



IN THE FIRST-TIER TRIBUNAL **Case No. EA/2014/0017**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50486339

Dated: 9 December 2013

Appellant: Department for Education (DFE)

Respondent: Information Commissioner

Additional Party: Richy Thompson obo British Humanist Association

Heard at: Fleetbank House, London

Date of hearing: 10 June 2014

Date of decision: 24 June 2014

Date of promulgation: 25 June 2014

Before

Angus Hamilton

Judge

and

Alison Lowton

and

David Wilkinson

Subject matter: Freedom of Information Act 2000 ss 35 and 43

Cases considered:

Department for Education and Skills v IC and Evening Standard, IT, 19 Feb 2007

Secretary of State for Work & Pensions v IC IT 5 March 2007

Friends of the Earth v IC and Export Credits Guarantee Dept. [2008] EWHC 638

R (Lord) v Secretary of State for the Home Dept. [2003] EWHC 2073

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal in relation to the exemptions claimed under ss35 and 43 FOIA and adopts the agreement reached between the parties as to the applicability of s.42 FOIA and consequently substitutes the original decision notice with the decision notice set out below.

SUBSTITUTED DECISION NOTICE

Freedom of Information Act 2000 (FOIA)

Date: 24 June 2014

Public Authority: Department for Education
Address: Sanctuary Buildings
Great Smith St
London SW1P 3BT

Complainant: Mr Richy Thompson
Address: BHA
1 Gower St
London WC1E 6HD

Decision (including any steps ordered)

Submission dated 3 August 2010 (Document 1)

During the course of the appeal, the Department discovered a further document (a submission dated 3 August 2010) which it said fell within the scope of the request.

The Department claimed sections 35(1)(a) and 43(2) were engaged in respect of the entirety of document 1 save for paragraphs 2; 4(iv); 9 and 20 in respect of which section 42(1) was claimed. The Appellant later argued that only paragraphs 13 to 15 fell within the scope of the request.

The Commissioner argued that paragraphs 4(ii); 10-15 and Annex A fell within the scope of the request. Accordingly, section 42(1) arguments fall away as the paragraphs to which this exemption had been claimed do not fall within the scope of the request.

The Commissioner also concluded that section 35(1)(a) was engaged but that the public interest test favoured disclosure. The Commissioner also found that section 43(2) was not engaged but that even if section 43 were engaged; the public interest test would nonetheless favour disclosure.

Submission dated 23 September 2010 (Document 2)

The Commissioner found that section 35(1)(a) was engaged in relation to the submission dated 23 September 2010 in its entirety, but that the public interest test favoured disclosure.

On appeal, the Appellant made a late claim of section 42(1) in respect of paragraph 16 only. The Commissioner accepted that section 42(1) was engaged in respect of the third, fourth and fifth sentences of paragraph 16 and that the public interest test favoured maintaining the exemption; but did not accept that section 42(1) was engaged in respect of the first two sentences of paragraph 16. The Department accepted the Commissioner's position in oral submissions.

On appeal, the Appellant also made a late claim of section 43(2) in respect of all of the disputed information. It is the Commissioner's decision that section 43(2) is not engaged but that even if the exemption were engaged; the public interest test would favour disclosure.

Steps

The Commissioner requires the Department to take the following steps to ensure compliance with the legislation:

- (i) Disclose those extracts of the submission dated 3 August 2010 which fall within the scope of the request, namely, paragraphs 4(ii); 10-15 and Annex A; and
- (ii) Disclose the submission dated 23 September 2010 in its entirety save for the third; fourth and fifth sentences of paragraph 16 which are properly withheld under section 42(1).

The Department must take these steps within 35 calendar days of the date of this substituted decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

REASONS FOR DECISION

Introduction

1 s.1(1) of the Freedom of Information Act 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.

2 s.35 of the Freedom of Information Act provides that:

Information held by a government department. is exempt information if it relates to -

(a) the formulation or development of government policy ...

3 s.43 of the Freedom of Information Act provides that:

(1) Information is exempt information if it constitutes a trade secret.

(2) 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).

4 ss 35 and 43 provide qualified exemptions and it is also necessary to consider whether:

in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (S.2 FOIA).

Request by Mr Thompson

5 On 8 May 2012 the complainant requested the following information from the appellant:

a) digital or written correspondence, minutes of meetings or agendas from May 2010 onwards related to anthroposophy and Steiner schools within the context of the Free Schools programme.

b) any internal briefings or investigations on this matter including a copy of the internal investigation carried out by the Free Schools team into Steiner schools...

6 On 28 May 2012 the DFE informed the complainant that it did not hold minutes of meetings or agendas in relation to a). It withheld the remaining information under section 35 FOIA.

7 The complainant sought an internal review but on 7 August 2012 that internal review resulted in the DFE upholding its decision to withhold the information under section 35 FOIA.

8 The complainant complained to the Commissioner on 19 February 2013.

That complaint resulted in the Decision Notice which concluded that the public interest favoured disclosure of the information withheld by the DFE under section 35 FOIA.

The Appeal to the Tribunal

- 9 On 21 January 2014 the Appellant submitted an appeal to the Tribunal (IRT).

- 10 In the Grounds of Appeal the DFE sought to rely on s.35 and also s. 43 in relation to the withheld information. The DFE also contended that certain parts of the information withheld were also exempt from disclosure under s.42 (legal professional privilege). However during the course of the proceedings the parties were able to reach an agreement over which parts of the withheld information were covered by s.42 and this ground of appeal therefore fell away.

- 11 Also subsequent to the issuing of the Decision Notice the DFE discovered that it held an additional document containing information falling within the scope of Mr Thompson's request. However the DFE's arguments for withholding the information contained in this additional document also relied on ss 35 and 43.

- 12 There was disagreement between the Commissioner and the DFE as to what items of information contained within the newly discovered document actually fell within the scope of Mr Thompson's original request.

The Commissioner contended that the request covered far more items in the newly discovered document than the DFE were prepared to accept. Mr Thompson was excluded from this debate given that the document in question was a closed item.

- 13 The Tribunal was unanimous that the scope of the request covered the information as suggested by the Commissioner rather than the narrower interpretation from the DFE. The tribunal did not consider that the more narrow interpretation correctly reflected the scope of Mr. Thompson's request. The tribunal also noted that the DFE itself appeared to have adopted the broader interpretation in its responses to Mr. Thompson's requests and that the proposal that there should be a narrower interpretation appeared to have been adopted by the DFE at a late stage.
- 14 The Tribunal was invited by the Commissioner to consider whether even more items of information contained within the newly discovered document fell within the scope of Mr. Thompson's request than was suggested by the Commissioner. The Tribunal reviewed the document but considered that the Commissioner's approach was correct in the identification of the items of information falling within the scope of Mr. Thompson's original request.

The Questions for the Tribunal

- 15 The Tribunal judged that the principal questions for them to consider were

first, whether ss 35 and 43 of FOIA were engaged' and then secondly, to consider whether the public interest balancing exercise favoured maintaining the exemption or disclosure.

Evidence & Submissions

- 16 This matter was considered by the Tribunal by way of an oral hearing on 10 June 2014 with one live witness – Mr Damon Boxer – from the DFE. The Tribunal also received and heard oral and written submissions from the parties and the Tribunal members are grateful to all the parties for the effort they had clearly put into the preparation of their submissions.

- 17 The DFE submitted that both s.35 and 43 were engaged. In relation to s.35 the DFE submitted that the public interest favoured the maintenance of the exemption. The DFE were entitled to a 'safe space' in which to formulate policy (*Department for Education and Skills v IC and Evening Standard*, IT, 19 Feb 2007 and *Secretary for State for Work & Pensions v IC* IT 5 March 2007) and policy in relation to the funding of Steiner schools was still being formulated at the time Mr Thompson's request for information was received. The DFE also contended that there would be a 'chilling effect' on free and frank discussions in the future within the DFE as a result of disclosure (referring to *Friends of the Earth v IC and Export Credits Guarantee Dept.* [2008] EWHC 638). Finally the DFE contended that public confidence in the policy in relation to Steiner schools would be undermined as a result of disclosure. These points taken together meant

that the public interest favoured the maintenance of the s.35 exemption.

18 In relation to s.43 the DFE contended that the disclosure of the information sought would prejudice the commercial interests of the various organisations that run independent Steiner schools and the organisations that run or seek to run Steiner free schools. Disclosure would be likely to damage the schools' reputation with parents of current and prospective pupils and thus the schools' commercial interests. That damage was likely in turn to threaten the economic viability of such schools and pose a risk to staff retention and recruitment. The DFE further contended that there was a strong public interest in protecting the commercial interests of the private sector generally.

19 In relation to s.35 – the Commissioner accepted that this was engaged but contended that the public interest balancing test favoured disclosure. The Commissioner pointed out that free schools were a radical new policy – there was heavy public interest in this new policy especially in relation to schools with a special philosophical or religious element. Steiner schools in particular have unique philosophical features and the public is entitled to know how the DFE has engaged with those unique features. The Commissioner further contended that it was strongly in the public interest for there to be a fully informed debate about Steiner schools. The local community and parents thinking of sending children to a Steiner school should have an opportunity to engage in an open debate about the philosophy of the school.

20 In relation to the public interest points raised by the DFE the Commissioner questioned whether particular policy issues (beyond the consideration of individual free school applications) were being considered at the time of Mr. Thompson's application that required safe space and would have been affected by disclosure of the sought information. In relation to the 'chilling effect' argument the Commissioner 'really struggled' to understand what the impact of the disclosure would be and what changes in behaviour would result. In relation to the 'loss of public confidence' contention (which the Commissioner saw as a fear that disclosure of information might result in fewer applications or increase local opposition) the Commissioner noted that this was a late adopted argument and did not appear in the DFE's initial response to the Commissioner's investigation.

21 The Commissioner further contended in relation to the 'loss of public confidence' argument:

The risk of negative publicity is already there. Criticisms of the type that concern the DFE are already in public arena. There is no evidence of such negative information already in circulation delivering a punch and impacting on pupil numbers. Are the documents under consideration today of such an impact that they would alter this situation? The DFE is seeking to 'cotton wool' applicants and insulate them from this type of high-level criticisms. These are not weighty arguments. These schools are engaged in an advocacy task - persuading a local community that their school is the place to be. As part of that advocacy they should be able to take on and answer criticisms. The applicants should perfectly well be able to look after themselves.

22 In relation to s.43 – the Commissioner disputed that this exemption was even engaged - referring to the test in *R (Lord) v Secretary of State for the Home Dept.* [2003] EWHC 2073 that what is required is a ‘significant and weighty chance’ of prejudice to commercial interests – and disputing that the DFE had provided any coherent evidence to establish this risk of prejudice. If the exemption was engaged then the public interest balancing test clearly favoured disclosure. The Tribunal noted the parties’ contentions regarding the possible ‘aggregation’ of the public interest arguments if the Tribunal was to conclude that both ss35 and 43 were engaged. Ultimately for the reasons set out below the Tribunal did not find it necessary to consider the aggregation arguments and so they are not set out in detail here

23 Mr Thompson’s approach was a holistic approach – contending that the public interest clearly favoured disclosure when there were, in his submission, worrying aspects of the philosophy underpinning Steiner schools including the use of homeopathy in treating pupils, the alleged teaching of ‘pseudoscience’ and examinations that pupils are able to take. These issues should be raised in public and should be the subject of public debate.

Conclusion

24 The Tribunal first considered whether s.35 was engaged. The Tribunal had significant doubts that s.35 was engaged. The Tribunal took the view

that there was a compelling argument that the policy that was being formulated was the policy in relation to state-funded free schools in general and that was arguably settled at the time that Mr Thompson made his FOIA application. The Tribunal expressed some doubts as to whether the consideration of individual applications for free school status could amount to the 'development' of policy. The Tribunal considered this matter at some length. Ultimately, and noting that no party was arguing that s.35 was not engaged, the Tribunal concluded that on balance the exemption was engaged.

25 In relation then to the public interest balancing test and s.35 – the Tribunal considered that the Commissioner's submissions were persuasive to the point of being overwhelming. The Tribunal also considered that the evidence from Mr. Boxer was particularly weak and not at all persuasive in relation to explaining how disclosure would impact upon the 'safe space' sought for the formulation of policy and what the claimed 'chilling effect' would be.

26 In relation to the engagement of s.43 - the Tribunal noted that the DFE failed to provide any evidence of an application for free school status actually failing as a result of negative publicity – not even on an anonymised basis. The Tribunal also noted that the DFE produced no evidence of damage to commercial interests resulting from disclosure of the type of material under consideration here – the assertion of likely

damage was entirely speculative and did not, in the Tribunal's view, pass the threshold in *Lord*. The Tribunal felt that applicants for free school status should be robust and should be able to deal with the consequences of this type of disclosure. The Tribunal noted that there was no assessment of the impact of any robust response to any negative information. The DFE's analysis appeared to be that an applicant would be entirely passive about the disclosure of information and not seek to issue a robust response or alternative information to mitigate any effect. The Tribunal considered this to be an unrealistic scenario. Consequently the Tribunal considered that s.43 was not engaged. As a result of this conclusion it was not necessary for the Tribunal to consider the issue of 'aggregation'.

- 22 Our decision to dismiss this appeal is unanimous in relation to the exemptions claimed under ss 35 and 43 FOIA. A substituted Decision Notice is required however to reflect the parties' agreement over what information falls to be excluded pursuant to s.42 FOIA.

Signed:

Angus Hamilton DJ(MC)

Tribunal Judge

Date: 24 June 2014