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## Case law update

University of Central Lancashire: access to course materials

Decision of the Information Tribunal 8 December 2009 (EA/2009/0034)

### Background

Professor Colquhoun, a research professor in pharmacology at UCL, made a request under the Freedom of Information Act 2000 in 2006 to the University of Central Lancashire (“UCLAN”) requesting information relating to their BSc in homeopathy, namely: course materials, course notes, powerpoint presentations and lists of textbooks; and, correspondence and minutes relating to the validation of the course.

The University refused, citing the following exemptions under the Act:

Section 41: that information was provided in confidence in respect of confidential case histories to UCLAN (this exemption was accepted);

Section 36 (2) (c): that in the opinion of the “qualified person” (UCLAN’s Vice Chancellor), disclosure would or would be likely to prejudice the effective conduct of public affairs of the University;

Section 43 (2): that disclosure would prejudice the University’s commercial interests.

The University appealed against the Information Commissioner’s decision notice which required disclosure. Professor Colquhoun, on his application, was joined as a party to the appeal, gave evidence, cross examined witnesses at the Tribunal hearing and made submissions, advocating unrestricted publication of course materials and expressing scepticism in the value of homeopathy.

## Commercial interests

Universities will be relieved to know that the Information Tribunal, although reaching the same end result, did not follow the reasoning of the Information Commissioner who had rejected the notion that universities have “commercial interests” (as opposed merely to “financial interests”). The Tribunal’s decision states:

“We do not consider the fundamentally charitable character of a university means that it should have no commercial interests. A body which depends on student fees to remain solvent has a commercial interest in maintaining the assets upon which the recruitment of students depends. Moreover, we accept the evidence that UCLAN operates in competition with other institutions of higher education in seeking to sell its products, namely undergraduate courses, to potential students. Therefore...we are satisfied that UCLAN’s interests in teaching material produced for its degree courses are properly described as ‘commercial’”.

However, the Tribunal was not persuaded that disclosure would or would be likely to cause the prejudice suggested, namely a loss of competitive advantage. It considered arguments about how competitors might use the materials and an argument about the possible damage to third parties who had granted copyright licences strictly for the purposes of teaching the particular course. The test adopted was that there must be a “significant and weighty chance of prejudice”. In this case, there was an absence of evidence, especially as the confidential case studies had been properly removed from disclosure. The Tribunal considered that the copyright attaching to the materials gave sufficient protection and it doubted that the course in question had significant commercial value in its own right given the absence evidence of an overseas interest.

## Quality assurance and the public interest

Although the Tribunal did not have to decide on where the balance of the public interest rested in the light of its finding on the prejudice test, it made some comments that the public interest weighed in favour of disclosure in this case:

“the public has a legitimate interest in monitoring the content and the academic quality of the course, particularly a relatively new course in a new area of study, funded, to a very significant extent, by the tax payer. It is no answer, we consider, to say that this function is performed by the process of validation or the continuing monitoring of academic standards with external input. Whether or not these processes are conducted with critical rigour, it must be open to those outside the academic community to question what is being taught and to what level in our universities. The apparent perception in some quarters that the intellectual demands of some or many degree courses have been relaxed, that higher classes of degree are too lightly earned, may be largely or entirely unfounded. But it is highly important that the material necessary to a fair judgment be available. That material will often, if not always, include the basic content of the course...”

The Tribunal went on to say, given the public controversy over homeopathy, that the balance of the public interest favoured disclosure. It dismissed the suggestion that the general public would be incapable of forming a proper judgment as independent expertise was available. The Tribunal did

make it clear however that its decision was based on the specific course in question, rather than determining the position for all courses.

## Prejudice to the effective conduct of public affairs

The Information Tribunal determined “that it could find no adequate basis for [the Vice Chancellor’s] opinion” under section 36, that it did not pass the test of objective reasonableness, nor was it reasonably arrived at. A clear record of the process adopted is required and the opinion of the “qualified person” must be based on “substantial evidence” of the likelihood of prejudice to the effective conduct of public affairs. It was a misunderstanding of the legislation to be concerned with the prospect of a flood of requests and consequent expense as the Act built in a cost of compliance threshold.

## Implications of the decision

The Tribunal stressed that this case relates to the course and the materials in question. The case does not determine a universal principle that all university course materials should be disclosed under the Act and, in that regard, it notes that MIT is in fact in a minority in publishing its course materials. There are comments in the decision about the private providers of homeopathy courses being in a “different market”; care should be taken not to apply this decision to other courses where private providers may be in the same market as a publicly funded university.

The case is a salutary reminder, however, of the importance of having evidence to back up the use of exemptions and to build a proper process for the use of the qualified person’s opinion under section 36. It also stresses the importance of a university making clear that it regards its course materials as protected by the law of copyright as it does leave hanging the risk of disclosure in other situations.

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