Appeal number: EA/2016/ 0161

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

NORFOLK COUNTY COUNCIL **Appellant**

- and -

THE INFORMATION COMMISSIONER **Respondent**

TRIBUNAL: JUDGE ALISON MCKENNA
Mr ROGER CREEDON
Mr ANDREW WHETNALL

Sitting in public at Fleetbank House, London on 1 December 2016

Zoe Gannon counsel appeared for the Appellant, Laura John counsel appeared for the Respondent

DECISION

1. The appeal is allowed.

REASONS

Background to Appeal

2. An information request was made to Norfolk County Council ("the Council") by a journalist on 12 October 2015. The relevant part of the request was as follows:

> *I would like to make a request under the Freedom of Information Act regarding the Council's risk assessment of Norfolk schools, carried out earlier this term.*
>
> *Please could you send me a list of all the schools that fall into each of the categories.*

3. This request related to the Council's system of regular risk assessment of schools and its assignment of each school to one of three categories ("causing concern", "requiring improvement", or "targeted to be system leaders"). The Council uses the risk assessment to direct funding and other resources to the schools which need it most. The Council's system is quite distinct from the publicly-available reports of Ofsted inspections and involves the exercise of subjective judgement by officials, relying on information supplied by the schools. The risk ratings category for each school has not previously been published.

4. The Council refused the information request in reliance upon the following sections of the Freedom of Information Act 2000 ("FOIA"): s. 33(1) ("audit functions"); s. 36 (2) (b)(i) ("inhibition to provision of advice"); s. 36 (2) (b) (ii) ("inhibition to exchange of views"); and s. 36 (2) (c) ("prejudice to the conduct of public affairs").

5. The Respondent issued Decision Notice FS50611688 on 8 June 2016, in which she required the Council to disclose the requested information. She decided that sections 33(1) and 36(2)(c) were not engaged and that, whilst sections 36 (2) (b) (i) and (ii) were engaged, the balance of public interest favoured disclosure.

Appeal to the Tribunal

6. The Council's Notice of Appeal dated 6 July 2016 asked the Tribunal to reach a different conclusion as to the balance of public interest and to substitute its judgment for that of the Information Commissioner. The Council's grounds of appeal also raised some public law challenges to the Information Commissioner's decision making, which are not within the remit of this Tribunal. In a helpful skeleton argument for the hearing, counsel for the Appellant clarified the Council's case. It no longer sought to rely on s. 33(1) FOIA, but did continue to rely on the remaining

claimed exemptions. The Council's submissions at the hearing are referred to in more detail below.

7. The Information Commissioner's Response dated 3 August 2016 maintained the analysis as set out in the Decision Notice. The submissions made on her behalf are referred to in more detail below.

8. The hearing of the appeal took place in public on 1 December. We are grateful to Ms Gannon, counsel for the Appellant, and to Ms John, counsel for the Respondent, for their helpful written and oral submissions. No witness evidence was relied upon, but we considered an open bundle of documents comprising 220 pages. We also had before us a closed bundle comprising the disputed information only.

The Legal Framework

9. The duty of a public authority to disclose requested information is set out in s.1 (1) of FOIA. The exemptions to this duty are referred to in section 2 (2) as follows:

> *"In respect of any information which is exempt information by virtue of any provision of Part II, section 1 (1) (b) does not apply if or to the extent that –*
>
> *(a) the information is exempt information by virtue of a provision conferring absolute exemption, or*
> *(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."*

10. The categories of exemption relied upon under FOIA in this case are: s. 36 (2) (b) (i) and (ii) and s. 36 (2) (c) These are all so-called qualified exemptions, giving rise to the public interest balancing exercise required by s. 2 (2) (b). As noted above, the Council's initial reliance on s. 33 (1) FOIA had been abandoned by the time of the hearing.

11. The relevant parts of s.36 FOIA for the purposes of this Decision are as follows:

> *(2) Information to which this exemption apples is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-*
>
> *(a) …*
>
> *(b) would, or would be likely to, inhibit –*
>
> *(i) the free and frank provision of advice, or*
>
> *(ii) the free and frank exchange of views for the purposes of deliberation, or*
>
> *(c) would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs.*

Powers of the Tribunal

12. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA as follows:

> *(1) If on an appeal under section 57 the Tribunal consider -*
>
> *(a) that the notice against which the appeal is brought is not in accordance with the law, or*
> *(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*
>
> *(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

13. We note that the burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong rests with the Appellant.

Argument

14. The Council's case presented by Ms Gannon was as follows. She explained, by way of background, that in 2013 Ofsted had raised concerns about educational standards in the county, so that the Council developed a plan for improvement which involved an on-going risk assessment of all schools. The Council now conducts an assessment of each school seven times per year, in response to which its officials allocate it to a risk category. The risk involved may be, for example, the risk of it dropping to a lower Ofsted rating at the next inspection, or relate to an anticipated change of leadership at the school. It does not map across to the Ofsted categories.

15. Ms Gannon explained that the Council relies upon voluntary disclosure by the schools of a wide range of information in order to assess such risks, the information going deeper than the schools are under any statutory obligation to provide. She submitted that only 5% of local authority schools did not supply the full range of data requested, and that academies – in respect of which the obligations to report information to local authorities are even more limited than for maintained schools – had also opted into the risk assessment system. In contrast to Ofsted reports, the information on which the risk assessment is based is not verified by inspection or reference to other sources, contains no narrative as to how the category allocation was arrived at, gives schools no opportunity to comment on the allocation made, and involves no system of appeal. She explained that it is designed to be confidential as between the school and the Council, with the aim of helping each school improve.

16. The Council's case was that the risk assessment system is working well, and has been effective in improving standards. Ms Gannon referred the Tribunal to a letter from Ofsted dated 30 July 2014 (page 232 open bundle) which refers approvingly to

the Council's "robust system for the collection and analysis of school data" which is used by all schools (including academies) to support their own improvement strategies.

17. Ms Gannon also referred the Tribunal to a number of letters from Head Teachers, expressing the view that the effective system of risk assessment now in operation would be jeopardised were it to be made public (pages 237 to 249 and 251 to 254 open bundle). The reasons given for this view were manifold: that parents and local communities would be likely to misunderstand the system and regard it as an adverse judgement on the school's performance; schools would be less likely to share certain information with the Council if it would be made public, especially sensitive information that could impact on a teacher's career development; the risk rating is based on headline data only and does not tell the full story of what is happening at a school; Ofsted reports are the appropriate way for parents to see how a school is performing; publication of the categories could serve to identify pupils and staff, as matters affecting a risk rating include potential and actual changes in staff and additional intake of high level need pupils; publication of the risk assessment category would damage the good relationships between the Council, Governors and Head Teachers; publication would lead to discussions with parents about the categories which could distract from the necessary improvement work; publication would result in a "trial by media"; the confidential nature of the risk assessment ensures that parents do not lose confidence in schools during periods of change. The Tribunal also had before it a letter from the Norfolk Governors' Network (page 250 open bundle) expressing concern that the publication of risk ratings without contextual information might worry and confuse parents and potential parents; that currently schools supply the Council with information over and above the statutory requirements voluntarily, but this would be inhibited were the information to be made public; that the publication of the data could adversely affect recruitment of staff and governors and affect any plans for academisation.

18. The Information Commissioner's skeleton argument for the Tribunal questioned how the views referred to above had been obtained. The Tribunal did not have before it the request for these views to be expressed and Ms Gannon confirmed that they had in fact been requested by telephone. She asked us to take into account that there was no "template" response before us and that a range of views and concerns had been expressed. She also asked us to find that it is clear from the terms of the letters that the writers were familiar with the issues before the Tribunal.

19. Ms Gannon's submission was that the Information Commissioner should have given the letters more weight in assessing the balance of public interest. The Information Commissioner's Decision Notice (paragraph 73) suggests that the Council could issue a statement to accompany publication of the data, explaining its limitations. Ms Gannon's submission was that as the withheld information involves data garnered at seven points in the year from 400 schools, it would not be reasonably possible for either the Council or the School Governors to issue a press release to give an explanation about each individual school's categorisation.

20. With regard to the "qualified person's opinion" requirement in s. 36 FOIA, the Tribunal had before it the record of the qualified person's opinion. This contained clear paragraphs addressing the factors in s.36 (2) (b) (i) and (ii) but the Information Commissioner's case was that the criteria for s. 36 (2) (c) were not adequately addressed in the record, because a prejudice separate from that identified under s. 36 (2) (b) had not been identified. Ms John described the qualified person's opinion as containing a "wrap up" paragraph which summarised all the risks identified, rather than a clear statement of the prejudice which was relied upon for the purposes of s. 36 (2) (c). For that reason, the Information Commissioner maintained her position that the exemption under s. 36 (2) (c) had not been engaged.

21. In relation to the balance of public interest under s. 36 (2) (b) (i) and (ii), Ms John submitted that the risks of disclosure relied upon by the Council should have been put before the Tribunal in witness evidence rather than in submissions only. She maintained her concern over the reliance by the Council on the Head Teachers' and others' letters, given the lack of information about their provenance or their introduction into evidence in any formal way. She asked the Tribunal to attribute limited value to the views expressed in these circumstances.

22. Responding to the submissions made by Ms Gannon, she argued that it was not plausible that the risk assessment process leading to categorisation was so poor that it relied on subjective judgement by officers only. If it were, it would not be as effective as claimed. She explained the Information Commissioner's view that the public interest in transparency about schools favoured disclosure and that the risk of "misinterpretation" of disclosed data can be dealt with by explanation at the point of disclosure. In reply on this point, Ms Gannon submitted that the process necessarily allows for rapid judgements to be formed in order to allocate a school to a category and that disclosure of the data would jeopardise that process.

23. In respect of the submission that the schools would be likely to cease to participate in the risk assessment system if the categorisation of the school were to become public, Ms John accepted that this was a risk and that it would be prejudicial to the system which the Council had put in place, but she submitted that the withholding of data by schools was unlikely to be frequent or widespread because schools would wish to keep such a helpful system operating.

24. Ms Gannon accepted on behalf of the Council that there is a public interest in parents and others being well-informed about schools. However, the Council's case was that parents are already provided with meaningful reports from Ofsted and other sources such as SATs and that the disclosure of the information requested in this case would not meet a legitimate public interest because it does not show how a school is performing or how public resources are spent. The Council's case was that the public interest favours supporting the continuation of a system which has been shown to be effective in improving standards and supporting schools. If the risk assessment data were to be released, the system would be likely to be scaled back because the data on which it relied would have to be verified and also contextualised for public consumption. In Ms Gannon's submission, the risk of diminution in the effectiveness

of the risk assessment system favoured maintaining the exemptions to the duty of disclosure.

Conclusion

25. The Tribunal agrees with the parties that s. 36 (2) (b) (i) and (ii) are engaged in this case. It follows that the question for the Tribunal is whether the public interest favours maintaining those exemptions or favours disclosure.

26. We have some sympathy with the Information Commissioner's submission that the risks of disclosure should have been put in evidence before the Tribunal in a formal way in this appeal, so that a relevant Council Officer should have provided a witness statement which explained the Council's views and exhibited the letters from Head Teachers and others and explained their provenance. However, whilst this would have been desirable, we note that the formal rules of evidence do not apply in a Tribunal setting – see rule 15 (2) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 – and we are content to take into account the views expressed in the letters placed before us. Although we do not know precisely how the letters came to be written, we discern no hint of inauthenticity, noting that the letters refer to a range of personal experiences of the usefulness of the system as a management tool.

27. Ms John urged us to give limited weight to the Head Teachers' letters but, on the contrary, we give substantial weight to them as expressing the views of those currently participating in an effective system which they fear would be broken by the disclosure of the categorisation information. This is, in our judgement, a significant factor to be weighed in the public interest test.

28. We acknowledge the public interest in transparency about the Council's running of schools, but we balance that against evidence from those directly involved in the system of a significant risk that it would fail to operate as effectively and thus achieve its goal of improving school performance were the risk category data to be published. We accept on the basis of the Head Teachers' evidence that there is a significant risk that schools would cease to provide voluntarily the range of data currently provided were the categorisation of the school to become public. It seems to us that such a risk poses a grave threat to the continuation of the current system. There is no evidential basis for concluding, as the Information Commissioner argued, that this risk should be regarded as remote.

29. Whilst we acknowledge that the risk of misinterpretation of information by others is in most cases insufficient to favour maintaining these exemptions, we accept that it would not be reasonable in the circumstances of this case to expect the Council or each school to contextualise a rating based on a subjective judgement by others of data taken in seven snapshots over a year for 400 schools. Such an exercise would, in our view, involve significant resources and thus very probably lead to a scaling back of the system currently in operation.

30. We conclude for these reasons that the balance of public interest favours maintaining the exemption from disclosure under s. 36 (2) (b) (i) and (ii). That finding is sufficient to dispose of this appeal. However, we go on to say that we agree with the Council that s. 36 (2) (c) is engaged in this case and that the public interest also favours maintaining the exemption. We accept that the qualified person's opinion identifies a specific prejudice to the effective conduct of public affairs (the ability to meet the Council's objectives for supporting school improvement and improving educational outcomes for children and young people in Norfolk). We find that this prejudice is identified over and above the risks identified under s. 36 (2) (b) and we find that the opinion is reasonable.

31. For the above reasons, the appeal is allowed, the Information Commissioner's Decision Notice is set aside and no steps are required.

(Signed on the original)

ALISON MCKENNA **DATE: 17 January 2017**
Promulgation Date: 17 January 2017

PRINCIPAL JUDGE