Neutral citation number: [2025] UKFTT 00308 (GRC)

Case Reference: EA/2023/0416
Decision given on: 11 March 2025

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: On the papers on 28 May 2024 with Case Management Directions, including Joinder of the Second Respondents and an Oral hearing GRC – CV Platform on 13 December 2024

Tribunal Judge Kennedy KC & Specialist Members Naomi Matthews & Kerry Pepperell:

Between:

MUKESH HINDOCHA

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

UNIVERSITY COLLEGE LONDON

Second Respondent

Representation:
For the Appellant: As a Litigant in person
For the First Respondent: Louisa Lansell of the ICO.
For the Second Respondent: Peter Lockley of Counsel

Decision given on 21 January 2025. The Appeal is dismissed.

REASONS

Introduction:

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”), against his decision notice of 29 August 2023 Ref. IC-241648 – Z4C1 ("the DN") which is a matter of public record.

2. The Appeal concerns a request for disclosure made on 4 June 2022 (“the Request”).

3. UCL refused the Appellant’s request for information, relying on s.36(2)(b)(ii), s.36(2)(c) and s.40 (2) FOIA. The Appellant complained to the Commissioner. Following an investigation, the Commissioner issued the DN, in which he held that s.36(2)(b)(ii), s.36(2)(c) and s.40(2) were engaged, and that the balance of public interest favoured maintaining the exemptions. The Commissioner has also decided that UCL has correctly applied section 40(2) (personal data) of FOIA to part two of the Appellant’s request.

4. The Commissioner did not go on to determine whether in the alternative, UCL was entitled to rely on s.41 FOIA, which they had sought to do in the course of the Commissioner’s investigation. The Appellant appealed to this Tribunal.

5. At the paper hearing on 28 May 2024 the Tribunal required further investigation and analysis for the proper and fair hearing of this appeal and that it would be necessary to join the public authority as the Second Respondent and the Tribunal directed that:
   a. An oral hearing be listed on 22 July 2024;
   b. UCL (which had previously filed written submissions only as a non-Party) be joined as Second Respondent;

c. By 3 July 2024, UCL file updated Open and Closed Bundles, comprehensive submissions, any further evidence or witness statements on which it wished to rely, and a bundle of relevant authorities;
d. By 10 July 2024, the Appellant respond to UCL's submissions with any submissions, evidence and authorities on which he wishes to rely; and
e. By 17 July 2024, the Parties make any further written submissions.

Request and Response:

6. On 4 June 2022, the Appellant sent correspondence to UCL which contained a number of requests for different sets of information. UCL considered the following parts of this correspondence to be requests for information that would fall within the scope of FOIA:
   • part one: "Immediately release the Environmental Investigation report."
   • part two: "Details of all other independent interviews UCL conducted based on the names I provided to UCL."

7. On 18 July 2022, UCL responded to the requests and refused to disclose the Report sought in part one of the request under sections 36(2)(b)(ii) and 36(2)(c) FOIA (prejudice free and frank views or prejudice the effective conduct of public affairs). UCL explained that the Provost of UCL is the qualified person for purposes of section 36 and that his opinion had been provided. It set out the public interest factors for and against disclosing the Report and concluded that the balance favoured maintaining the exemption from disclosure.

8. UCL also confirmed that it was refusing part two of the Appellant's request under section 40(2), by virtue of section 40(3A) (a), of FOIA.

9. UCL also refused to disclose details of the interviews referenced in part two of the request under section 40(2) FOIA (third party personal data). UCL submitted that individuals were identifiable form the requested interview details and they would not reasonably expect their personal data to be disclosed, and it would not be fair and lawful to disclose it in breach of the first data protection principle.

10. On 16 September 2022, the Appellant requested an internal review and challenged UCL's reliance on the exemptions claimed. He rejected UCL's section

36 FOIA arguments as speculative and stated that the Report would have less impact if published now as it was disclosed to managers two years ago and that the then Assistant Director, who featured in the investigation, left UCL before the Report was completed.

11. Alternatively, the Appellant conceded that if UCL were correct that the investigatory manager and interviewees would have been much more circumspect had they known that the Report would have been published, UCL could disclose the Report, with interviewees names redacted, to UCL staff on a confidential basis. The Appellant stated that the investigation was not confidential as groups of staff could share their experiences with the investigator and staff expected the Report to be disclosed to them, if necessary, in confidence.

12. In terms of the public interest in the disclosure of the Report the Appellant declared the Report a "whitewash" given that no action was taken against the former Director and former Assistant Director. The Appellant referred to the Bartlett report which was published on 9 June 2022 following an Environmental Investigation into UCL's Bartlett School of Architecture. The Bartlett report identified a culture of bullying, harassment, discrimination and sexual misconduct over years and following its publication, several staff were subject to further investigations. The Appellant claimed that the publication of the Bartlett Report provided accountability and transparency and triggered an apology from UCL, and action being taken against staff. He claims that the converse is true in respect of the Report which he argues should be disclosed "for scrutiny, transparency, accountability and holding senior managers to account…"

13. In relation to section 40(2) FOIA, the Appellant accepted that UCL could redact interviewees names for the protection of participants but not the names of the relevant Director and Assistant Director14.

14. UCL maintained its position following an internal review the outcome of which it communicated to the Appellant in correspondence dated 16 November 2022. As to the public interest in withholding the Report from disclosure UCL submitted that: *"…reports of this nature are an internal management tool for UCL. As a general rule, such reports should not play out in the public domain because,*

amongst other things, if they were routinely made public, this might have a significant impact on the willingness to commission such investigations and the accuracy and effectiveness of other such reports in the future. This would be detrimental to UCL, its staff and its students."

15. In the same correspondence UCL maintained that the interview information sought, in part two of the request, intrinsically contains the personal data of the individuals
involved and therefore, it was not possible to disclose it names redacted.

16. On 21 January 2023 the Appellant provided UCL with a 79-page document ('The Appellant's Document') and requested a further review of UCL's position not to disclose the requested information. The Appellant's Document contained: previous Decision Notice ref. IC-96056-F5J7 issued by the Commissioner in January 2022 against Imperial College London ('the Imperial DN') ordering the disclosure of a report, the Nolan Principles, documents from UCL's website and the press and the SLADE report. The latter was published in October 2022 and found that unprofessional workplace behaviours and racial disparities characterise the SLADE's
high-stress culture.

17. In the correspondence the Appellant argued that it is in the public interest to disclose the Report on the basis that UCL is institutionally racist and has failed to tackle bullying and harassment, discrimination, racism and dishonesty for ten years as evidenced by the Barlett and SLADE reports; the Report would show that the relevant Director and Assistant Director's credentials are dishonest; and those who fund UCL including taxpayers have a right to know how their money is spent, how UCL treats staff and students and how it is doing compared to its public statements.

18. On 3 February 2023, the Commissioner received a complaint from the Appellant about UCL's handling of his request and a copy of the Appellant's Document. On 2 June 2023 UCL responded to the Commissioner's investigation queries.

19. The Commissioner considered the following:

• Whether UCL is entitled to rely on section 36(2)(b)(ii) and 36(2)(c) as its basis for withholding he information relevant to part one of the request.

• Whether UCL is entitled to rely on section 40(2) of FOIA as its basis for withholding the information relevant to part two of the complainant's request.

The Decision Notice:

20. On 29 August 2023, the Commissioner issued the DN in which he concluded that UCL was entitled to refuse to disclose:
(i) the Report in response to part one of the request under sections 36(2)(b)(ii) and
36(2)(c) FOIA (DN§ 2); and
(ii) the details of interviews requested in part two of the request under section 40(2) FOIA.

21. The reasons for the Commissioner's decision are contained in §§10-58 DN.

The Grounds of Appeal and the Commissioner's Response:

22. The Appellant's Grounds of Appeal (total 31 pages) set out the background to his request and extensively quote from ICO guidance, First-Tier Tribunal decisions, the DN, the Imperial DN and refer to the Bartlett and SLADE reports none of which are
binding on the Tribunal. Moreover, the Grounds of Appeal repeat the Appellant's previous submissions to UCL and the Commissioner which were considered before the DN was issued.

23. In summary the Appellant argues that the Commissioner erred in law in concluding that:
(i) sections 36(2)(b)(ii) and 26(2)(c) FOIA are engaged in respect of the Report sought in part one of the request and the public interest favours maintaining those exemptions; and
(ii) section 40(2) FOIA applies to information about interviews sought in part two
of the request.

24. As a preliminary point the Commissioner submits that the time at which to consider the application of the exemptions and the public interest is the date of the public authority's response, or if the response is served late, 20 working days following receipt of the request per the statutory time frame: Montague v IC [2022] UKUT 104 (AAC). In this case, UCL issued a late response, and the relevant time is 2 July 2022. In July 2022, the Report was nearly three years old, and the Bartlett report had recently been published in an anonymised form, but the SLADE report had not been published.

25. The Commissioner submits that several issues raised in the Appellant's Grounds of Appeal post-date 2 July 2022. Accordingly, they are only relevant and admissible, subject to the Tribunal's case management powers, "…in so far as they throw light on the grounds now given for refusal" Evans and another v Information Commissioner and Attorney General [s2015] UKSC 21

26. Accordingly, the Commissioner acknowledges UCL's submissions served during the appeal proceedings 'UCL's appeal submissions') which further distinguish this case from the Imperial DN, the Bartlett report and the SLADE report.

Section 36(2) FOIA-engagement of the exemption:

27. The Appellant's Grounds of Appeal at pages 10-17 comment on the DN §§16-21 and the Commissioner's conclusion that sections 36(2)(b)(ii) and 36(2)(c) are engaged in respect of part one of the request for the Report. The Appellant argues that UCL's qualified person's opinion did not address how disclosure would be likely to otherwise prejudice the effective conduct of public affairs for the purposes of section 36(2)(c) FOIA. The Commissioner refutes this argument and considers that UCL's submission that the disclosure of the Report would be likely to adversely affect its safe space in which to make decisions regarding improvements to workplace practices concerns section 36(2)(c) FOIA (DN §19). UCL's further submission that if such reports were routinely published, this might significantly impact on UCL's willingness to commission investigations and the accuracy and effectiveness of other such reports in the future which would be detrimental to UCL, its staff and its students (see §35 above) is also relevant to section 36(2)(c) FOIA.

28. As to UCL's submissions on section 36(2)(b)(ii) FOIA (the DN §§17-18), the Appellant claims that UCL's safe space was prejudiced before SSESS staff were informed of the Environmental Investigation, by email dated 18 May 2023,19 due to the former Director's email dated 15 May 202020 in which she praised the work of the then Assistant Director. The Appellant claims that individuals either chose not to participate in the Environmental Investigation or to limit their contributions to the investigation for fear of victimisation and losing their jobs. In response, the Commissioner submits that the perceived impact of the Director's email is acknowledged in the Report and at the relevant time, 2 July 2022, SSEES staff had voluntarily participated in the Environmental Investigation and, having been reassured of anonymity, shared their experiences on sensitive issues with the investigator. Accordingly, the Commissioner was right to accept UCL's submission that if the Report were disclosed in July 2022, it would be likely to adversely affect UCL's processes by deterring staff from participating in any future Environmental Investigations of this nature.

29. The Appellant claims that disclosing the Report *"could actually lead to better quality advice"* The Commissioner submits that this argument appears to concern s 36(2)(b)(i) which formed no part of the Commissioner's investigation nor the DN to the extent that it concerns 36(2)(b)(ii) or 36(2)(c), and that this argument should be rejected as unparticularised and unevidenced.

30. In respect of the DN §18, the Appellant claims that SSEES staff had assumed that the Report would be published and sought to have their names redacted from their contributions by reference to an email dated 9 June 2020 which reassured interviewees: *"… should person A in an interview session name Person B, we will be maintaining confidentiality in that respect and person B will not be informed about person A's disclosure."*

31. The Appellant acknowledges that SSESS staff were offered one to one discussion with the relevant investigator as well as group discussions. He claims that the latter are public and not confidential. The Commissioner refutes this claim and submits that staff agreeing to share their experiences with the Investigator, in the presence of colleagues, who may report similar concerns, is entirely different to consenting to the disclosure of their contributions to the

investigation, to the public in response to the Appellant's request. A disclosure by a public authority under FOIA is made to the world at large and is free from any duty of confidence. Accordingly, the consequences of disclosure to persons other than the requester cannot be ignored: IC v Halpin [2019] UKUT 29 (AAC).

32. Further the Commissioner note that the email dated 18 May 2020 states that the Report is to be prepared for the Vice-Provost for Education and Student affairs to review which supports UCL's submission that the Report was prepared for internal use only. That email also states: -*"We understand the barriers to coming forward and are committed to improving trust and confidence in reporting and follow up action."* The Commissioner has seen no evidence that UCL intended to publish the Report and has no reason to doubt UCL's submissions that it was intended for internal use only and UCL's appeal submissions. Moreover, the content of the Report itself refers to information being submitted on the condition of anonymity.

Public Interest:

33. The Grounds of Appeal at pages 18-27 contain the Appellant's comments on the DN §22-43 and the Commissioner's conclusion that the public interest balance favours maintaining the exemptions in section 36 FOIA in respect of the Report. The Appellant repeats his previous submissions to UCL and the Commissioner.

34. The Appellant claims that the Report's recommendations, as disclosed to SSEES staff, did not mention two key members of staff (see the DN §28). The Commissioner notes that the purpose of the Report was not to make findings regarding individual staff and that UCL has separate procedures for such matters as stated in the DN §§34-35. Moreover, the Commissioner notes that the recommendations include; *"investigating individual behaviours under UCL procedures where appropriate"* and the Tribunal will be able to view the Report itself which makes clear that the allegations made against the former Assistant Director were not tested as that was not the purpose of the investigation.

35. As to the public interest in the disclosure of the Report, the Appellant accuses UCL of wrongdoing and claims that UCL senior managers corrupted the Environmental Investigation by failing to inform staff of the results of the Athena Swan survey report: 50% of female SSEES staff claimed to have suffered

or witnessed bullying/harassment, until the Report had been completed. The Commissioner notes that the Athena Swan survey is referenced in the Report at page 13 and that the Appellant put this argument to UCL. The Commissioner considers that UCL is best placed to address this argument albeit is not clear how this could have affected the separate Environmental Investigation.

36. The Appellant argues that disclosure of the Report will reveal some new details which further inform public debate on issues including how and what progress, if any UCL is making and to what lengths senior managers go to hide wrongdoing. In response the Commissioner submits that since 2 December 2020, SSESS staff, including the Appellant, have been able to assess what progress UCL has made in respect of the recommendations contained in the Report. Having considered the Report during his investigation and, for the purposes of this appeal, the Commissioner maintains for the reasons in the DN, above and in UCL's submissions that the public interest balance lies in favour of maintaining the exemptions in section 36(2) FOIA.

Section 40(2) FOIA:

37. The Grounds of Appeal at pages 28-29 dispute the Commissioner's conclusion that section 40(2) FOIA applies to the details of interviews conducted as part of the Environmental Investigation into SSEES sought in part two of the request. This includes information that was provided by staff and details about their roles, experiences, opinions, thoughts and comments about their workplace environment and their colleagues (DN §50).

38. During the Commissioner's investigation the Appellant accepted that the names of SSEES staff contained in the requested interview details represent personal data for the purposes of section 3(2) DPA. Accordingly, he accepted that the majority of those names (save for individuals referred to in his correspondence with UCL could be
withheld/redacted under section 40(2) FOIA (DN §49).

39. In his Grounds of Appeal, the Appellant argues that it would not be possible to identify the interviewees or staff that they had mentioned during the interviews, if their names were redacted, given the number of SSEES staff. The Appellant repeats his arguments at paragraph 36 of his Grounds of Appeal concerning the SLADE report, the Bartlett report and the Imperial DN27 which the Commissioner has addressed above. Further, the Commissioner submits that the Appellant acknowledged during the Commissioner's investigation, that the SLADE and Bartlett reports were the only two out of nine Environmental Investigation reports that were published whilst the majority of reports were disclosed to select members of staff28. UCL has explained why it chose to publish those two particular reports and has distinguished them from the Report (see UCL's appeal submissions §16). It is clear to the Commissioner, having considered the requested information, that the individuals interviewed during the Environmental Investigation into SSEES considered their discussions, not only their identities, to be kept confidential as per UCL's submissions §14(b).

40. Moreover, the Commissioner submits that the issue for the Tribunal to determine in this appeal is whether the information withheld from disclosure in this particular case, concerning interviews with SSEES staff, can be effectively anonymised such that no living individual could be identified from the requested information, by any member of the public which includes approximately 200 SSEES staff who have pre-existing knowledge of their colleagues and their workplace environment.

41. The Commissioner submits that even if individuals' names were redacted from the requested interview information, that does not prevent the information from being personal data for the purposes of section 3 DPA: information relating to an identifiable living individual…who can be identified, directly or indirectly (see §7 of the Commissioners' Response).

42. The Commissioner maintains (as per the DN §51) that it is reasonably likely that out of the interviews conducted as part of the SSEES Environmental Investigation, at least one SSEES member of staff would be able to correctly identify an interviewee or an individual discussed by an interviewee from the requested information even if their names were redacted, together with other information known or reasonably available to them. Accordingly, it is possible for a member of SSEES staff to 'single out' (see Recital 26 GDPR at §9 of the

Commissioner's Response) and distinguish an interviewee or member of staff discussed by an interviewee from other individuals in accordance with NHSBSA FTT and NHSBSA UT (cited at §11 of the Commissioner's Response) if the requested information was disclosed. The Commissioner submit that the risk of identifiability is reasonably likely and more than a "*hypothetical possibility*" (see the Opinion 4/2007 on Recital 26 of the Directive at §9 of the Commissioners' Response) or an educated guess.

43. The Commissioner submits that a disclosure under FOIA is free of any duty of confidence and is akin to a disclosure to the world. As the High Court held in Office of Government Commerce v Information Commissioner [2010] QB 98, per Burton J [72]: *"once such a request [i.e. a FOIA request] has been complied with by disclosure to the applicant, the information is in the public domain. It ceases to be protected by any confidentiality it had prior to disclosure. This underlines the need for exemptions from disclosure".*

44. Accordingly, for the reasons in the DN, and in his response, and UCL's appeal submissions, the Commissioner maintains that that there is no lawful basis for disclosing the requested personal data (details of interviews requested in part two of the request) under. Article 6(1)(f) GDPR and that such disclosure would breach the first data protection principle in Article 5(1)(a) GDPR. Accordingly, UCL was entitled to withhold the information sought in part two of the request under section 40(2) FOIA by virtue of section 40(3A) (a) FOIA.

45. In written submissions for the appeal, UCL argued in the alternative thus*; "The University was and remains convinced of the correctness of its position regarding sections 36 and 40 FOIA per the above. Because of this conviction, it did not consider it necessary to deploy additional exemptions as justification for non-disclosure – until it was before the ICO which naturally encouraged fullness of submissions. At this stage, UCL also raised section 41 FOIA (confidential information) as a relevant exemption as a legitimate additional or alternative basis for withholding the relevant information in each case, although it notes that the Commissioner did not reflect or discuss this in the ICO Decision; it therefore re-raises it now, in the alternative, for the Tribunal's consideration for the purposes of the present proceeding".*

The Commissioners' Submissions of 22 March 2024:

46. The Commissioner helpfully clarified his position in respect of the application of the exemptions in sections 36 and 40 the Freedom of Information Act 2000 ("FOIA") in respect of the disputed information thus:

"As the Tribunal will notice from inspecting the withheld information, the Environmental Investigation report sought in part two of the Appellant's request has a number of appendices including interviews conducted as part of the Environmental Investigation. The Commissioner's position is that the entire Report including the appendices (sought in part one of the request) is exempt from disclosure under sections 36(2)(b)(ii) and 36(2)(c) FOIA (DN §2). Further, to the extent that the
entire Report including its appendices contains details of the interviews sought in part two of the request, it is also exempt from disclosure under section 40(2) FOIA per the DN §3. The Commissioner submits that the Tribunal is tasked with determining whether the Commissioner's decision that University College London ("UCL") were entitled to withhold the Report from disclosure under FOIA sections 36(2)(b)(ii), 36(2)(c) and 40(2) in response to the Appellant's FOIA request contained an error of law or that any discretion exercised by the Commissioner ought to have been exercised differently. Further, the Tribunal is to consider the application of the exemptions and the public interest test where relevant, in the circumstances as they existed at the time of that UCL's response was required by law (2 July 2022 per §43 of the Commissioner's Response). Ultimately, the Tribunal is concerned with the potential disclosure of the entire Report to the world under FOIA in circumstances where UCL considered that the full report is not suitable for publication."

On 11 November 2024: the Commissioner made the following brief final submissions:

47. *"Scope of the request: The Commissioner accepts UCL's position as to the scope of the request as per the DN §57. The Commissioner confirms that he did not consider all appendices to the withheld report during his investigation albeit he obtained these for inclusion in the bundles for completeness during the appeal proceedings. This supports UCL's submission that not all of the appendices to the withheld report are within the scope of part 2 of the request concerning UCL interviews.*
<u>Section 40(1) FOIA:</u> The Commissioner has no objection to UCL's late reliance on section 40(1) FOIA in respect of the Appellant's own personal data contained in the

interview information within the scope of part 2 of the request: ***Birkett v Defra*** *[2011] EWCA Civ 1606, [2012] AACR 32.*

To assist the Tribunal in determining this appeal, the Commissioner has attached a copy of his section 40 and 41 FOIA guidance and provides weblinks to his further relevant guidance below:

Section 40 and Regulation 13 – personal information | ICO

48. *The Commissioner notes that the Appellant wishes to rely on UCL's handling of a separate information request that he made in June 2024. The Commissioner notes that this appeal concerns the Appellant's request dated 4 June 2022 and that relevant time at which to consider the application of the exemptions from disclosure and, in respect of section 36 FOIA, the public interest test is 2 July 2022 (see the Commissioner's response §43).*

The Appellants Submissions on 6 December 2024:

49. The Appellants submissions prior to the hearing in summary are as follows:

"This appeal challenges the decision of the Information Commissioner's Office (ICO) to uphold University College London's (UCL) refusal to disclose the Environmental Investigation (EI) report under Sections 36 and 40 of the Freedom of Information Act (FOIA). I contend that this decision was erroneous and failed to appropriately weigh the public interest in disclosure against the cited exemptions. The EI report addresses systemic misconduct at a publicly funded institution, including allegations of bullying, discrimination, and managerial failures. These failings have caused significant harm to staff well-being and morale and undermine UCL's obligations as a public institution. Transparency is essential to ensure accountability and rebuild trust. Contrary to UCL's claims, the public interest in exposing this systemic failure far outweighs speculative concerns about inhibiting future deliberations.

Key Legal Arguments

Public Interest in Addressing Wrongdoing: UCL admits (Skeleton Argument, §33) that there were significant problems with SSEES's working culture, which necessitated the commissioning of the EI report. Allegations of systemic bullying and discrimination are of pressing public interest, particularly at a publicly funded university. UCL cites differences between this case and the Imperial College report institutional failure, and the public interest in understanding how UCL addressed such issues remains equally compelling.

ICO's Failure to Appropriately Exercise Discretion: The ICO accepted UCL's speculative claim of a "chilling effect" without adequately considering whether such an effect is realistic or outweighed by the substantial public interest in disclosure.

Department of Health v Information Commissioner (2017) and Davies v IC (2020) caution against over-reliance on "chilling effect" arguments, noting that public authorities are generally aware that sensitive information may be disclosed. UCL failed to provide evidence that disclosure would inhibit future investigations (Skeleton Argument, §62)

Reasonableness of the Qualified Person's (QP) Opinion:Section 36 requires the QP's opinion to be substantively reasonable. While UCL argues that disclosure would undermine deliberative processes (§54-58),this reasoning assumes that public scrutiny inherently impedes effective management. The opposite is true—transparency fosters better practices by holding institutions accountable for addressing systemic issues.

Weakness of Section 40 Arguments on Personal Data: UCL asserts that redactions would not sufficiently anonymize individuals. However, this argument overstates the risk of identification and underestimates the feasibility of effective redactions.The Upper Tribunal in NHS Business Services Authority v Spivack (2021) clarified that identifiability requires a "degree of certainty," not speculative associations."

The Second Respondents Submissions on 6 December 2024:

50. The written submissions made on behalf of UCL prior to the hearing included the following material matters:

"The FTT is not conducting an inquiry into the culture of UCL overall; it is determining whether the Commissioner erred in the DN and whether a specific report relating to SSEES should be disclosed. All the material necessary to determine the issues before the FTT is contained in the Open and Closed Bundles."

*"First, that is the natural meaning of Part 1 of the Request as the Appellant phrased it: 'the Environmental Investigation report' most naturally means the 16-page report that was drafted by the investigator. That document is signed and dated by the investigator on its final page [**CB/34**], after which follow the words 'the report should be submitted to the Commissioning Manager (cc' HR support) for consideration'. In other words, it is the 16-page Report that comprises the outcome of the investigator's work, and which the Commissioning Manager will review. This is consistent with the terms in which the Vice-Provost announced the investigation to*

*staff, when he characterised=the 'report for my review' as one which 'will summarise the investigation undertaken, the findings and themes identified, and recommendations and observations on what the department should consider moving forward'[**OB/A224**];"*

"Second, Part 2 of the Request is for the Interviews, which themselves comprise a significant part of the Report's appendices. Although the Appellant may not have been aware of the structure of Report and its appendices, when construed objectively, Part 1 of the Request must be limited to the 16-page Report, since if it included the Report's appendices, Part 2 would add nothing to it."

*"As to which appendices are Interviews: Part 2 of the Request was for 'Details of all other independent interviews UCL conducted based on the names I provided to UCL' [**OB/C473**]. UCL adopts a broad approach both to what constitutes an 'interview' (so that it includes, for example, e-mail statements of witnesses, and follow up e-mails by interviewees) and to whether any interview was 'based on' names provided by the Appellant to UCL. Since the Appellant's complaint triggered the environmental investigation as being 'based on' names he provided, and so being within the scope of Part 2. On this basis, all of the documents within appendices A1 [**CB/C35-129**], A2 [**CB/C130-139**], B1-B3 [**CB/C144-150**] and J [**CB/C484-495**] are within the scope of Part UCL also considers appendix A3 [[**CB/140-143**]], which simply tabulates information gathered from the interviews, to fall within the scope of Part 2 of the Request. The other appendices which do not fall within Part 2 of the Request are therefore outside of the scope of the Request."*

51. On the applicable exemptions:

*"(Response para.43 [**OB/A275**]) that the relevant date at which the balance of the public interest falls to be judged is 2July 2022, applying the decision of the UT in **Montague v Information Commissioner & DIT** [2023] 1 W.L.R. 1565 at ¶86-87 [**AB/15/516**] (unaffected on this point by the decision of the Court of Appeal: [2024] 1 W.L.R. 2185).*

The Commissioner was correct to find that UCL was entitled to rely on s.40(2) FOIA in relation to the Interviews, and to the Report insofar as it reflects the content of the Interviews.

However, in relation to one interview given by the Appellant himself, and in relation to short passages in a number of interviews by third parties which refer to the Appellant, ***UCL seeks the FTT's permission to rely in addition on s.40(1) FOIA:***

this information is the Appellant's own personal data, and as such is absolutely exempt from disclosure by s.2(3)(f) FOIA.

Further or in the alternative, both the Interviews and the Report engage s.41 FOIA – an absolute exemption by s.2(3)(g) FOIA. The Interviews were conducted with express, repeated assurances of confidentiality to interviewees, and the Report is derived from that confidential information and would reveal it if disclosed. There would be no valid public interest defence to an action for breach of confidence and accordingly the withheld information is absolutely exempt from disclosure."

52. On Section 36 – prejudice to the conduct of public affairs and the Engagement of the exemption:

*"The QP reviewed the Report and concluded that disclosure would be likely to prejudice the free and frank exchange of views for the purposes of deliberation (s.36(2)(b)(ii) FOIA) and would otherwise prejudice the conduct of public affairs (s.36(2)(c) FOIA) [**OB/E623-625**]. This was on the basis that if it had been thought that the Report would be disclosed, the investigatory manager was likely to have been more circumspect, and to have failed to inform decision-makers about the full circumstances, to the detriment88637751.2 of their deliberations. It follows that disclosure of the Report under FOIA cold lead to similar inhibition in a comparable future case – the so-called 'chilling effect'. The QP also considered that disclosure would impinge on UCL's safe space 'to properly engage on these sensitive issues' and 'to effectively mitigate and manage the process of eradicating inappropriate behaviour' [**OB/E624**].*

*The Commissioner accepted that this was a reasonable opinion (DN ¶15-20, **OB/A3-4**). It is not clear whether the Appellant challenges this conclusion in relation to both limbs, or only limb (c) 'otherwise prejudice', or whether his challenge relates only to the balance of public interest.*

In any event, the FTT is respectfully invited to uphold the Commissioner's finding that the exemption was engaged on both limbs. Applying the low threshold for a reasonable QP's opinion: it was clearly not irrational or absurd to hold that there was a significant risk that this investigator (who was an employee of UCL) would have been inhibited in dealing with sensitive matters, had he thought the report might be put in the public domain – and by implication, that future investigators would also feel inhibited. That satisfied limb (b)(ii) – the risk was that investigators would be less free and frank in giving their views to commissioning managers for the purposes of management deliberation of sensitive issues.

As to limb (c) – the QP plainly identified a distinct prejudice to the conduct of public affairs; namely, impingement on the safe space needed to take decisions arising from the Report, and thus an adverse effect on how managers implemented the Report's recommendations. That is a completely different type of prejudice to that under limb (b)(ii), because it relates to implementation by managers, not the views of investigators. The QP's view that this prejudice would be likely to arise can hardly be called irrational, even in July 2022, when the very fact of the Request, and especially the highly adversarial e-mail containing the Request, demonstrated that the issues raised in the Report were still controversial – certainly in the view of the Appellant. Weight of prejudice and public interest in maintaining the exemption.

This is a case in which the FTT should give significant weight to the QP's opinion about the likely prejudice when carrying out its own assessment of the public interest balance, since the Provost was a senior individual who was well placed to assess the likely effect of publication. In any case, the FTT can satisfy itself"The DN is in accordance with the law and the Commissioner correctly exercised any relevant discretion. As to the applicable exemptions:

The Commissioner was correct to find that both s.36(2)(b)(ii) and s.36(2)(c) FOIA were engaged in relation to the Report, and that the balance of the public interest favoured maintaining these exemptions.

*UCL agrees with the Commissioner from perusing the Report that it contains sensitive material, of a kind that a future investigator might choose to omit from a similar report if they considered it might be published, resulting in a less effective report. Thus, there are numerous instances where the investigator expresses himself in vivid and direct language, for example at [**CB/C19**]. The use of blander language, with an eye to publication, would not convey the situation at SSEES so effectively to those reading such reports, and so would reduce the imperative to act to improve matters. Further, the Report is candid in reporting negative feedback about senior individuals: Section A(iv) [**CB/C24**] summarises what the investigator was told about CH and DK in a frank and unguarded way. These comments are critical in conveying to the reader an accurate picture of the perceptions of junior staff about senior management at SSEES – a central theme the investigator was tasked with exploring. Again, if this Report were disclosed, a future investigator would be wary about recording similar comments in a report that was not intended for publication, given the precedent set by such disclosure.*

*The line of authority discussed by the UT in **Davies** is of limited application to the present facts, given the very different context. A civil servant carrying out their regular, constitutional role of advising a Minister on issues of public policy may well be expected to advise candidly, setting aside any concern about public pressure. However, that is a very different situation to that of an individual at an academic*

institution, tasked (outside of their ordinary role) with investigating the conduct of (potentially senior) colleagues. Such a person may understandably be rather more prone to be swayed by concerns about the effects of disclosure.

A further distinct aspect of the prejudice is likely inhibition of future interviewees. All interviewees were given explicit assurances of confidentiality, and some only felt able88637751.2 to come forward on the basis of these assurances. The Report quotes or paraphrases extensively from these interviewees, and given the small size of SSEES, and the specific nature of some of the comments made, their identities would be apparent in many cases to those familiar with the workings of SSEES. If the interviewees felt that the assurances they were given turned out to be hollow, because the Report was later disclosed to the world at large, then interviewees in any future investigation would be much more circumspect when providing input on sensitive matters – or would not come forward at all.

Accordingly, the Tribunal is invited to find that disclosure would give rise to a real chance of a substantial chilling effect on future environmental investigations that were not intended for publication: they would become blander in their language and safer in their exploration of sensitive areas, and would be likely to have a much reduced pool of information on which to draw, because interviewees would be reluctant to come forward. The public interest in avoiding such an outcome is clear: it would be harder for senior management to obtain a frank and detailed view of difficult workplace situations, and it would therefore be harder for management to address them. Ultimately, that would have a detrimental effect on the quality of research and teaching at SSEES. That would be strongly contrary to the public interest, for a publicly- funded institution with a reputation for excellence in its field that enhances the UK's standing in the academic world."

"The Provost was also well-placed to assess UCL's need for a safe space to implement the Report's recommendations. The FTT should give significant weight to his view that disclosure would impede the process of improving working relationships within SSEES. It can in any case be seen from the documentary evidence that disclosure to the world on 2 July 2022 would have had a detrimental effect on the ability of UCL and SSEES to improve the working culture within SSEES. This is, quite simply, because it would have led to the Appellant (whose intentions are clear from the wider e-mail containing the Request), and potentially others, raking over perceived historical wrongs, dating back to the period 2017-2020. That would have been overwhelmingly negative for relationships within SSEES, at a time when (i) SSEES had taken significant steps to address the Report's recommendations by means of open discussion and staff training; (ii) CH (on whom the Appellant's grievances focus) had left some time before; and (iii) SSEES had separately investigated and dealt with the Appellant's complaints, as they related specifically to him, through appropriate HR procedures. There comes a time when any institution

is entitled to draw a line under past controversies and focus on improving relationships and behaviours going forwards. For SSEES, that time had plainly come by 2 July 2022. In this sense, disclosure would have impinged on the 'safe space' required by SSEES to implement the recommendations and focus on improving the working culture. That would have been detrimental to the public interest, because a healthy working culture is strongly in the public interest."

53. On Public interest in disclosure: *"UCL recognises that there is a public interest in transparency in relation to both the working culture at a publicly funded institution such as SSEES, and in how UCL and SSEES address concerns that are raised about that culture. However, the extent to which those public interests would be served by disclosure of the Report in July 2022 is overstated by the Appellant.*

The Appellant focusses on a comparison with (i) the Bartlett and Slade reports, which UCL voluntarily published; and (ii) a report into bullying at Imperial College which the Commissioner ordered to be disclosed in Decision Notice IC-96056-F5J7.

*The differences in circumstances from the Bartlett and Slade reports are addressed at 16 of UCL's previous written submissions [**OB/A255**]. In summary, those reports concerned allegations by students of inappropriate behaviour, including discrimination or harassment on the basis of sex and race. There was therefore an especially strong public interest in their publication, both because of overt allegations of discrimination had been made, and because they concerned UCL's public-facing role in teaching students. It was obvious that a public response was required to such allegations, and accordingly the relevant reports were prepared from the outset with the intention of publication. By contrast, the Report concerned internal working culture of a department, and while themes of race and sex discrimination arose in interviews, they were not its focus. There is a far lower public interest in scrutiny of internal working practices, even if they happen to arise at a public institution, than there is in addressing allegations of discrimination in how an institution delivers a public service.*

*The significant differences in circumstances from the Imperial report are tabulated at para 17 of UCL's previous written submissions [**OB/A255-256**]. In short, the Imperial report concerned allegations against staff who were extremely senior within the university overall (the President and CFO), generating such significant public interest that questions had been asked in Parliament [**OB/A12** ¶5]. Crucially, the Imperial report had made findings of fact against these individuals, and the university had subsequently given them its strong backing, after publishing only parts of the investigation report. There was therefore an exceptionally strong public*

*interest in publication of the full report, to understand the extent of the findings against these individuals. By contrast, the Report was not intended to, and does not, make findings of fact about individuals [**CB/C21**]. While it reports allegations against individuals, it states expressly that these allegations have not been tested [**CB/C24**]. A further important difference (albeit relevant to the public interest in maintaining the exemption), is that the identities of Imperial witnesses could effectively be protected, as they were drawn from a pool of 20,000 employees; whereas the much smaller size of SSEES meant that interviewees could still realistically be identified even if their names were redacted.*

The FTT, of course, must focus primarily on the inherent public interest in disclosing the information before it, rather than on comparisons with disclosure in other circumstances. When the question is properly framed in that way, it is submitted that the public interest in disclosure of the Report is relatively modest. It concerns the internal working culture of a small department of a university; it does not make findings of fact about individuals, and although it reports allegations against senior staff of SSEES, the primary focus of those allegations (CH) had left before the Report was even completed. There can be no credible allegation that the Report, or SSEES, ducked the question of how to address CH's behaviour – it was simply that he left before appropriate action could be taken.

Moreover, SSEES had addressed the broader themes of the report through open discussion and staff training, and in addition by sharing the full Athena Swann report – which touches on a number of the same themes – in advance of the same Town Hall meeting at which the recommendations of the Report were debated amongst staff members.

*The narrowness of the Appellant's interest can be seen from his reply to the submissions of UCL and the Commissioner [**OB/A283-302**], with which he enclosed various documents dealing largely8 with his grievances about his own historical treatment [**OB/A407-460**].*

*The Appellant has sought to make much of the Director's e-mail of 15 May 2020, in which she expressed support for CH (and other members of staff). Whatever the FTT's view of the wisdom of the Director's comments, it is unclear how this e-mail enhances the public interest in disclosure of the Report. The Appellant views it as an attempt to deter participants from speaking to the investigator. If that is correct (which is not accepted), then it would be further evidence of the need to respect confidentiality; in any case, many interviewees did come forward, and so the point is moot. Moreover, the e-mail of 15 May 2020 was raised during the course of the investigation, and the FTT can satisfy itself that it was dealt with appropriately in the Report [**CB/C27-28**].*

At the relevant date, therefore, the public interest in disclosure of the Report was both relatively narrow, and historical in nature."

The Appellant's stated Grounds of Appeal on 29 December 2024:

54. *"Section 36 Challenge:*

- *The Qualified Person's opinion lacks reasonable foundation and contemporary evidence of prejudice*
- *The "safe space" argument is overly generalised without specific analysis of the report's content*
- *No concrete evidence demonstrates likely (as opposed to possible) prejudice*
- *The "safe space" justification is significantly weakened by the three-year gap between report completion and the QP's decision*
- *No evidence supports claims that disclosure would impede institutional candor*
- *No demonstration of current prejudice to public affairs conduct after three years*

Legal Framework:

- *Section 36(2) engagement requires:*
  - *Contemporary evidence of decision-making*
  - *Specific identified harm*
  - *Evidence-based reasonable opinion*

Public Interest Considerations:

- *Substantial public interest exists in:*
  - *Understanding institutional handling of bullying allegations*
  - *Ensuring accountability*

Promoting effective management practices".

The Hearing on 13 December 2024:

55. The Tribunal heard evidence in Closed session and the Gist of that hearing states as follows: The Tribunal looked at the Terms of Reference for the report.

"Peter Lockley ("PL") of Counsel on behalf of UCL noted that:

- *the genesis of the report included a complaint by MH, but that issues specific to MH and his line manager had been addressed through other processes, including a*

grievance investigation. PL suggested the Tribunal could not resolve issues pertaining to MH's grievance.

- *the EI investigation and report was intended to focus on system issues and root cause, rather than to make findings about the conduct of individuals.*

- *It had always envisaged that the report would be made to the Commissioning Manager, not more widely*

- *The Tribunal looked at the main body of the Report.*

- *PL noted that the bulk of comments related to one individual, CH, who had now left, and that the Investigator indicated what course of action he would have recommended had CH remained in post.*

- *A smaller number of comments related specifically to DK, largely in relation to her behaviour vis-à-vis CH.*

- *There were only a 'small number' of comments about other individuals, none of whom were named in the Report.*

- *While the report did identify issues of concern, it was known that these existed prior to commissioning of the Report – they were the reason why it was commissioned. The published Athena Swann survey also contained information on similar themes.*

- *The Report recorded that staff had expressed fear of repercussions for speaking out, including through the Environmental Investigation. PL submitted that this underlined the particular strength of the public interest in maintaining confidentiality in the circumstances of this case.*

- *PL highlighted a number of places in which he said the investigator had expressed himself in direct or candid language or had reported the words of interviewees who had done so. He noted that the Report frequently either quoted directly, or summarised, statements by interviewees.*

- *PL noted that a number of the comments were specific enough that the maker of the comment would be identifiable to those within the small SSEES family.*

- *The panel challenged PL on the extent to which this would actually be feasible, by reference to a number of specific examples.*

- *PL accepted that there were few examples in the report itself where identifiability would be possible for the purposes of s.40 FOIA. However, it was likely that if the report were disclosed, there could be unhelpful speculation about the identity of individuals, which would be relevant to s.36 – and that these comments were also caught by s.41, because they reflected the confidential interview material.*

- *The Tribunal looked at how the investigator dealt with concerns raised by interviewees about DK's e-mail of 15 May. PL noted that interviewees were not in fact inhibited from coming forward by this e-mail, or from raising it with the investigator, who dealt with it in a balanced way.*

- *The Tribunal looked at a sample of interviews. PL drew attention to the clear assurances of confidentiality given to interviewees. He also demonstrated the difficulty of redacting the interviews in a way that would mask the identity of the interviewee, because the interviewees were describing their personal experiences in a way which would identify them to readers familiar with SSEES.*

- *PL showed the Tribunal e-mails from one individual who had insisted on assurances of confidentiality as a condition of taking part. He also showed the Tribunal material within the interviews where the interviewee was putting forward a different perspective from the one presented by the Appellant. He submitted that there were two sides to every story and it was not the Tribunal's function to decide who was right and who was wrong.*

- *PL also showed a number of examples of the Appellant's personal data within the Closed Material."*

56. Given the previous exhaustive submissions from the partiers and a restriction of available time the Appellant and Second Respondent were invited to make their final submissions in writing.

The Final Submissions on behalf of UCL:

57. On the Withheld Information and the exemptions relied on UCL's position on the scope of the Withheld Information is set out at paras.11-14 of its skeleton. In summary, Part 1 of the Request relates to the main body of the Report [CB/18-34], excluding its various appendices, and Part 2 relates to any of the Appendices that could reasonably termed 'interviews': A1 [CB/C35-129], A2 [CB/C130-139], B1-B3 [CB/C144-150] and J [CB/C484-495] and A3 [CB/140-143], (which simply tabulates information gathered from the interviews).

58. UCL has taken a deliberately broad approach to the scope of Part 2, to include all of the primary factual material relied on by the Investigator.

59. The Tribunal could reasonably take a narrower view – for example that Appendices B1-B3, which consist of Report and Support material, do not amount to 'interviews. Should it do so, that material would simply be out of scope.

60. UCL relies on s.41(1) FOIA and s.36(2)(b)(ii) and (c) FOIA in respect of all of the 'Withheld Information'. It relies on s.40(2) FOIA in relation to the Interviews, save where these are the personal data of the Appellant, in which case it relies on s.40(1). In relation to the Report, it relies on s.40(2) for the personal data of named individuals. While there are a small number of instances in which it might be possible for those familiar with SSEES to attribute comments or views to specific individuals (particularly where small groupings are identified), on reflection UCL does not seek to apply s.40(2) to such instances. Rather, the examples discussed in closed session are ones where disclosure might give rise to unhelpful speculation about 'who said what' to the Investigator and so are relevant to s.36(2)(c), rather than cases where positive identification is more likely than not to occur.

61. UCL submit the Appellant makes no challenge to the DN and outline the Appellants arguments thus: "*The Appellant's submissions address only the application of s.40 and s.41 FOIA to the Report. That is to say, the Appellant makes no submissions about either the application of s.36 FOIA to the Report – which was the basis on which the Commissioner found that UCL was entitled to withhold it – or about the Interviews. Accordingly, the Appellant makes no challenge to the DN, in relation to either the Report or the Interviews".*

62. UCL submit an appeal under s.57 FOIA is an appeal against a decision notice, and to succeed, an appellant must show either that the decision notice is (a) not in accordance with the law, or (b) that any discretion ought to have been exercised differently by the Commissioner: s.58(1) FOIA. The Appellant, they argue, does not even attempt to do so, in relation to either Part 1 or Part 2 of his Request. The Appeal should fail on that basis alone: even an unrepresented appellant must satisfy the basis requirement of saying why his appeal should

succeed, addressing the legal issue(s) it raises – but the Appellant has not done so. The remainder of UCL's submissions are made without prejudice to this fundamental point.

63. UCL submit the Appellant makes unsupported factual assertions for example about the conduct of DK and CH (including at his previous employer), or that UCL has displayed a "*broader pattern of suppressing uncomfortable truths*" or that "*Many staff no longer recall specific events*. The Appellant, they argue has not given a witness statement (and was therefore not cross-examined), his assertions made in submissions are not evidence, and he does not support his assertions by reference to documents. UCL argue one of the Appellant's assertions, that staff were concerned about retaliation only by CH and DK, has been directly disproven by evidence shown to the Tribunal in closed session. Others misrepresent the position by implication – for example, the statement that UCL is "*a publicly funded institution receiving over £1 billion annually*" implies that UCL receives £1 billion of public money a year. UCL argue, it does not – the bulk of its funding comes from tuition fees, accommodation charges, donations and other income.

64. UCL submit it would be disproportionate for UCL to identify and rebut every unsupported assertion made by the Appellant: many of which are of doubtful relevance to the Appeal, and some are too general to be capable of rebuttal. However, as a general point the Tribunal is invited by UCL to treat the Appellant's assertions with scepticism, or at the very least not simply to accept them as fact. One specific matter, the position in relation to the COIR Report is referred to by UCL.

65. In relation to the engagement of s41 FOIA, UCL submit no appellate authority has been identified on the question of when information is *'obtained from another* person' for the purposes of s.41(1)(a) FOIA, in circumstances where it is obtained from employees of the public authority in question. However, in the first-instance case of Johnston v Information Commissioner (EA/2011/0055, 18 October 2011), where the Tribunal gave a reasoned decision on this issue (at paras.19-30), applying then-current Ministry of Justice guidance on FOIA, which is consistent with the current guidance from the Commissioner (cited at ¶43 of

UCL's skeleton argument), which suggests "*A transcript of the verbal testimony given by an employee at an internal disciplinary hearing*" as an example of information that satisfies s.41(1)(a). The Tribunal in **Johnston** drew a distinction between information obtained from employees acting 'solely in the capacity of employee' (which would not be obtained from 'another person') and information obtained from employees acting in some different or private capacity (when it would be obtained from another person) (see para.23). Johnston concerned an investigation by an NHS Hospital Trust into the death of an elderly patient. Staff were interviewed as part of the investigation, a report was produced, and 'feedback meetings' were subsequently conducted. In relation to the interview material, the FTT held that employees were acting in the course of their employment when *"providing the public authority with information about its own processes/systems etc. or with information recorded in medical records in the course of their employment" (para.29) – and accordingly this information did not fall within s.41(1) FOIA. By contrast, when employees were "expressing a subjective and personal opinion or judgment as to e.g. the behaviour of an individual patient, patient's relative or colleague would not be attributable to the employer or made in the usual course of employment and therefore could be obtained from the employee as "another". Consequently, the Tribunal is satisfied that in respect of those elements of the interviews where personal judgment or opinions were obtained beyond the usual scope of employment duties".*

66. In relation to the report, the Tribunal held that the investigating officer was appointed and trained by the Trust for such investigations and carried them out on its behalf, and consequently s41 is not engaged in relation to the report except insofar as the report quotes information from other individuals which the Tribunal considers separately under the heading "staff interviews"(para.28). Records of the subsequent feedback meetings were not within s.41(1) FOIA, because they were carried out for a work purpose: enabling the conclusions of the investigation to be put into practice (para.30).

67. UCL submits that the approach of the FTT gives is persuasive and should be followed. It gives a principled and pragmatic basis for determining when information obtained from employees is 'obtained from another person'. Applied in the context of the present Appeal, it would mean that:

"a)The Interview material within Part 2 of the Request is obtained from another person for the purposes of s.41(1)(a) FOIA, because employees were stepping outside of their usual course of employment in order to give personal reflections on the behaviour of colleagues and the culture of SSEES. The context of the Interviews carried out for the purpose of an environmental investigation is similar to the example given in the Commissioner's guidance, of an employee giving evidence to a disciplinary hearing. While the wider background in both cases is, of course, the employment setting, the employee is not imparting information that is germane to their ordinary employment; rather they are giving personal reflections about matters that have gone wrong and are therefore by definition outside the ordinary course of employment. Contrary to the Appellant's submission, giving evidence to the Investigation was not "part of an employee's professional responsibility", as is clear from the fact that participation was entirely voluntary – had it been part of employees' duties to participate, that would not have been the case;

b) As for the Report within Part 1 of the Request – the investigator is not 'another person' for the purposes of s.41(1)(a) FOIA. But this has never been UCL's case; rather, it relies on the extent to which the Report reflects the underlying confidential subject matter of the Interviews. Here, the Tribunal in Johnston applied too narrow an approach, seemingly restricting the application of s.41 FOIA only to passages in the report that were direct quotations from interviews. That UCL submit is wrong: the subsequent appellate authority of Evans, binding on this Tribunal, holds that s.41 can extend to "both the general subject-matter of a communication and the fact that the communication took place."

68. On the wider approach required by Evans, the whole of the Report is within s.41(1) FOIA, for it is derived from and reflects the contents of the Interviews (together with a small number of further confidential disclosures provided through the UCL 'Report and Support' facility. Most directly, the 'Findings' section of the Report [CB/C23-32] is comprised of summaries of interviewee responses, including a number of direct quotations from them. The 'Executive Summary' [CB/C19] and 'Conclusion' [CB/C32-33] sections draw on this material and precis it further. Even more structural sections of the Report – the 'Introduction' [CB/C19-20], 'Remit' [CB/C20] and 'Investigation Process' [CB/C20-21] sections – draw on the same confidential background material as is explored by interviewees: these sections too reflect the 'general subject matter of the confidential communications and the fact that they took place. The 'Recommendations' [CB/C33-34] section has been disclosed to SSEES staff, with the exception of two bullet points. The withheld bullet points also reflect the substance of the Interviews – the second of them explicitly so – and are confidential information accordingly.

69. UCL submit that while the Appellant argues that "*implied confidentiality requires clear evidence of explicit assurances or longstanding practice*", and that there is no such evidence. This statement is both internally incoherent, and wrong in point of fact. If there are explicit assurances, confidentiality is express, not implied. Here, had there been no express assurances of confidentiality, confidentiality would nonetheless have been implied by the circumstances (an investigation into sensitive issues, in the context of staff concerns about retaliation). However, UCL does not need to rely on implied confidentiality, because express assurances of confidentiality were given to each and every interviewee, at the start and (in most cases) at the end of the interview.

70. In relation to the application of s36 FOIA. UCL's submissions on the application of s.36 FOIA are set out at paras 54-73 of its skeleton argument of 6 December 2024. There are UCL submit, three distinct elements to the prejudice that would be likely to arise from disclosure: (1) inhibition by investigators in future cases (s.36(2)(b)(ii)); (2) inhibition of interviewees in coming forward, or in their frankness if they did come forward (s.36(2)(c)); and (3) disruption to efforts by SSEES management to implement the recommendations of the Report and move forward (s.36(2)(c)).

71. UCL submit that while the Appellant states that no assurances of confidentiality were given in the e-mail announcing the Investigation, but this is not correct either. The Vice-Provost's statement that "*We understand the barriers to coming forward and are committed to improving trust and confidence in reporting and follow up action*" [**OB/A224**] clearly implies that the 'barriers' would be addressed in part by ensuring confidentiality – a point that was in any event spelled out by the Investigator to every interviewee, and by his administrative staff to those employees who specifically raised the issue.

72. UCL submit that there would be no valid public interest defence to an action for breach of confidence, for the reasons given at paras.64-72 and para 80 of UCL's skeleton argument of 6 December 2024.

73. UCL submit that of these, the evidence for (2) is particularly striking in the present case. Indeed, the nervousness of potential interviewees is a matter that the Appellant has repeatedly emphasised, and the Tribunal has been shown a

number of examples in both closed and open session. Contrary to the Appellant's oral submissions on the gist of the closed session (by reference to [OB/195]), repeated in his written closing submissions, interviewees' concerns about repercussions do not relate solely to CH and DK – as the Tribunal saw in closed session (by reference to [CB/485-487] and [CB/138-139]). The picture UCL submit is more mixed than the Appellant would have the Tribunal believe. In relation to (1), the Appellant emphasised that all UCL employees are given FOIA training and will be aware that information can be requested under FOIA. That is of course true, but FOIA training also explains to employees the operation of FOIA exemptions. It remains the case that the Investigator would not have expected disclosure beyond the commissioning manager and senior management of SSEES, as plainly evidenced in the Terms of Reference, and investigators in future would be likely to react to disclosure by being more circumspect in their reports. Unlike impartial civil servants giving advice on matters of policy, investigators in future environmental investigations will be employees of UCL, whose reports will deal with sensitive matters, usually concerned with the conduct of colleagues, and potentially (as here) senior colleagues. It is unrealistic to expect that an investigator in such a position would be wholly uninfluenced by the prospect that a report would be likely to be disclosed. Even if the inhibition were relatively subtle, it would reduce the value of the report, because it would not convey such a full or clear picture of the matter under investigation. That is a significant disbenefit to the public interest, because it reduces UCL's ability to investigate and correct problematic situations. As to (3), it is clear from the lengthy, hostile e-mail in which the Appellant made the Request that he did not, in 2022, regard the issues discussed in the Report as concluded, despite the departure of CH, and despite UCL's significant efforts to hold open conversations and training with SSEES staff and to improve the working culture (see UCL Skeleton of 6 December 2024 @paras.29-30). Disclosure of the Report and/or Interviews is likely to lead to further time-consuming and distracting conversations about historical matters, to the detriment of efforts being made at SSEES to improve the working environment in future.

74. UCL submit that the public interest in maintaining these exemptions would outweigh that in disclosure, for the Interviews, and for all parts of the Report. Plainly some aspects of the Report are less sensitive than others, and for some elements – UCL accepts – the prejudice from disclosure would be quite modest.

However, it would still arise to some extent, because disclosure would represent a breach of the expectations of the Investigator and interviewees about how the report would be treated. Moreover, these are the same elements for which the public interest in disclosure is weakest – because they deal with more anodyne procedural or background matters. In UCL's submission, while the weight on both sides of the scales is reduced in such cases, in all cases the balance remains in favour of maintaining the s.36 exemptions, because the prejudice from releasing any part of the Report remains real and of substance – and those cases where it is least significant are those cases where the public interest in disclosure is all but non-existent.

75. In relation to Section 40 FOIA UCL submit The Interviews are plainly the personal data of the interviewees, and disclosure would neither be fair or lawful, for the reasons at paras 87-89 of UCL's skeleton of 6 December 2024. They are absolutely exempt under s.40(2) FOIA – save for the elements listed at para.82 of UCL's skeleton argument, which are the personal data of the Appellant and are absolutely exempt under s.40(1) FOIA (without the need for further analysis).

76. UCL does not on reflection rely on s.40(2) FOIA other than in relation to individuals overtly identified in the Report itself. There are a number of instances, examined in closed session, where the Report identifies groupings of staff, and UCL remains of the view that disclosure of the Report would lead to an unhelpful 'guessing game' about who might have made such comments (which contributes to element (3) of the prejudice under s.36 FOIA, since it would tend to re-open historical issues and promote factionalism within SSEES). However, UCL does not now suggest that positive identification of a single individual would occur, in the way explained by the Upper Tribunal in Spivack as necessary for the engagement of s.40(2) FOIA.

77. UCL submit that as to individuals directly identified in the report (CH and DK) – disclosure would not be fair or lawful, for two related reasons: (i) they had a reasonable expectation that disclosure would not take place, based on announcements made to staff about the limited circulation of the Report and (ii) insofar as the Report sets out what was reported about their conduct, it states that these matters are not verified as findings of fact, because that was not the purpose of the Report (as explained in the Terms of Reference). There is

obvious prejudice to the data subjects in this material being released, since the allegations against them would be likely to be treated as findings of fact by those adverse to them, despite not having been verified in reality.

78. The Tribunal considered the two bullet points from the Recommendations that were not disclosed to staff, and which are therefore part of the 'Withheld Information'. As well as engaging s.36 and s.41, these bullet points are plainly also personal data. Disclosure would not be fair to the data subject, because the bullet points relate to matters of personal conduct and capability that would reasonably be expected to remain confidential between the data subject and HR.

79. In relation to the COIR report, UCL disputes the relevance of the COIR report to these proceedings, since it is concerned with governance structures of UCL overall and has little bearing on the working culture at SSEES. However, to the extent the Appellant relies on it, UCL wishes the Tribunal to have an accurate understanding of its contents. The Appellant rightly withdrew his allegations that it had made findings of racism or corruption, and UCL is grateful to him for doing so.

80. The Appellant maintains that the COIR report made findings that UCL's Senior Management Team ("SMT") had been misled. That is, strictly, correct, but the two instances where the report makes reference to 'misleading information' are in the nature of misunderstandings of technical matters, not deliberate or sinister attempts by one body within UCL to mislead another:

a). The first instance relates to the renewal of the UCL-wide Athena Swann accreditation. The COIR report found that SMT were given 'misleading information' about the impact on funding applications [OB/330]. The way in which it was 'misleading' is explained at [OB/334] – the National Institute for Health and Care Research ("NIHR" – a major funder for UCL research) requires recipients of grant funding to hold a silver Athena Swann award. However, that requirement relates to the 'academic setting' of the applicant. SMT were informed that the 'academic setting' was UCL itself; as the COIR report explains, that was incorrect: 'academic setting' is defined by NIHR to mean 'faculty' or 'medical school' [OB/335] – and so it was sufficient for applicant departments to

hold accreditation. There is no suggestion that SMT was deliberately misled, and the result was an additional exercise in equality and diversity that might not have been agreed (due to its cost) had this mistake not occurred. Given the Appellant's strong focus on promoting equality and diversity, it is hard to see why he complains about this mistake.

b). The second and only other instance in which the COIR report refers to 'misleading' information concerns a somewhat arcane point about the scope of powers delegated to UCL's Academic Committee ("AC") by its Academic Board ("AB"). It is set out below so that the Tribunal can satisfy itself that (1) there is no suggestion of deliberate misleading and (2) the issue is one of no conceivable relevance to the present Appeal. The COIR report author records (at [OB/371] that he was told the following by a member of the Provost's office:

"The ToRs are misleading in one respect: by saying Council charges AC to advise using powers delegated from AB, it makes it seem as though itis Council's decision that the delegation should be in place. This confuses two matters: i) what Council can charge a body (given the powers it already has delegated to it) and ii) who decides that those powers are delegated in the first place. The latter is purely in the discretion of the Academic Board – no Charter or Statute provision allows for the intervention in the powers/rights of AB by another body and indeed Charter Article 7 explicitly makes clear that the powers of Council are 'subject to the powers of the Academic Board'. Thus, Council is not the deciding power on extent and duration of this delegation, AB is and Council must respect that discretion [...]"

The Appellants Final Submissions of 30 December 2024:

81. The Appellant notes UCL's closing arguments dated 20 December 2024 contend my appeal should fail as I have not demonstrated why the Information Commissioner's decision notice is incorrect or how discretion was improperly exercised. This argument was not raised before the paper hearing in May 2024, suggesting UCL had previously accepted my detailed "Appellant's ground of appeal" submission (Bundle pages A185 to A215).

82. The Appellant subsequently filed additional submissions dated 11 October 2024 (supplementary bundle pages 180-193) and agreed to remove certain unlocatable case authorities before the 6 December 2024 hearing at UCL solicitors' request but argues this does not diminish the substance of his arguments.

83. The Appellant frankly and honestly confirms he focused his submissions on ss 40 and 41 as directed by the Tribunal and if he has misinterpreted these directions, he sincerely apologises and explains unfortunately, his ability to engage fully has been impacted by mental illness stemming from bullying and discrimination since 2017, as well as a subsequent minor stroke.

The Appellants Substantive Grounds of Appeal

84. Section 36 Challenge:

- The Qualified Person's opinion lacks reasonable foundation and contemporary evidence of prejudice
- The "safe space" argument is overly generalised without specific analysis of the report's content
- No concrete evidence demonstrates likely (as opposed to possible) prejudice
- The "safe space" justification is significantly weakened by the three-year gap between report completion and the QP's decision
- No evidence supports claims that disclosure would impede institutional candor
- No demonstration of current prejudice to public affairs conduct after three years

Legal Framework:

- Section 36(2) engagement requires:
    - Contemporary evidence of decision-making
    - Specific identified harm
    - Evidence-based reasonable opinion

Public Interest Considerations:

- Substantial public interest exists in:
    - Understanding institutional handling of bullying allegations
    - Ensuring accountability
    - Promoting effective management practices

Procedural Fairness:

85. The Appellant asks that the Tribunal will afford him appropriate procedural latitude and maintains that this appeal satisfies the FOIA requirements and

request the Tribunal to reject UCL's procedural challenge. The Appellant submits his appeal submissions demonstrate that the DN is not in accordance with law and that discretion should have been exercised differently, specifically that his appeal satisfies the FOIA requirements and request the Tribunal to reject UCL's procedural challenge.

Discussion:

86. This appeal was not straightforward from the outset hence the Case Management Directions and joinder of the public authority with a request for more detailed information. The Tribunal are grateful for the extensive and helpful resulting submissions from all parties.

87. With respect to s36 FOIA the Tribunal had originally not seen the Qualified Person's opinion. It is now in the bundle at E623. It is significantly lacking in detail; however, we now see it makes clear that the exemption is relying on "*thinking space*".

88. The SSEES environmental investigation was a voluntary exercise for the organisation. It was essentially considered to be a safe space to explore potential problems in the culture within. If the Report was disclosed, we accept it would potentially discourage Universities from seeking to commission this type of investigation and also witnesses from coming forward to participate in such investigations.

89. The prejudice/harm was convincingly fleshed out in the closing submissions and in the Closed Session as the Gist demonstrates in so far as it can for a wider audience.

90. The Qualified Person notes in his opinion that the ability to properly engage in sensitive issues would be diminished. While this Opinion was brief, we accept it is reasonable and we accept there is clearly a significant chilling effect, and it would also have an effect on the integrity of the process.

91. The recommendations were published, which in itself was an acceptance of a Bullying and Harassment problem within and the fact that this investigation took place reinforces the issues of concern. This in our view on the balance of probabilities did satisfy the public interest in so far as this has been necessary.

92. We considered the report in two parts, with some of the annexes postdating the request and the interviews clearly being within the scope of s41 and s36 FOIA.

93. We unanimously agreed on the chilling effect space and of likely future investigations not happening at all if the report was dissected and parts redacted, although the Qualified Person's opinion did not, in our view highlight this enough.

Conclusion:

94. On hearing the representations at the closed session and having carefully considered the comprehensive and compelling closing submissions made on behalf of the Second Respondent (see in particular page 8 para. 22) of the Closing Submissions on behalf of ULC and paras. 54-73 of its skeleton argument of 6 December 2024), we are not persuaded that s 41 applied to parts of the report, however we find that the report is covered by s 36 FOIA .

95. Having considered all the submissions and evidence before us the Tribunal now, we can accept the Commissioners decision that UCL are entitled to rely on Section 36(2) (b)(ii) and 36(2) (c). We consider that UCL are also entitled to rely on s.40(2) FOIA.

96. We therefore unanimously accept the Commissioners view that UCL are entitled to rely on Section 36(2) (b)(ii) and 36(2) (c) and we find they are also entitled to rely on 40(2).

97. Accordingly, we must dismiss this appeal.

Brian Kennedy KC 27 January 2025.