IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL (INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

EA/2012/0204

B E T W E E N:-

DR BART MOORE-GILBERT

Appellant

-and-

THE INFORMATION COMMISSIONER

First Respondent

-and-

THE DEPARTMENT FOR EDUCATION

Second Respondent

Tribunal

Judge Brian Kennedy QC
Jacqueline Blake
Roger Creedon

Subject matter: Freedom of Information Act 2000, specifically section 36 exemption.

Appearances:

The Appellant in person.
Christopher Knight of Counsel (by written submissions) for the First Respondent.
James Cornwell of Counsel for the Second Respondent.

DECISION OF THE FIRST-TIER TRIBUNAL:

The tribunal dismisses the appeal.

REASONS

Introduction

1. This decision relates to an appeal brought under the Freedom of Information Act 2000 **("the Act"),** specifically in relation to a section 36 exemption and the decision of the First Named Respondent **("the Commissioner")** contained in a Decision Notice **("DN")** dated 29th August 2012 (reference FS50442095).

2. The Tribunal sat on between the 5th and the 7th June inclusive 2013 and have decided the case after this oral hearing. Witnesses were called on behalf of the Appellant and the Second named Respondent and detailed and comprehensive submissions were made on behalf of all parties.

Request by complainant:

3. The complainant requested from the second respondent all correspondence about the "Tottenham Palestinian Literary Festival", including communications to the Secretary of State for Education **(the "SofS")** which may have prompted him to intervene in relation to school participation in workshops organised as part of the festival and his responses to those communications. The second respondent withheld some of the requested information under section 36 and 40(2). The Commissioner's decision was that the second respondent had correctly withheld the disputed information.

4. The request, on the 3rd November 2011 was as follows:

> "--- *all official correspondence on the Tottenham Palestinian Literary Festival – in particular, communications to the Secretary of State drawing his attention to this event which may have*

prompted him to intervene as he did – and his responses to such communications."

5. The Tottenham Palestinian Literature Festival is an arts festival which was set up with the stated aim of "talking, listening, debating and learning about Palestine through the prism of books, songs, films and photography". As part of the festival, workshops were offered to schools in the area. There is not and has not been any criticism of the festival or its organisers. On the contrary all the evidence supports a history from 2011 of a successful and peaceful annual festival which was on this occasion and has always been intended to be of benefit to the community.

6. Following concerns being raised with him, the SofS wrote to schools that he understood might be participating in the workshops. He reminded them of their duty under Section 407 of the Education Act **("the 1996 Act")** to ensure that, where political issues are brought to the attention of pupils, the pupils are offered a balanced presentation of views about the subject matter in question.

7. The second respondent responded to the complainant's request on the 28th November 2011. It disclosed some information but withheld the remainder ("the disputed information") under Section 36(2) (b) (i) and (ii) and (2) (c) of the Act.

8. Following an internal review the second named respondent wrote to the complainant on the 17th February 2012. It confirmed its original decision and informed him that since it had issued its refusal notice some additional documents had been identified which fell within the scope of his request. The second named respondent went on to explain that it believed these additional documents were also exempt under section 36(2) (b) (i) and (ii) and (2) (c). It also informed him that some of the withheld information was third party personal data which was exempt from disclosure under section 40 (2).

9. The Appellant complained to the Commissioner, who investigated the complaint as a result of which the second named respondent sought consent from external parties (those who had raised concerns with the second named respondent, the schools and local authorities) to its disclosing their communications with the second named respondent. With the exception of one third party all consented to disclosure. The second named respondent therefore disclosed to the Appellant all the communications it had received from third parties (with the one exception), plus, in redacted form, an internal table summarising the responses from the five schools involved.

10. In preparing for this hearing the second named respondent discovered that the Third Party that had refused consent, the Board of Deputies (**BoD)**, had published on its website their concerns about the Festival and stated that they brought it to the attention of the SoS. Following correspondence with the second named respondent, the BoD confirmed that they had no objection to being named as the source of information provided to the second named respondent but did not wish the content of their e-mails to be disclosed. The name of this Third party was also provided to the appellant.

The Commissioner's Decision:

11. The DN dated the 29th August 2012 held that, in accordance with the Act; the second named respondent has correctly applied section 36 of the Act and the Commissioner did not require the second named respondent to take any further steps to ensure compliance with the legislation under the Act.

12. Following the filing of this appeal, the second named respondent reviewed and audited the searches it had done previously between November 2011 and January 2012 and carried out further searches which identified two short e-mail exchanges (plus an attachment) between officials that had not been identified as being in-scope. The said e-mail chains contained

information similar in nature to that contained in the disputed information in relation to which the second named respondent had already relied upon exemptions under section 36(2) of the Act. After consideration of this information, the second named respondent sent a further refusal letter to the Appellant in relation to it on the 22nd February 2013.

13. The DN is a matter of record in the public domain and the detail will not be set out herein but in short the Commissioner ruled on the application under section 36(2) (b) (ii) (the free and frank provision of advice for the purpose of deliberation) and concluded that the exemption was engaged and applied to all the disputed information (see DN, Paras 20-21). The Commissioner went on to consider the public interest test and concluded that the public interest test was in favour of maintaining the exemption with his reasoning clearly set out.

The Legal Framework:

14. Section 36(2)(b) and (c) provides that:

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –

(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.

The Issues for the Tribunal:

15. This appeal is emotionally charged as the appellant and his witnesses, all undoubtedly genuine in their concerns, query inter alia, potential bias or prejudice on the part of the SofS, this perception arising from the manner in which he, the SofS, appeared to intervene in the matter of the local schools' possible involvement in the festival workshops. This Tribunal heard at

length and in detail the concerns of the appellant and his witnesses about the conduct of the second respondent and the apparent influence and bearing the SofS had on what they perceive to be unfair, unreasonable and disproportionate interference in local schools' participation in the festival. The appellants' witnesses gave evidence to the effect that the direct correspondence from the SofS to the schools in question was extraordinary, unprecedented and was perceived to be threatening. Mr Butcher, a civil servant and witness on behalf of the second named respondent did not deny that the direct intervention by the SofS was the first he had experienced. It seems that this perception of bias and/or prejudice, which on the evidence is understandable, is apparently the basis upon which the demand for transparency and accountability are founded in the circumstances of this particular case. Whether or not these perceptions are correct is not for us to decide. The Tribunal must and can only scrutinise the application of the Act in the process of the decision that section 36 was engaged as applied and that the balance of the public interest was or was not correctly applied by the commissioner in his DN in the particular circumstances of this case. However it is plain that the balance in the public interest test cannot ignore the effect of the perception that has arisen in this particular case. It is appropriate to say at this stage that this Tribunal were impressed with the calibre, integrity and candour of all the witnesses who gave evidence at this appeal. All of the witnesses we heard could not have been more forthcoming or helpful.

The Engagement of Section 36:

16. Section 36 (5) (a) states in relation to information held by a government department in the charge of a Minister of the Crown, that a qualified person is any Minister of the Crown. In this case the Opinion was given by the Minister of State for Schools. The Commissioner concluded that he was satisfied that the Minister was an appropriate qualified person (QP) for these purposes. There has been no evidence to the contrary and this tribunal accept this proposition.

17. In support of the application of section 36, the second named respondent provided to the Commissioner with a copy of their submissions to the qualified person, which identified the information to which it is suggested that section 36 should be applied, and a copy of the qualified person's opinion.

18. The Commissioner, in our view, properly argues that in order to determine whether section 36 has been correctly applied, he has

    (a) ascertained who the qualified person is for the public authority;
    (b) established that an opinion was given;
    (c) ascertained when the opinion was given; and
    (d) considered whether the opinion given was reasonable.

19. The DN sets our clearly the application of the necessary criteria used by the second respondent and considered by the Commissioner in the engagement and application of section 36. It is not necessary to repeat this verbatim here but the Tribunal have carefully considered the reasoning and deliberated upon it in light of the evidence of the witnesses at the hearing of this appeal.

20. The onus is on the appellant to prove on the balance of probabilities that the Commissioner was wrong. Having heard all the evidence, in particular of Mr. Butcher on behalf of the second named respondent, this tribunal are satisfied that the appellant has failed to establish, on balance, that the Commissioner was wrong in his assessment on the engagement of section 36 in the particular circumstances of this case.

21. The Commissioner then having decided that section 36 (being a qualified exemption) was engaged went on to consider the public interest test setting out the arguments in favour and arguments against in considerable detail. The Tribunal are not satisfied that the appellant has established on balance that the Commissioner was wrong in his determination of the public interest test either.

Reasons:

22. The appellant argues the Commissioner failed to consider new material after the request. This Tribunal has had an opportunity to examine carefully in closed session the new material in the short e-mail exchanges and we are satisfied that this material was of the same nature and content as the requested information. We find nothing to distinguish the new material in terms of the application of section 36 exemption or the public interest test applied to the circumstances of this particular case.

23. The appellant argues that the disputed information contains material from the BoD lobbying the second named respondent and/or the SofS and that this in itself should require disclosure. He cites authorities which support this contention. However the tribunal are not satisfied that in the circumstances of this case the body concerned were in fact lobbying as such on this occasion, as opposed to expressing concern in the way that informants or whistle blowers would. We are firmly of the view that the relevant information consisted of such an expression of specific concern about the festival rather than anything in the form of a political lobby.

24. The appellant argues that the BoD had privileged access to the second named respondent and this should be considered in the public interest test. The Tribunal are satisfied by the evidence of Mr. Butcher that although familiar with the body in question, this had no bearing on his assessment of the concern raised and/or the method or manner in which he dealt with it. The Tribunal accept entirely the truthfulness and integrity of this witness and accordingly accept his assertion. We are also satisfied that the Commissioner applied the exercise of balance in the public interest test correctly in this regard.

25. In the course of discharging their duty under S407 of the 1996 Act schools are required to identify whether political issues are being raised and if so whether the presentation of views is likely to be balanced and if not then

identify steps that might be taken to achieve balance. We find that these highly pertinent issues applied to the considerations presented to the second named respondent in this case. The evidence of Mr. Butcher demonstrated the considerable lengths to which he and his colleagues went in considering these issues before advising Ministers and the SofS. An event being organised by Haringey Justice for Palestinians might be viewed as divisive, although we accept the evidence of the appellant that the festival was entirely peaceful. However the evidence of the appellant's witnesses indicated, at times, acceptance that one aspect or view of the political dimension might be expected to prevail. This seemed to us to support the arguments for the need to ensure that any schools involved were aware of their duty (under the 1996 Act) to enable and ensure the presentation of a balanced view. Indeed the detailed evidence of Mr. Butcher on behalf of the second named respondent was that his investigation quickly focused on the issue of political balance rather than the specific actions or views of specific individuals.

26. In his evidence, Mr. Butcher explained that although Haringey Council had expressed concerns about schools' participation in the event, they had not written to the relevant schools and whilst Islington Council had written to some schools, he had not seen their letter. He told the Tribunal that he considered a letter from the second named respondent would be useful in setting out in unambiguous terms what the legal position was so that the relevant schools would be aware of the position. Again the Tribunal entirely accept his bona fides in this regard.

27. Letters were signed by the SofS on the 22nd September 2011. The second named respondent submits that the letters had neither the intent nor the effect of banning or preventing school children attending the festival or associated workshops. They point out that they merely reminded the schools of their duty under Section 407 of the 1996 Act and identified that there appeared to be a risk of unbalanced presentation of political views and therefore sought assurances as to how such lack of balance would be avoided and if the schools chose to participate. The letter goes on to say: *"I*

am concerned that the festival will not offer a balanced view, and ask that you either withdraw from the event or set out plans you have put in place to ensure that the political issues are given a balanced presentation within your school".

28. Thee Second Respondent argues it was reasonable in the circumstances for the SofS to warn the relevant schools of the risk of breaching S407. Further they argue that the SofS did not issue a direction pursuant to S497 of the 1996 Act, notwithstanding that some of the schools had participated in workshops associated with the festival. They further submit that the SofS letters did not accuse the Festival of extremism or suggest that the schools were participating in extremism. Much was made in evidence that schools were given just 2 working days to respond (by the 26th September) but this has to be seen in the context that the Festival was on the 29th September. The second respondent argued that the short time span of days meant it was also appropriate that schools be directed straight to the appropriate point (the Preventing Extremism Unit) within the Department as a contact. The appellant does not seem to take issue with the reasoning in the above but suggest that the personal involvement by the SofS was significant and had an enormous deterring effect on the schools. While the Tribunal accept that the personal intervention was unusual and created the perception of significant prejudice or bias, we cannot say that the evidence we have heard supports the case that it amounted to an extreme deterrent nor and more importantly that it made the action of sending the letters unreasonable in all the circumstances.

29. The second named respondent argues also that the opinions of Nick Gibb MP and Elizabeth Truss MP, both acting as a qualified person (QP) within the meaning of the Act, were both reasonable in substance and reasonably arrived at. The Tribunal having heard and considered the comprehensive evidence of Mr. Butcher on the background of his advice to the Ministers accept this submission and accept that it applied also, on the evidence to the new information identified after the initial request. The tribunal, for these reasons also accept the Commissioner's submissions in relation thereto.

30. In relation to the inhibitory effect that disclosure would have for the purposes of Section 36(2) (b) and (c) the Tribunal accept the evidence of Mr Butcher. He has persuaded us of his careful consideration of the effect of disclosure that would identify informants and the importance of not deterring people from providing the second respondent with relevant information that might prevent extremism and the need in the circumstances of this case to avoid such a chilling effect. Similarly we accept his sincere concern about disclosing the internal deliberations of the second named respondents' officials as he clearly indicated how it would undermine and deter the free and frank discussion and analysis by officials of information received and deliberation as to possible actions to take. He expressed vividly how this would be likely to adversely affect the ability of officials to advise Ministers effectively and for ministers then to deliberate effectively. We accept entirely the evidence of Mr. Butcher that the disclosure of internal discussions between officials frankly analysing and debating information received from third parties would potentially deter third parties from providing information and further we accept his reasonable concern that the views of a third party and/or officials on a sensitive issue such as the Israeli/Palestine political scenario could potentially cause tension in the community. In light of the evidence in regard to the above the Tribunal accept that Section 36 is fully engaged in the circumstances of this case and further that the Commissioner was correct in his application of the public interest test to the non disclosure of the disputed information. Mr. Butcher gave long testimony and was subjected to comprehensive cross examination. His detailed evidence was not only convincing but clearly sincere and independent.

31. The perception of bias or prejudice by the SoS is perhaps understandable in light of the evidence given by the appellant and his witnesses. However the Tribunal have heard from Mr. Butcher the detail of the deliberations given by officials to the background of the circumstances pertaining to this case and it persuades us that the advice itself as given to Ministers (both QP's) was neither biased or prejudiced and was in fact reasonable in the

circumstances. The appellant never suggested to Mr. Butcher that either he or other officials doing the research herein were biased or prejudiced. Having heard Mr. Butcher at length the Tribunal have no doubt that he was impartial and objective in his careful deliberations pertaining to the disputed information and the issues herein. Accordingly we find that the appellant has failed to establish that the Commissioner was wrong to conclude that the Section 36(2)(b)(ii) exemption and the exemptions under Section 36(2)(b)(i) and 36(2)(c) are engaged.

Section 42 exemption:

32. While not strictly a matter raised in the decision notice, the Tribunal finds in so far as the information at Annex G is within the scope of the request, we accept that it is exempt from disclosure pursuant to Section 42 of the Act. The e-mails are either instructions being provided to a lawyer for the purposes of obtaining advice or the advice that is provided by a lawyer. The contents are clearly subject to the legal advice limb of the doctrine of legal professional privilege and Section 42 exemption provided by the Act is engaged.

The Public Interest Test:

33. The Tribunal have considered carefully the Commissioner's DN in light of the evidence we have heard at the hearing of this appeal. We too have had the advantage of careful consideration of the disputed information provided to us in the closed bundle. Further we have heard the detailed evidence in closed session from Mr. Butcher (an official of the second named respondent) responsible for the issues herein (see paragraph 31 above). We are not persuaded that the appellant has established that the commissioner was wrong in his decision on the balance he applied to the Public Interest test and in particular we agree with the reasoning as set out at paragraph 33 of the DN. We agree that on balance it is not in the public interest to disclose the disputed information.

34. The tribunal does understand the perception of bias or prejudice that pertains as a result of what appears to be an unusual direct and personal intervention by the SofS and did consider in the public interest that this might justify the release of some carefully redacted material but on balance has decided against such limited disclosure for the following reasons:

a. There has been considerable disclosure made by the second respondent herein and most of the relevant information in already in the public domain. We find that nothing in what would be redacted disputed information would add to the transparency or accountability of the process involved herein.

b. In the few instances where the disputed information (viewed in isolation) might not be regarded as having the inhibitory effect identified under Section 36(2), were these passages to be disclosed in isolation they would shed little if any light on the decision making process and would not materially advance the public interest in transparency. We also accept the argument that some such limited passages could give a misleading impression of how the decision was reached if read in isolation and we are not convinced that such disclosure might not still create an inhibitory effect which is the concern at issue.

c. The appeal was an oral hearing open to the public where the appellant and his witnesses heard the evidence of Mr. Butcher, tested at length. They have had more benefit from that hearing than the limited partial disclosure of any further information from the disputed information could possibly provide. The public hearing and this resulting Judgment should serve the public interest adequately and certainly more than any limited piecemeal disclosure that might be provided

35. We have considered the appellant's arguments on the public interest balance and accept merit in all however without repeating each verbatim, for the reasons set out above, we are of the view that the appellant has failed in each instance to persuade us that the Commissioner was wrong in

exercising the balance of the public interest test in the way he did in all the circumstances of this case.

36. Accordingly for the reasons above the tribunal dismiss this appeal.

37. The Tribunal wish to express their sincere thanks to the parties and their representatives for the exemplary manner in which they conducted this appeal throughout. As chairman I wish to apologise most sincerely for the delay in providing the judgment by reason of a serious illness in my immediate family.

Brian Kennedy QC

23rd September 2013.