' in its ability to recruit students.
73. As noted above, the public authority freely admits that there is a risk of disclosure from students who are taught on the course, and also suggests via the application of section 21 that the prejudice to its commercial interest would be trivial if payments were made in return for disclosing the course materials.
74. If the harm is to its ability to recruit students as suggested by the public authority, then the possibility that the course materials could be disclosed by students on the course means there is already the likelihood of prejudice to its commercial interest (if any) by virtue of the fact that students already enrolled on the course have access to the course materials which could be easily made available to the public authority's competitors. The materials could still be subject to copyright protection and the public authority would still have rights to prevent copying if a competitor sought to reuse the course materials.
75. As already noted above in relation to the likelihood of prejudice, the Tribunal commented that the chance of prejudice being suffered should be more than a hypothetical possibility, there must be real and significant risk. In the Commissioner's view, disclosure under the Act would add little to the existing harm (if any).
76. In addition to his finding on commercial interests the Commissioner finds that section 43(2) would in any case not be engaged as the likelihood of prejudice to the public authority's ability to recruit students as a result of disclosure under the Act is no more than the likelihood of prejudice resulting from the availability of the course materials to students already enrolled on the course.

Section 36(2)(c)

77. In light of the above finding, the Commissioner next considered whether the remainder of the course materials (i.e. excluding the case studies) were correctly withheld by virtue of the exemption at section 36(2)(c).
78. Information may be withheld under the above section if its disclosure, in the reasonable opinion of a qualified person, would or would be likely to prejudice the effective conduct of public affairs.
79. A full text of section 36 is available in the Legal Annex at the end of this Notice.

80. As noted above, section 36 may only be engaged if in the *'reasonable opinion of a qualified person'* disclosure would or likely result in prejudice to the effective conduct of public affairs. According to the Tribunal in *Guardian Newspapers Ltd & Heather Brooke v The Information Commissioner & The BBC* (EA/2006/0011 & EA/2006/0013);
- 'On the wording of s 36(2)(c) we have no doubt that in order to satisfy the statutory wording the substance of the opinion must be objectively reasonable...'*(paragraph 60)
81. On the weight to be given to the process of reaching a reasonable opinion, it further noted;
- '.....in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at....'* (paragraph 64)
- '.....can it really be said that the intention of Parliament was that an opinion reached, for example, by the toss of a coin, or on the basis of unreasoned prejudice, or without consideration of relevant matters, should qualify as "the reasonable opinion of a qualified person" under s 36 merely because the conclusion happened to be objectively reasonable?' (paragraph 63)*
82. Therefore, to determine whether section 36(2) (c) was correctly engaged by the public authority, the Commissioner decided to consider the qualified person's opinion as well as the reasoning which informed the opinion.
83. According to the public authority, the Vice-Chancellor is the qualified person for the purposes of section 36(2)(c), and his opinion was sought on 26 September 2008 and received on 29 September 2008.
84. The Commissioner notes that a Vice-Chancellor is the qualified person for a university from the list of qualified persons for public authorities published by the Ministry of Justice.⁴
85. The public authority however declined to provide the Commissioner with a copy of the opinion and/or a copy of the submissions made to the Vice-Chancellor in respect of the application or otherwise of the exemption. According to the public authority;
- '.....(it did not) consider it appropriate to disclose the submissions made to the Vice-Chancellor: knowledge that documentation produced for the purposes of the production of an opinion under section 36 may be subject to disclosure would in our view be – at least – likely to inhibit the free and frank provision of advice and/or exchange of views within the University.....'*
86. It did however explain the reasoning behind the application of the exemption (i.e. the qualified person's opinion). According to the public authority;

⁴ Available online at; <http://www.foi.gov.uk/guidance/exguide/sec36/annex-d.htm>

'.....it would be reasonable to anticipate that if the applicant in this case were to obtain the course materials for which he has applied without payment or at a cost which did not reflect its costs to the University and its commercial value, then it is likely that many applications would be received for all or any of the University's.....courses. The number of such applications is clearly unquantifiable, but is likely to be substantial, and to cause continuous or disproportionate interruption and disruption.'

87. The public authority further argued that if *'course materials were to be released electronically, issues could arise in relation to copyright and moral rights.'* It explained that a distinction needed to be made between;

'.....on the one hand, controlled disclosure to the (relatively) small number of students in a cohort studying the qualification who are subject to strict licence conditions from the copyright owner in relation to the material received and who will also be subject in some respects to obligations of confidentiality, and, on the other hand, the possibility of disclosure of the course materials in electronic form to an applicant under the Act.....'

88. Similar to its stance in relation to section 43(2), it also declined to explicitly clarify whether it was relying on the lower or higher threshold of prejudice. Based on the points in relation to section 43(2) above, the Commissioner also relied on the lower threshold of prejudice in reaching a decision on the application of this exemption.

89. In *Mcintyre v The Information Commissioner & the Ministry of Defence* (referred to above), the Tribunal commented;

'We would recommend to the Commissioner that in future investigations for complaints where a s.36(2) exemption has been claimed that he should require to see more evidence in relation to the opinion given by the qualified person, such as civil servants' submissions to ministers and their responses.' (Paragraph 47)

90. The Commissioner notes the public authority's concerns in stating that, providing the Commissioner with the documentation leading to the opinion of the qualified person could inhibit the free and frank provision of advice and exchange of views. The Commissioner does not however agree that this argument could be used in preventing him from having access to information which would assist him in conducting an investigation. The Tribunal's comments in *Mcintyre's* case above reinforces this point.

91. To investigate the reasonableness of the qualified person's opinion, the Commissioner may need to establish the circumstances he/she took into account by reference to the information available to them at the time. The logical expectation therefore is that the opinion would have been sought and received at the time of the request, and not during the course of the Commissioner's investigation.

92. The Commissioner has chosen to exercise his discretion to accept the late reliance on section 36(2)(c) because in the circumstances of this case, he does

not consider the qualified person would have been influenced by circumstances other than those prevalent at the time of the request in reaching his opinion. However, he would like to reiterate the importance of public authorities not relying on new exemptions during the course of his investigation. The Commissioner also notes that the request was made at a fairly early stage of the implementation of the Act and when the public authority's experience was limited.

93. As to the reasonableness of the of the opinion, whilst the Commissioner is unable to comment on the process due to the lack of evidence from the public authority, he is not persuaded that the opinion itself could be accurately described as objectively reasonable to engage the exemption at section 36(2) (c). Although the Commissioner has not commented on the process leading up to the qualified person's opinion, he is satisfied that in the circumstances of this case, there are sufficient grounds to reach a decision based only on the opinion itself.
94. In the Commissioner's view, section 36(2)(c) is only available to a public authority in cases where the disclosure would prejudice a public authority's ability to offer an effective public service or to meet its wider objectives or purpose (rather than merely function) due to disruption caused by the disclosure and diversion of resources in managing the impact of disclosure. In *Mcintyre v Information Commissioner & Ministry of Defence*, the Tribunal commented in agreement;
- '.....this category of exemption is intended to apply to those cases where it would be necessary in the interests of good government to withhold information, but which are not covered by another specific exemption, and where the disclosure would prejudice the public authority's ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure of the diversion of resources in managing the impact of disclosure.'* (Paragraph 25)
95. As already noted above, in the public authority's view, if the complainant was provided with the course materials, then the number of applications for the same or other course materials is likely to be substantial, and electronic disclosures would on the other hand lead to copyright infringements. It did not however provide any documentary evidence in support of the assertion that students are subject to copyright restrictions in respect of the dissemination of the course materials for the BSc in homeopathy, and as noted above, it has already admitted the course materials are at risk from disclosure by the students enrolled on the course.
96. The Commissioner accepts that information which may be subject to disclosure under the Act may also be subject to copyright protection. The Commissioner's view however is that public authorities complying with the duty to disclose information under the Act are not breaching the Copyright, Designs, and Patents Act 1988. However, where such information is disclosed under the Act, the public authority is entitled to make the applicant aware that the information is copyright protected and is to able to protect its intellectual property. The Commissioner also finds that impact on the public authority's intellectual property rights is not a relevant interest to consider under section 36(2)(c), unless the impact on those

rights could be linked to an effect on their ability to offer an effective public service.

97. The Commissioner recognises that if as a consequence of disclosure in this case, the public authority received a large number of requests for the course materials for all or most of its courses, it could be so disruptive that section 36(2)(c) might be engaged. However, he does not consider that it is at all plausible that this would happen, and that the public authority has not considered if there is any evidence in support of the likelihood that this would be the case. As already noted by the public authority, course materials which are available to students enrolled on a course are already at risk from further dissemination, and it is unlikely that disclosure in this case would lead to substantial applications for the course materials for the BSc in homeopathy or any other courses offered by the public authority in light of the fact that they are readily available to potentially thousands of students therefore making them quite easily accessible to anyone determined enough to have them. He does not accept that for the material other than the case studies a strong level of control exists, as argued by the public authority.
98. For the reasons set out above, the Commissioner finds that section 36(2)(c) is not engaged as he does not accept the opinion of the qualified person is an objectively reasonable one. He does not find that disclosure would be likely to prejudice the effective conduct of public affairs.

The Decision

99. The Commissioner finds that section 41 is engaged
100. He however finds that the exemptions at sections 21, 43(2), and 36(2)(c) are not engaged.
101. The Commissioner therefore finds the public authority in breach of;
- Sections 1(1)(b) and 10(1), because it failed to disclose the remainder of the course materials (i.e. excluding the case studies) to the complainant within 20 working days.
 - Section 17(1), because it did not specify in its refusal notice that it was also relying on sections 41 and 36(2)(c),
102. A full text of sections 1 and 10 are available in the Legal Annex at the end of this Notice.

Steps Required

103. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Disclose all the course materials for the BSc (Hons) in Homeopathy apart from the case studies listed in Annex A of this Notice.
104. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

105. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

106. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 30th day of March 2009

Signed

**Steve Wood
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Annex A

Case study – Acute Case Josh aged 23 months

Case study – Your patient is 7 year old female, Millie

Case Study – Male, 70s: Case 4.1

Case Study – Male 71: case 4.2

Case Study – Female, 45: case 9.1

Case Study – Female, 50s: follow- ups: case 9.2

Case study – hierarchy: concomitants & modalities – Male, late 40s: case 9.3

Case study – A case of crotalus cascavella

Cases 1 – 4

Female b. 1960

Case analysis, case taken 27/8/95, male DOB 28.3.94

Female aged 43

Chronic case, Female aged 51

Case, Female 38 years old

Case, female DOB 27/3/56

Student cases – CR case 3/initial consultation, male – 49 years old, IT processor

COB case 9

BB case 7 – initial consultation, Female age 56

JB case 6 – initial consultation case notes, female, age 66

VD case 5 IC case notes

KF case 2 – initial consultation, case notes, female: DOB 5/1/74

JD case 2 case notes

Confidential Patient case notes

Case 8 female age, 24, 8/6/1998

Reference: FS50140374



Information Commissioner's Office

Case 9 female age 51, 14/11/97

Case 10 Male age 65, June 1996

Legal Annex

General Right of Access

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 1(3) provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

Fees

Section 9 provides that -

- (1) "A public authority to whom a request for information is made may, within the period for complying with section 1(1), give the applicant a notice in writing (in this Act referred to as a "fees notice") stating that a fee of an amount specified in the notice is to be charged by the authority for complying with section 1(1)."
- (2) "Where a fees notice has been given to the applicant, the public authority is not obliged to comply with section 1(1) unless the fee is paid within the period of three months beginning with the day on which the fees notice is given to the applicant."
- (3) "Subject to subsection (5), any fee under this section must be determined by the public authority in accordance with regulations made by the Secretary of State."
- (4) "Regulations under subsection (3) may, in particular, provide –
 - (a) that no fee is to be payable in prescribed cases,
 - (b) that any fee is not to exceed such maximum as may be specified in, or determined in accordance with, the regulations, and
 - (c) that any fee is to be calculated in such manner as may be prescribed by the regulations."
- (5) "Subsection (3) does not apply where provision is made by or under any enactment as to the fee that may be charged by the public authority for the disclosure of the information."

Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Section 10(2) provides that –

"Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt."

Section 10(3) provides that –

"If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

Section 10(4) provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

Section 10(5) provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

Section 10(6) provides that –

“In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

Refusal of Request

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(2) states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 17(4) provides that -

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

Section 17(6) provides that –

“Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.”

Section 17(7) provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

Information Accessible by other Means

Section 21(1) provides that –

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”

Section 21(2) provides that –

“For the purposes of subsection (1)-

- (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
- (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.”

Section 21(3) provides that –

“For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is

available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme."

Prejudice to effective conduct of public affairs.

Section 36(1) provides that –

"This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

Section 36(2) provides that –

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Section 36(3) provides that –

"The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2)."

Section 36(4) provides that –

"In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".

Section 36(5) provides that –

"In subsections (2) and (3) "qualified person"-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
- (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
- (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
- (d) in relation to information held by the House of Commons, means the Speaker of that House,
- (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
- (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
- (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
- (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
- (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
- (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
- (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
- (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
- (m) in relation to information held by the Greater London Authority, means the Mayor of London,
- (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
- (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
 - (i) a Minister of the Crown,
 - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
 - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.”

Section 36(6) provides that –

“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.”

Section 36(7) provides that –

A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion-

- (a) disclosure of information held by either House of Parliament, or
- (b) compliance with section 1(1)(a) by either House, would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.

Information provided in confidence.

Section 41(1) provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Section 41(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”

Commercial interests.

Section 43(1) provides that –

“Information is exempt information if it constitutes a trade secret.”

Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

Section 43(3) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”