



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2014/0285

BETWEEN

KING EDWARD VI HANDSWORTH SCHOOL FOR GIRLS

Appellant

and

INFORMATION COMMISSIONER

Respondent

Tribunal

**Brian Kennedy QC
Jean Nelson
Pieter de Waal**

Hearing: 18 March 2015.

Location: Fleetbank House, London.

Decision: Appeal Refused.

Appearances:

Appellant: Tom Johnson, Solicitor.

Respondent: Christopher Knight of Counsel.

Subject Matter: The Freedom of Information Act 2000 (“FOIA”) and reliance by the King Edward VI Handsworth School for Girls (“the Appellant”) on Section 36(2)(c) [prejudice to the effective conduct of public affairs] and 40(2); [personal data] to withhold disclosure of the requested information.

Introduction:

1. This decision relates to an appeal brought under section 57 of the FOIA. The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“the DN”) dated 16 October 2014 (reference FS50534972) which is a matter of public record.

2. An oral hearing took place on 18 March 2015 after which the Tribunal deliberated on the issues in this appeal. The Tribunal and parties have been provided with a paginated (1-349) and indexed Open Bundle ("OB") containing all relevant papers together with a Closed Bundle ("CB"), which contains the withheld information which for obvious reasons is not in the public domain. We have been provided with submissions from the Appellant dated 16 March 2015. We find the Commissioner's Response (11 December 2014 pages 31 - 39 OB) to the Grounds of Appeal (16 September 2014 pages 10 - 16 OB) and the Appellant's Reply thereto (14 January 2014 pages 40 - 46 OB) particularly helpful in setting out the issues for the Tribunal but for the sake of completeness we will give a brief account of the background and the issues before us:

Background:

3. On 7 January 2014 the complainant requested information from the Appellant (a public authority under FOIA) by way of copies of collated results ("the results") of pupil, parent and staff surveys conducted in 2013. The Appellant withheld the information under section 36(2)(c) FOIA (prejudice to the effective conduct of public affairs). During the course of the Commissioner's investigation, the Appellant also applied section 40(2) FOIA (personal data) to some of the withheld information.
4. By letter of 4 February 2014 the Appellant a) informed the complainant that it held the information; b) advised the complainant that section 36(2)(c) was engaged c) averred that disclosure would prejudice the effective conduct of public affairs; and d) advised; "*- - - the detriment to the teaching and learning of the students overrides the public interest in disclosure of the three surveys and therefore the school will not be disclosing the surveys pursuant to section 36(2)(c) of FOIA.*"
5. The complainant sought an internal review on 10 February 2014 and on 17 March applied to the Commissioner for a decision. The Appellant was formally notified of the Commissioner's investigation on 31 March 2014. The Appellant responded to the request for a review on 4 April 2014 confirming its view as follows: "*I have carefully considered the points made by you in your letter, but consider that the rationale behind the refusal to disclose the surveys was correct, and the exemption is justified.*"
6. Notwithstanding its letter of 4 April 2014, the Appellant, in May 2014, provided the complainant (on a confidential basis, and not under FOIA) with a copy of the results of the surveys with personal information redacted. The Appellant further wrote to the Commissioner on 9 July 2014 claiming that the personal information as redacted from the results provided to the complainant were exempt under section 40(2) and 40(3)(a)(i).
7. While redacted copies of the survey results were provided by the Appellant to the complainant on a confidential basis, what remained in dispute was whether, for the purpose of wider publication, the reports were properly withheld (in their entirety) by the Appellant in response to the complainant's FOIA request. In his DN

at paragraph 73 the Commissioner has determined that neither section 36(2) nor section 40(2) are applicable to the reports.

The Decision Notice:

8. We regard it as important to consider carefully and in detail the reasoning of the Commissioner as set out in his DN from paragraphs 10 - 72 as this is the subject to the appeal.
9. Section 36(2)(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 - - - would otherwise prejudice or would be likely otherwise to prejudice, the effective conduct of public affairs.”*
10. In order to determine whether section 36(2) has been correctly applied the Commissioner has:
 - (i) ascertained who the qualified person was for the Appellant ;
 - (ii) established that an opinion was given;
 - (iii) ascertained when the opinion was given; and
 - (iv) considered whether the opinion given was reasonable.
11. The Appellant confirmed that the opinion in relation to the application of section 36 was given by its Chair of Governors. The Commissioner was satisfied that she was the appropriate qualified person for these purposes.
12. The Commissioner noted that the qualified person’s opinion was provided on 29 January 2014 on the basis that she believed that disclosure of the withheld information would be likely to have the effects set out in section 36(2)(c). The Commissioner noted that she accepted that section 36(2)(c) was engaged for the following reasons:
13. a) The disclosure of the surveys would leave the school vulnerable to qualified or part onward disclosure of the surveys, which may result in a distorted picture of the provision of teaching and learning in the school and a partly or distorted picture of overall parent, pupil and staff engagement with the school. The reports are set in tabular format and are based on personal opinions which are a snapshot in time and may not necessarily reflect the individual’s accurate view.

b) Furthermore the publication of the survey reports may well lead to the undermining of individual teachers in their subject areas in the eyes of the pupils and parents to the detriment of overall teaching and learning in those subjects, the undermining of authority and prejudice to effective education, efficient use of resources and effective management and control.
14. The Commissioner then noted his guidance on section 36 and recorded the following: *“Provided that the Commissioner is satisfied that the opinion is in accordance with reason and not irrational or absurd, in short it is an opinion that a reasonable person could hold, then he will regard it as a reasonable opinion for the purposes of section 36.”*

15. After reviewing the withheld information, the Commissioner concluded that it was reasonable for the qualified person to conclude that section 36(2)(c) applied to it.
16. As section 36 is a qualified exemption, it is subject to a public interest test and the Commissioner went on to consider whether the public interest in maintaining the exemption outweighed the public interest in disclosure of the information.
17. The Commissioner noted that the qualified person's opinion was that disclosure of the withheld information "*would be likely*" to have the effects set out in section 36(2)(c), as opposed to that it "*would*" have those effects. The Commissioner took this to mean that there is a real and significant chance of the prejudice occurring, even though the probability may be less than 50%. The Commissioner, properly in our view, took this into account in assessing the public interest arguments in favour of maintaining the exemption.
18. The Commissioner provides the authority for his reasoning at paragraphs 21 and 22 of the DN when he concludes, again properly in our view, that: "*...this means that while due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of the likely prejudice to the effective conduct of public affairs.*" This means that the Commissioner must consider again those factors that should have been considered by the qualified person. It also means that this Tribunal in turn must consider the factors to be considered by the Commissioner and whether or not his assessment of those factors was correct in all the circumstances.
19. The Commissioner then continued by identifying the public interest arguments and the balancing test in favour of and against maintaining the exemption.

Public interest arguments relating to the exemption:

20. The Commissioner sets out the arguments in favour of maintaining the exemption in detail at paragraphs 24 to 32 of the DN and those in favour of disclosing the requested information at paragraphs 33 to 37. The Commissioner considered the balance of the public interest arguments at paragraphs 38 to 40 and for the reasons set out therein concluded that section 36(2)(c) does not apply. This Tribunal accepts and adopts the Commissioner's reasoning as set out in the DN.
21. The Commissioner then considered the Appellant's claim that a small amount of the disputed information was exempt under section 40(2), and set out the reasons for his decision to reject the application of this exemption at paragraphs 41 to 72 of the DN. This Tribunal accepts and adopts the Commissioner's reasoning as set out in the DN.

The Evidence:

22. The Tribunal had the advantage of taking evidence at the hearing. Mr. John Collins, clerk to the Board of Governors of the Appellant school gave evidence inter alia as follows:
23. He confirmed he acted as Secretary to eight schools including the Appellant school. The Appellant had the benefit of an endowed charitable trust fund but also relied on significant public funding. He confirmed that the school commissioned a survey by Kirkland Rowell after the appointment of a new head in 2012 to provide the senior leadership with information for planning. The survey led to the results, which form the disputed information in this Appeal.
24. The survey was put together by the chair of the Board of Governors in consultation with the head teacher and was ultimately carried out partly on-line and partly on paper by questionnaire. He informed us: *"The survey was carried out online by an otherwise anonymous method by Kirkland Rowell to inform stakeholders."* He continued: *"The way the survey was put together, many of the questions were such that many of the stakeholders could not answer as lay persons."* – *"I have to say now seeing the methodology employed we would not use it again."* He explained three concerns about public disclosure of the survey results: damage to staff morale, causing absenteeism, and the timing of disclosure at the time of the request in late spring early summer when stress levels were high. He explained that the use of certain words in the survey results, such as "inadequate" were inappropriate. They could be confused with the meaning of the same language in Ofstead reports.
25. Of the complainant (the requester), he said: *"She, we believe, was intending to and trying to do harm. To undermine their leadership and to distort their leadership. The issue for the leadership and Governors of the school was that public disclosure was potentially damaging to the leadership and staff of the school."* He explained that it had never been their intention for it to be published, according to the head teacher, but he confirmed: "I can't say that the participants were told it was an anonymous survey. It was commissioned by the head teacher with the support of the Board of Governors. There was no set of instructions or covering letter.". He confirmed that the headlines of the survey were favourable to the school but said he felt the school would have no control over the complainant or what she would release.
26. Under cross-examination he confirmed he was not responsible for the proposed redactions. He agreed the results of all three surveys were "pretty positive". He accepted the Appellant was not under the control of the local council and therefore it had more control over its spending. He accepted that "–we have learned – I don't think we would do this again without more research and control." While he stated that he questioned the complainant's motivation, he accepted there were no specific references to individuals in the survey reports.
27. In relation to cross-examination on the application of section 40 to some parts of the information he agreed there was no suggestion made in the survey or the questionnaires as to whether or not the results would be confidential. He could not refute the suggestion that there was no basis in the presentation of the sur-

vey to lead to the assumption that the school did not intend to publish the results. He confirmed he was only made aware that the head teacher had indicated to the Board of Governors that it would be kept confidential. He confirmed that Individual members of staff had not been approached and asked for their consent to release information, which may identify them, because this would have taken a considerable amount of time and would have placed a disproportionate burden on the school.

28. When asked whether harm would be caused by disclosure, he answered: "One would hope not" but added "I believe that single individuals would be associated with those areas of work". When questioned further on the detail of this, and it was suggested to him that there was no evidence that personal harm would follow disclosure, he said, "I can only accept your point." He added: "Our fundamental position is we are not happy with the release of this information."
29. When asked about how specific redactions were proposed on the basis of the Section 40 exemption he answered: "If I am honest, I don't know. School management was involved."
30. The Tribunal also clarified some points with the witness. He confirmed that although the Appellant received funding from a charitable trust, the vast bulk of its funding came from the public purse. He confirmed that the cost of the survey was also paid from public funds.
31. When asked about the complainant's perceived motives he acknowledged that this was not clear and that the Appellant's senior management team may have been ill advised or over-cautious. He said: "*I think they were left in the dark [about the survey results]. It was not what it might have been. It would have been better to be open with staff members*".
32. On cross examination about the public interest in disclosure, it was put to Mr. Collins that it was generally in the public interest that heads of departments should have sight of the survey results. He responded: "*Yes, it is in the public interest to have some of this information released but it is also important that senior managers are able to plan in a way they see fit for the good of the school.*" When put to him that only *the Head Teacher and other members of the Appellant's leadership team* were privy to the disputed information and that this was not a healthy situation, he conceded that the Appellant was perhaps over-protective but felt that public release of the survey results could be damaging.
33. We have only selected what we feel are the most pertinent aspects of the oral evidence, but it was clear to us that at no stage did the evidence of Mr. Collins undermine the reasoning of the Commissioner in the DN and we have not heard direct, illustrative or convincing evidence of the nature or extent of any material damage or prejudice that would be caused to the Appellant or any individual if the results of the survey were to be disclosed.

Reasons:

- 34.** The Appellant argues in its first ground of appeal that the DN was wrong to conclude that the risk of misinterpretation of the disputed information could be mitigated by the provision of an explanatory note. The Appellant also argues that it is not in the public interest to receive inaccurate information. The Tribunal rejects this argument for two reasons: We do not accept that any potential misinterpretation of the information per se is a sufficient ground for engaging the Section 36(2)(c) exemption. Further, and in any event, we do not accept on the evidence before us that the information could be misinterpreted, especially if it were to be accompanied by an adequate explanatory note or statement clarifying its purpose together with a summary analysis of the results and conclusions. We do not accept that the evidence before us demonstrates that the results were misleading or inaccurate. The oral evidence, we also find, failed to demonstrate that there was a significant risk of misinterpretation of the results or that they were misleading or inaccurate in any material or relevant sense. We find that so far as the results are concerned, there is no significant evidence before us to suggest that the public is likely to confuse them with results of an Ofsted report. Even if an Ofsted report was available (in respect of the Appellant) at any material time, we consider that the public interest would weigh in favour of disclosure of the survey results commissioned directly by the Appellant as there is a significant interest held by heads of departments, other stakeholders and participants in knowing the results of the survey which they were all made aware of and asked to willingly participate in without any request for, or promise of, anonymity.
- 35.** In any event, on the evidence before us we find that at the time of the request there was no Ofsted report available in respect of the Appellant and this fact further increases the public interest in disclosure of the survey results in this case.
- 36.** We reject the suggestion, in the grounds of appeal, that there is not a public interest in the participants of a survey being able to know the outcome of the survey, simply because it was not the intention of the Appellant to publish the outcome. Further on the facts before us, this purported intention was never conveyed to the participants in general or individually, and we repeat our observations at paragraph 34 above.
- 37.** We accept and adopt the reasoning of the Commissioner in relation to his response to ground 3 of the grounds of appeal. In the absence of any evidence of an express representation that there would be no publication or circulation, we agree that the staff would have a reasonable expectation that the results would be made public. We also accept that the performance of publicly funded institutions, and the views of its stakeholders in respect of its performance, is a matter of considerable public interest to which we attach significant weight.
- 38.** Similarly in relation to ground 8 of the grounds of appeal and the application of condition 6(1) of Schedule 2 to the Data Protection Act (for the purpose of sustaining the personal data exemption in Section 40 FOIA), we accept and adopt the reasoning of the Commissioner in his DN and at paragraphs 35 and 36 of his response to this appeal.

39. In summary therefore, we reject the submission made on behalf of the Appellant that disclosure of the results would be to the detriment of its staff, pupils or parents. There has been no significant or convincing evidence before or during the hearing substantiating or identifying the nature or extent of such harm. To generally assert that non-disclosure is considered to be better for the morale of staff is, in our view, insufficient.
40. In the context of the facts of this case, there is in our view a significant public interest in providing openness, transparency and accountability. There is, we find, a significant public interest in shedding light on the quality of education here. The results will assist in evaluating the use of funds provided by the public purse, which indeed was the purpose of the survey, which was itself commissioned with public funding.
41. The survey results hold important information to assist a better understanding for staff, parents, children and the public. That itself is of significant public interest. Against that, as we have indicated, no identifiable significant harm in disclosure has been demonstrated. More particularly, as conceded by the Appellant's witness, the results are generally positive and disclosure, in our view having heard the evidence, poses little, if any identifiable risk of prejudice.
42. Against disclosure the qualified person suggests there will be prejudice and there would be likely to be damage. For the reasons above we find insufficient evidence to support significant weight to the argument that prejudice or damage would, or would be likely, to result from disclosure. Similarly we do not find any persuasive evidence that the results are misleading or could be presented in such a way. Even if they could, we find that this is not a sufficient factor in law to be taken into account in assessing and weighing up the balance of public interest.
43. The Appellant avers through Mr. Collins that, in hindsight, they would not have carried out this survey in the way they did. While one may be sympathetic to the view expressed by Mr. Collins, this too is not a reason, which in our view can carry weight in favour of non-disclosure of the information when weighed and balanced against the factors in favour of disclosure.
44. Finally, the Tribunal notes the absence of any witness evidence that one would expect to be presented in this Appeal, by the head teacher, or the few that planned and approved the survey, factually supporting the exemptions claimed by the Appellant. In particular relating to the harm, damage or prejudice that disclosure of the information would or would be likely to cause. In the absence of such evidence we conclude that there is nothing before us to support the challenge to the Commissioner's DN, and that the reasoning and conclusions therein.
45. Accordingly and for the reasons above we unanimously refuse the Appeal.