IN THE FIRST-TIER TRIBUNAL

Appeal No: EA/2012/0136,0166,0167
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notices Nos:
FS50427672, FS50426626, FS50415927

Dated: 29/5/2012, 9/7/2012, 4/7/2012

Appellant: **Department for Education**

Respondent: **The Information Commissioner**

2nd Respondent: **British Humanist Association**

Heard on the papers: Field House, London

Date of Hearing: **5 December 2012**

Before

C Hughes

Judge

and

Henry Fitzhugh and **Andrew Whetnall**

Tribunal Members

Date of Decision: **15 January 2013**

Subject matter:

Freedom of Information Act 2000

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeals.

IN THE FIRST-TIER TRIBUNAL

Appeal No: EA/2012/0136,0166,0167
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

SUBSTITUTED DECISION NOTICE

Dated: **18 December 2012**

Public authority: **Department for Education**

Address of Public authority: Sanctuary Buildings, Great Smith St., SW1P 3BT

Name of Complainant: **Christopher Walden, Jeevan Vasagar, Richy Thompson**

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal rejects the appeal and substitutes the following decision notice in place of the decision notices dated 29/5/2012, 9/7/2012, 4/7/2012 to the extent necessary to clarify the legal reasoning.

Dated this 15th day of January 2013

C Hughes

Tribunal Judge

REASONS FOR DECISION

Introduction

1. In June 2011 the Respondent Department for Education received three requests for information concerning applications to open Free Schools. The applicants were the Association of Colleges, the Guardian newspaper, and the British Humanist Association.

The request for information

2. the request from the Association of Colleges was:-

   "please can the Department publish the list of applications to open 16-19 free schools in September 2012, including information as to which geographical area each would be located, if approved "

   "please can the Department published a list of applications to open a university technical college or a technical Academy in September 2012, including the geographical area which each will be situated in if approved"

3. the request from the Guardian was :-

   "the names and locations of the 281 groups that applied to open free schools in September 2012 , in the application round that opened on 17 March 2011 and closed on 15 June 2011 "

4. The third request, from the British Humanist Association was:-

   "A list of free school proposals received by the Department for Education, including the 323 received during the first wave and the 281 received during the second wave, giving for each:

   The name of the project

   The local authority/area of the proposed school

   The previous name (if applicable) of the proposed school

   The faith (if any) of the proposed school

Whether the proposal was received in the first wave or the second wave"

The complaint to the Information Commissioner

5. In each case the Respondent initially resisted the application on the grounds of section 21 (information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information) and section 22 (information intended for future publication). The Commissioner concluded in each case that these exemptions were not engaged and considered the application of section 35 (the formulation or development of government policy) and concluded that while this was engaged the balance of public interest favoured disclosure.

The appeals to the Tribunal

6. The Appellant argued that the Commissioner had failed to take sufficient account of the fact that applications which reached the second stage of the free school process would be published, that at the first stage there was not an obligation on the applicants to consult and that at the end of the second stage there was an obligation on ministers to consider the impact of proposed new free schools on the local area. Therefore in disclosing the withheld information the only matter that the requestors would find out that they would not find out in due course was the names, locations etc. of the proposed schools that did not reach the second stage.
7. The Appellant argued this information would not have assisted the public debate about policy or the merits of individual applications since the disclosure of information would not have informed the public about why an applicant was unsuccessful. There would be an opportunity for the public to be informed in the areas in which free schools which had gone through to the second stage published their proposals.
8. There was a risk that potential applicants could be deterred from applying and applicants might be ill-prepared to cope with the negative attention that might result from media coverage of their unsuccessful first attempt.

9. Potential applicants hoping to set up a faith school might be put off by the prospect of campaigning promoted by the British Humanist Association against the setting up of such schools when they did not have the support of the Minister.

10. The Appellant further argued that premature knowledge of the public about proposed free schools could lead to representations to ministers and public officials about such schools and this would disrupt the conduct of public affairs and could be detrimental to the free schools programme.

11. The Appellant concluded that the Commissioner did not act in accordance with the law in ordering the disclosure of the withheld documents.

Questions for the Tribunal

12. The first question before the tribunal was the proper scope of the appeal. During the earlier stages of his consideration of the British Humanist request the Commissioner, (no doubt influenced by the Appellant's initial reliance on section 21 of the Act) wrote a not entirely clear communication to the Second Respondent referring to the faith and area of the proposed school and stating that he was " proceeding on the basis that this part of your request has been satisfied".

13. This was clearly wrong since the information was not publicly available. What was known to all the parties that stage was that what had been published by the Appellant was a breakdown by faith and regional area; however the request by the Second Respondent quite clearly sought a listing in which five pieces of information with respect to each of the proposed schools was provided and so gave a succinct summary of each project on an individual rather than aggregated basis. In his decision notice the Commissioner did not address this point or disclose this error and his decision notice was consistent with a consideration of the request as made. The Appellant was not prejudiced by this in putting forward its appeal against the Commissioner’s decision on the British Humanist Association (BHA) request. The Appellant did so based on an analysis of the implications of the request as made (paragraph 24 Appellant’s grounds of appeal decision notice FF50415927, EA/2012/0167). The Commissioner has acknowledged (Appellant's written submissions paragraph 14) "the Commissioner therefore accepts that he should have considered in his decision notice local authority/ area and the faith (if any) of each of the proposed schools as falling within the scope of the request."

14. The Tribunal rejects the submission on behalf of DFE that it has no jurisdiction to take any action on the basis of errors in a decision notice that are not relied on by the appellant in an appeal. On this basis, it was argued, we should not address the BHA's challenge to two aspects of the Commissioner's decision notice: the conclusion that s35(1)(a) is engaged, and the conclusion that as the request for information on the faith of the proposed school had already been met it did not have to be addressed. It may be that the appellant failed to address the point in his initial grounds of appeal because he had misread the notice. In our view the notice is not ambiguous but contains a mixed error of fact and law, and it is within our jurisdiction to address this whether or not it is pointed out in the initial grounds of appeal. We note also our duty under rule 2 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 to deal with these appeals fairly, justly and in a proportionate way avoiding unnecessary costs which might well arise if the issues were left for subsequent proceedings. The pleadings before us are sufficient to cover the points at issue. We therefore address the substantive merits of the appeal as set out in paragraph 4 (above), and our substitute decision notice corrects any flaw in the Information Commissioner's decision notice.

15. The substantive issues that the tribunal therefore has to consider are whether the exemption provided by section 35 is engaged (as argued by the Appellant and the Commissioner but disputed by the Second Respondent), whether section 36 (prejudice to the effective conduct of public affairs) is the appropriate exemption to consider and in either event where the balance of public interest lies.

<u>Evidence</u>

16. In a witness statement Mr Paul Schofield on behalf of the Appellant set out the background to the free schools program and the information which had been published at the time of the request and subsequently:-

    "(9) A list of the first 16 free schools approved to business case and plan stage was published on 6 September 2010. Wave 1 (2011 and beyond) applications continued to be received until 17 February 2011. The list of schools aiming to open in September 2011 was published in a press notice on 24 August 2011 and included the names and local authorities of the schools. 24 free schools opened in September 2011.

(10) In June 2011 the Department announced a round of applications received from groups wishing to open schools in 2012 and beyond. Between October and December 2011, the Department published the names of schools that had successfully progressed to the pre-opening stage. 55 of these schools opened successfully in September 2012 and a list of the schools was published in the press notice on 3 September 2012. This list included the names and local authorities the schools."

17. He argued that disclosure of the identities of unsuccessful applicants would discourage renewal of those applications and further applicants. In support of those arguments he gave details of a survey carried out by an organisation called the New Schools Network in which:-

" proposer groups were asked, in relation to the ICO decision notice, whether publishing the details of unsuccessful applicants would have made them less likely to apply/reapply. Of the 100 respondents, almost half (44) said the judgement would have made them less likely to have applied. 22 said they would have been much less likely to have applied. Extrapolating, this means that the programme would probably have reached just over 100 schools to date, rather than two hundred. "

Legal submissions and analysis

18. So far as is relevant to this appeal section 35 (formulation of government policy, etc.) provides:-

"(1) Information held by a government department is exempt information if it relates to – (a) the formulation or development of government policy

(2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded—

(a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or

(b) for the purposes of subsection (1)(b), as relating to Ministerial communications.

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

(4) In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking. "

19. The Commissioner , relying on his decision notices, argued for the engagement of section 35:-

" the formulation of government policy comprises the early stages of the policy process where options are generated, the risks are identified and consultation occurs. Developments may go beyond this stage to the processes involved in improving or altering already existing policy such as monitoring, reviewing or analysing the effects of existing policy. "

20. He explained some of the history of Free Schools and how the policy was developed:-

"In addition to this the DfE has explained that the application process is still being reviewed and evaluated. The DfE analyses ratios of successful and unsuccessful applications and uses its analysis in its evaluations which may be fed to organisations supporting the development of applications, such as the New Schools Network, to help applicants improve their proposals and reapply.

The timing of the process is important, falling just after the completion of the first wave and before decisions had been made on the second wave, in a period when the DfE was still evaluating and analysing proposals to feed back into improving the process. The Commissioner's view is that whilst the policy is still being reviewed and improved the policy development is still ongoing and he therefore considers that the withheld information relates to the formulation or development of government policy and the exemption is engaged."

21. The Appellant's view, while supporting the Commissioner's analysis, was that the question was largely academic since it could in any event rely on 36 (2)(c). The Appellant also made procedural arguments that this point should not be considered. The Tribunal was satisfied that it should do so in accordance with its duty under rule 2 of the Tribunal's rules.

22. The Second Respondent rejected this analysis. It considered the actual nature of the request and the information required to be disclosed by it. This was in essence a list; factual information concerning the names of the proposed schools associated with the previous name, local authority and faith of that proposed school. It submitted that this could not relate to the formulation or development of policy. It was the subject matter upon which policy operated and around which policy was developed in order to deal with the decision-making. The scope of the request was information identifying the proposals this was not germane to any subsequent decision making or formulation of policy.

23. The Tribunal is satisfied civil servants were, at the time of the requests, actively engaged in implementing government policy with respect to Free Schools. During the course of these endeavours they were no doubt reflecting on their experience and understanding of how the process was working and how to advance ministerial policy. However what was sought by these three organisations was not the policy deliberations and advice. It was simply factual information and disclosure would not reveal any deliberation or advice either as to future policy or the reasons why applications were or were not successful. It cannot be argued that the compilation of this factual material was such as could be seen as part of the policy process- these were not the relevant facts to be sorted from the chaff and incorporated in a submission to a minister, (in which it could be argued that while falling within section 35 (1), section 35 (4) should be taken into account); rather they with the whole factual matrix without any selection, prioritisation or evaluation. The tribunal is therefore satisfied that section 35 was not engaged.

24. It was undisputed between the parties that in the event that section 35 was not engaged the case fell to be considered under section 36 - prejudice to the effective conduct of public affairs. In this case a qualified person has given, as his reasonable opinion, that disclosure of the information would otherwise prejudice or would be likely otherwise to prejudice, the effective conduct of public affairs.

25. The evidence in support of this proposition was provided by one of the Appellant's Deputy Directors of the Free School Group. Mr Schofield took issue with the various grounds on which the Commissioner found that the public interest favoured disclosure. He argued that there was little need for the wider public to be informed about applications which had not been accepted onto the pre-opening stage by the Department, the information was not high level and rather could still result in the identification of applications and by association individuals, disclosure could attract negative publicity and discourage further applications. It provided details of a survey by an organisation known as the New Schools Network which showed that 44% of applicants for Free School status would have been less, or much less, likely to have applied "*if you had known your details might be released even if your application was rejected – and possibly before DfE made its decision*",

26. The witness drew attention to an occasion when teachers involved in a Free School proposal were dismissed *"…..teachers employed at a private school. We are informed that when it became known to their employers that they had submitted a Free School application they were dismissed. We are informed that they subsequently made a claim for unfair dismissal which was successful*"

27. The tribunal was unimpressed by this evidence. The benefit of transparency and the ability to inform the public debate was of far greater importance than the slight administrative inconvenience for civil servants of receiving representations and arguments at a time that was not convenient to them. Civil Servants are robust and will not be encumbered in their deliberations by material if it lacks merit. The Commissioner was correct in finding that the "safe space" argument had little weight against the strong arguments in favour of disclosure.

28. We were not impressed by the argument advanced on behalf of the DFE that the public interest in the public being informed and being able to participate in the debate about the areas in which Free Schools may be located was met, to a great extent, by the second stage of the application process – during which details of potential schools are published and consulted on. The second stage is clearly compressed, with in some cases less than a month between the publication of the applications and the opening of the school, while the process of assessment by the Department can occupy more than six months and might itself benefit from greater public engagement. We therefore

accept that earlier notice of what applications are being considered would significantly enhance the scope for public participation.

29. The Tribunal considered that the Appellant's evidence with respect to prejudice to individual teachers by reason of the fact of their association with a Free School proposal coming to the knowledge of the private school which employed them was imprecise and uncertain; in any event they had successfully vindicated their rights in the employment tribunal.

30. The quality of the survey evidence upon which the Department (blessed as it is with a wealth of expertise in surveys and other statistical matters) has chosen to rely is poor. The information to be disclosed was not explained and many respondents appear to have believed that the information released would include the personal details of individuals involved with the application. The survey design was weak. The survey question was circulated by the New School Network to Free School applicants under cover of an e-mail:-

    "The Department for Education has recently been petitioned to make public the details of all those who applied to open a free school, regardless of their success or failure. The Information Commissioner's office has ruled the DfE must disclose the data, although we believe that the DfE will appeal against this decision.

    To help with that appeal, we would appreciate hearing from successful applicants as to whether this ruling, and the possibility of your details being made public, would have affected your decision to apply to open a free school. To do this, we have created a short, one question survey..."

31. The bias in design and description of the questionnaire fatally undermines any reliance that can be placed upon it. The Tribunal is satisfied that the analysis of the questionnaire carried out by the British Humanist Association fairly and appropriately demonstrates the fundamental flaws. The Tribunal was surprised that a Department of State should have chosen to rely on a survey which even on its face was of doubtful reliability but which on further analysis is deeply suspect.

32. It must be emphasised that the information sought is that set out in paragraphs 2,3 and 4 of this decision. The information sought by the Second Respondent, name, local authority area, name of previous school, name of the project, faith (if any), year of application, are as the Commissioner argued in his submission "of a high level and

does not reveal the detail of each application itself". He further reasonably concluded that in a local area local communities may also be aware that there will have been discussions about a potential school which weakens the argument to maintain exemption from disclosure, since in many cases the information will already be known.

33. He also considers that "there is a very strong public interest in allowing people who would be potentially affected by such a school to be able to have an informed debate on any application that would affect them, or be able to make an informed representation to their local council or MP."

34. The Commissioner properly maintained that the disclosure of the withheld information, "even when no decision has been made whether to approve the proposals would contribute to [an informed public discourse]".

Conclusion and remedy

35. The tribunal is therefore satisfied that the Commissioner properly weighed the public interest in concluding that in each of these cases the information sought by the complainant should be disclosed. The Free School programme involves substantial public funds and significant changes to the way the education service is controlled, managed and delivered. It is a matter of considerable public importance and the transparency of the process and its openness to public debate and consideration are of concern to communities across England. The only error in law in his reasoning was in concluding that S35 rather than S36 was engaged. This did not however go to the merits of the appeal.

36. Our decision is unanimous.

C Hughes

Tribunal Judge

Date: 15 January 2013