



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

Case No. EA/2015/0294

ON APPEAL/APPLICATION FROM:

Information Commissioner's

Decision Notice No: FS50588285

Dated: 2nd. December, 2015

Appellant: Paul Boam (“PB”)

Respondent: The Information Commissioner (“the ICO”)

Heard at: Cambridge]

Date 28th April 2016

Date of decision: 16th May 2016

Attendances:

For the Appellant: The appellant appeared in person

For the Respondent: The ICO did not attend but made written submissions

Subject matter

FOIA S. 31(1)(g) and 31(2)(c)

- (i) Whether the disclosure of the requested information would or would be likely to prejudice the exercise by a public authority, namely the Department for Education (" the DfE"), of its functions for the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of The Education Act, 2005 or The Education and Inspections Act, 2006 existed or might arise and
- (ii) if they did or might, whether the public interest in maintaining that exemption outweighed the public interest in disclosing the requested information.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal finds that the exemption is not engaged and that, if it were, the public interest in withholding the requested information would not outweigh the public interest in disclosure.

The appeal is therefore allowed and the following notice substituted for the Decision Notice :

Ofsted is to serve on the ICO and the Tribunal, within twenty – one days of receipt of this Decision, its proposals for redaction of the requested information in order to protect personal data where processing of such data would be unlawful.

Subject to such redaction, Ofsted is ordered to communicate the requested information to PB within fourteen days of receiving the Tribunal' s approval of any such redaction.

This decision will be published five days after service on the parties.

Dated this 16th. day of May, 2016

David Farrer Q.C.

Judge [Signed on original]

Relevant Statutory Provisions

FOIA S.31(1) Information which is not exempt information by virtue of s.30 is

exempt information if its disclosure under this Act, would

or

would be likely to, prejudice –

.....

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2).

.....

(2)

.....

(c) the purpose of ascertaining whether the circumstances which would justify regulatory action in pursuance of any enactment exist or may arise

Authorities

Department of Health v IC and Lewis [2015] UKUT 159 AAC
APPGER v IC and FCO [2013] UKUT 0560 (AAC)

Abbreviations

In addition to those indicated above, the following abbreviations are used in this ruling -

Ofsted The Office for Standards in Education, Children’s Services and Skills.

The DfE **The Department for Education and Skills**

The DN **The Decision Notice of the ICO.**

REASONS FOR DECISION

The Background

1. Ely College is an academy providing secondary education to about 1300 students.

2. Ofsted is a non – ministerial department charged, among other duties, with the inspection of schools. Such inspections are carried out by the Chief Inspector of Schools, through teams of inspectors appointed by Ofsted.
3. The Chief Inspector is required by s.5 of the Education Act, 2005 to conduct inspections of a school at prescribed intervals. If requested to do so, he may conduct an inspection at any time, pursuant to s.8. A s.8 inspection may be converted into a s.5 inspection, if appropriate.
4. If, following an inspection conducted pursuant to s.5, the Chief Inspector is of the opinion that “ special measures” are required in relation to the school, he must send a copy of his report to the governing body of the school for comment and notify the Secretary of State of his finding (see Education Act, 2005 s.13(1) – (3)). His report will review the findings of the inspection team covering every significant aspect of the school’ s performance, as specified by statute. A school made thus subject to “ special measures” is liable to intervention by the DfE, including directions to the governing body, notices regarding performance and teachers’ pay and orders for closure, unless progress is observed through a process of monitoring (see e.g., Education and Inspections Act, 2006 s.62 and 66A – 69A).

We are satisfied that such measures constitute “ regulatory action” for the purposes of s.31(2)(c).

5. Serco Inspections, a private sector contractor, carry out Ofsted inspections. A team with a lead inspector is appointed and substantial background work is performed before the visit to the institution. The inspection at Ely College was a s.5 inspection. It lasted two days, 11th. and 12th. February, 2015. By chance, the

first day did not involve the usual timetabled lessons, so that a different pattern of inspection was employed.

6. The result was a highly unfavourable report, published in March, 2015 and thereafter available on the Ofsted website. The Tribunal members read it. It contains serious criticism of the leadership and management of Ely College, of the quality of teaching and of student behaviour. The conclusion was that it was failing to provide an acceptable standard of education for students and should be made subject to " special measures" .

7. Four months earlier, in October, 2014, a DfE inspection of Ely College had taken place, as a result, it seems, of a decline in its performance in public examinations the previous summer. This appears to have been a less formal event than the Ofsted inspection, though our only information as to its character came from PB, a parent. Be that as it may, the performance of the College was regarded as satisfactory in all important respects, according to the evidence before the Tribunal. The leadership of the College did not change between the two inspections.

8. So it was to be expected that a responsible parent, such as PB, would be shocked and dismayed by such an apparently sudden decline in the leadership and management of the school and in the quality of the teaching that it offered. Alternatively, whilst accepting that the two inspections were different in character, he might question whether they had employed consistent standards and methods of assessment.

The Request

9. In an attachment to an email to Ofsted dated 30th. April, 2015, PB requested the following information -.

" (i) The observation, inspection and evidence notes for each of the inspectors.

(ii) The observation, inspection and evidence notes for the lead inspector.

(iii) The minutes for the internal meetings between the inspection team.

(iv) All handwritten notes for any of the inspection team pertaining to the visit or any decisions made.

(v) All preparatory notes pertaining to the inspection.

(vi) Records of emails between Serco inspection team, OFSTED and the DFE pertaining to the Ely College inspection in March, 2015."

The reference to March, 2015 should have been to February, 2015.

10. In its response dated 1st. June, 2015, Ofsted stated that it held no emails passing between Ofsted and the DfE relating to this inspection. (It later amended that statement as regards one email, which it contended was in part exempt (see below) and, as to the rest, out of scope.) As to all the other requested information, it was exempt by virtue of FOIA s. 31(1)(g) and 31(2)(c) and a proper weighing of competing public interests. The likely prejudice resulting from disclosure was explained as follows -

" It is important that the school is given time to improve and that the disclosure of information about the inspection to the public does not distract attention from the fundamental improvements required to bring the school out of special measures. Furthermore, it is important that the decision – making process, in relation to taking potential regulatory action to secure improvement, is afforded the time and space to effectively consider whether or not it is required on the basis of the official findings set out in the report.

We consider that disclosure of information about the inspection at this time is likely to distract attention from the official findings in the report and potentially negatively affect any efforts being made to make improvements in the school, or deciding whether regulatory action is required; by the evidence being subject to public scrutiny

Presumably, the people whose attention might be distracted and whose efforts at improvement might be weakened were those running the school in the aftermath of the s.5 inspection, not the DfE. As to the effects on decision – making, the response did not embark on any explanation as to how public scrutiny would impair discussions within the DfE as to regulatory intervention, either in general or, more importantly, in this particular case.

11. Ofsted maintained its refusal following a requested internal review, which resulted in a careful and comprehensive response dated 1st. July, 2015. The nature of the prejudice was now said to be the diversion of DfE resources from making intervention decisions to answer questions from sharply polarized factions of parents, each selective in its approach to the evidence, lobbying for different courses of action by the DfE. There was a “ high potential” for Ofsted’ s evidence to be misrepresented by highly motivated parents. The Ofsted report alone must determine intervention decisions. Why senior civil servants in the DfE should be misled into ignoring or devaluing the report’ s findings by such partisan parental arguments and misinterpretations was not discussed.

12. The same letter referred also to the exemption provided by FOIA s.40(2) for the personal data contained in the requested documents.

13. On 6th. July, 2015, PB complained to the ICO

The ICO’ s investigation and the DN

14. Whilst the Tribunal is not concerned with the route by which the ICO came to issue the DN, it is necessary to review the course of his investigation in this appeal because it is relevant to the strength of his case as to the engagement of the exemption relied on and the balance of the public interests. No evidence beyond what the ICO received was presented to the Tribunal.

15. It is important to observe that, whilst the public authority to which the request was made was Ofsted, the exemption relied on depended on proof of prejudice to the regulatory functions of the DfE, a matter on which the DfE, not Ofsted, might be thought best placed to give evidence. It appears that the ICO made no direct contact with the DfE at any stage of his inquiries. Indeed, the DfE's involvement in presenting the justification for refusing this information seems to have been confined to a single brief email which was the culmination of a series of communications between the ICO and Ofsted, which merits examination in this particular case.

16. The ICO evidently studied the response to the request for an internal review with care. A senior case officer wrote to Ofsted on 13th. August, 2015 requesting a copy of the withheld information and the Ofsted report, asking which threshold of likelihood of prejudice Ofsted relied on and whether the same exemption applied to all the withheld information. Apart from those inquiries, he does not seem to have probed the Ofsted case on the engagement of the exemption or the public interest in any way.

17. Those requests having been satisfied, the ICO asked Ofsted to obtain a formal statement from the DfE that it supported the Ofsted case as to the prejudice likely to be suffered by the DfE from disclosure and the balance of public interests. He asked for a dated copy of the DfE's statement as to the prejudice to its regulatory functions which, he supposed, formed the basis of the response to the request for an internal review. Ofsted evidently regarded this as an unusual demand but agreed to obtain such confirmation.

18. An email letter was sent by Ofsted to the DfE on 18th. September, 2015. Its terms clearly indicate that this was the first that the DfE had heard of PB' s request. It stated that the DfE had not seen the request. It expressed the hope that the DfE, in the short time available, could corroborate the letter conveying the result of the internal review (which was attached). It continued –

“ Alternatively, we do think we are able to construct similar arguments using other exemptions, if that is necessary, without any statement from DfE. In any event, we are not of the view the requested information should be disclosed at this time.”

It is plain that the ICO' s assumption that Ofsted' s case was supported by a witness statement or something similar from the DfE, was unfounded.

19. The DfE' s endorsement came in the form of an email from somebody in the Inspections and Accountability Unit of the Education Standards Directorate, whose name and status were concealed from the Tribunal, no doubt in the interests of protecting personal data. It read as follows –

“ The Department is happy to support Ofsted' s position that the consequences of disclosure would likely result in prejudice to the DfE' s regulatory functions in the manner described in Ofsted' s internal review.”

Since the ICO did not attend the hearing and neither Ofsted nor the DfE applied to be joined as parties to this appeal, the Tribunal does not know who sent this email nor what, if any, consultation as to its terms had taken place within the DfE. No witness from either submitted any statement to the Tribunal in support of the ICO' s case.

20. When this endorsement was communicated to him, the ICO, by his DN, upheld Ofsted's refusal to disclose the requested information on the basis of the letter of 1st. June, 2015 following the internal review. The prejudice that he identified was the diversion of DfE resources from decisions on regulatory interventions to responses to lobbying by parents and other interest groups. Such prejudice was apparently regarded as a likely result of any disclosure of the evidence underlying any critical Ofsted report. No reference was made by Ofsted in the letter of 1st. June, 2015 to the particular circumstances of the Ely College case.
21. As to the public interest, the DN referred to the public interest in ensuring that " regulatory actions are taken without external interference or prejudice to that process" That interference would apparently take the form of expressing opinions to the DfE for or against possible regulatory measures or questioning the validity of the stated conclusions of the Ofsted report. Some might think that a core purpose of FOIA is to facilitate such " interference" , even if it results in some inconvenience and additional work for a public authority.
22. PB appealed to the Tribunal. His grounds were succinct. He stressed that the majority of parents supported the work which was being done to improve Ely College. There was no wish to disrupt the process nor any likelihood that disclosure would do so. He simply wanted to assess objectively the evidence on which the report was based. If the evidence was robust, there was no reason to withhold the requested information. The public interest in transparency should prevail on an issue of such importance to parents and the local community.
23. The ICO responded. He analysed the grounds of appeal, identified the likely prejudice in the same terms as in the DN, argued that withholding the information was in those circumstances within the letter and spirit of FOIA and submitted that

it served a greater public interest than disclosure, namely the efficient exercise of the DfE' s regulatory functions.

24. PB gave evidence and advanced oral arguments at the hearing. He stated that, in his experience, parents were surprised and anxious at the content of the Ofsted report but there was no sign of factions forming or action likely to hinder progress in strengthening the school' s performance. He requested publication of the underlying evidence so that he or any member of the public could see whether the Ofsted assessment was reasonable, given the contrast with the assessment in October, 2014. If it justified the decision to apply special measures, he would accept that and give his full support to the process designed to improve the school. Transparency was vital to parental confidence. If everything was in order, why withhold this information ?

The reasons for the Tribunal' s decision

25. The requested information was not exempt by virtue of s.30 of FOIA. There are two possible issues –

- (i) Is s.31(1)(g) engaged ?
- (ii) If so, is the public interest in withholding the information greater than the public interest in disclosure ?

Where, as here, the exemption is based on prejudice to a function of a public authority, there is a considerable overlap between them, since the public interest in withholding the information generally relates to the prejudice which engages the exemption.

26. A public authority which relies on this exemption from the duty to provide information must adduce evidence before the Tribunal which persuades it that

prejudice is either more probable than not or (as in this case) a likely consequence, if the requested information is disclosed. " Likely" means that there is a substantial chance that the identified prejudice will result. Reliance on the latter (and less stringent) test may weaken the public interest in maintaining the exemption.

27. The prejudice first identified by Ofsted in its initial refusal was two – fold -

- (a) Distraction (presumably of school leaders and staff) from the task of improvement.
- (b) The familiar argument that the DfE would be deprived of the " safe space" required to make informed judgments on intervention.

28. Its letter of 1st. July, 2015 specified

- (c) The diversion of DfE resources from work on interventions (generally) to deal with parental factions.
- (d) The potential for misrepresentation of Ofsted findings by partisan lobbying groups.

29. The DN adopted (c) and, by implication (a) when it recited the concerns of Ofsted and the DfE as the school being " distracted by the minutiae of raw evidence used to form the basis of the report" .

30. These forms of prejudice were all advanced initially by Ofsted without reference to the DfE. When pressed by the ICO for DfE authentication, Ofsted, whilst indicating that it could find other exemptions, if the DfE could not provide its imprimatur, obtained the anonymous response set out at §19 above.

31. This is not a case where the Tribunal need take account of any specialist expertise in the Department because nobody with such expertise contributed to the evidence. There was no evidence even as to the status of the officer who approved the Ofsted argument. The formal endorsement provided to Ofsted and accepted by the ICO is almost worthless.

32. There is no indication that the DfE provided any input whatever for these assertions as to prejudice beyond that one bland email. Of course, one public authority is a competent witness as to prejudice likely to be suffered by another but the value of its evidence depends on the circumstances of the particular case. There was no evidence as to Ofsted' s familiarity with DfE experience of the risks of parental interference.

33. Here, even at the level of generic prejudice, there was no evidence of previous experience as to parental interference when primed with evidence underlying a report or material relating to a report. Still less was there any evidence relating to this specific case. It is not suggested that the Ofsted report itself produced a wave of parental protest or a disruptive clash between opposing factions, badgering the DfE or Ofsted for explanations as to the sudden change in assessment of the school. It is not obvious why the disclosure of the underlying evidence for the report should create a greater risk of " external interference" than the publication of the report itself. If there were intrinsic features of the requested information (which was in the closed bundle) which the DfE considered likely to provoke disruption of its decision – making function, such a matter could have been dealt with by a closed witness statement and, if necessary, submissions in closed session. No such evidence or submission was forthcoming. Indeed, the Tribunal was given no guidance whatever as to the significance of anything in the requested information, which amounted to 374 pages.

34. We conclude that the claim that disclosure may cause prejudice of the kind or kinds mooted in these proceedings is simply speculation, unconvincing at a theoretical level and unrelated to any general experience, let alone the facts of this case. Making allowances for the fact that it is only one parent' s evidence, we accept PB' s statement that there was and is no obvious indication among Ely College parents of a desire to protest, lobby the DfE or disrupt progress in the restoration of the school; rather the reverse. We do not believe that disclosure of the requested material would alter that position.
35. The Tribunal members read the requested material. None of us is expert in assessing the performance of schools and we were not familiar with all the acronyms. That said, we found nothing that seemed likely to provoke a major controversy among interested parties. If there had been, that might have strengthened the ICO' s case on diversion of resources, whilst increasing the public interest in disclosure, if the exemption were engaged. Of course, those more familiar with Ely College might have greater insights and take a different view but, in the absence of enlightenment, we have to do the best we can.
36. We therefore find that the exemption relied on is not engaged.
37. That finding is sufficient for us to allow this appeal. However, we shall deal with the balance of public interests, if the exemption had been engaged. We do so on the footing that, contrary to our primary finding, disclosure could cause some diversion of DfE resources from decisions on intervention, whether in this case or more generally. That could constitute some degree of prejudice. This decision has already referred to much of the relevant evidence.
38. In *Department of Health v the ICO and Lewis [2015] UKUT 159 AAC*, Charles J. demonstrated that the public interest balancing exercise under FOIA was similar to the test applied to claims for public interest immunity in criminal and civil

litigation. Generalised claims as to prejudice relating to disclosure of a class of information carry little weight. What matters is the content of the particular document or information under scrutiny. At §20 Charles J. states –

“In my view a class approach is wrong. It does not accord with the underlying purpose of FOIA, it flies in the face of the background I have described, and it does not fit with equivalent balancing exercises in respect of the public interest (e.g. when a duty of confidence is owed). Also, it creates unnecessary problems in the difficult weighing or assessment of competing interests and the “apples and pears” arguments it involves by introducing a comparison of classes or generic issues when what is at issue is the disclosure of specific information”.

Charles J. had referred at §16 to *APPGER v IC and FCO [2013] UKUT 0560 (AAC)* where the Upper Tribunal had previously commented on the consideration by a tribunal of competing public interests. Its consideration involved s.27 of FOIA, a similar prejudice – based qualified exemption. There is no reason to doubt that the same principles apply.

“[74] This assessment gives rise to a process of parallel reasoning that arises

in other balancing exercises (e.g. in the BM litigation in respect of PII)

and so it involves what is sometimes described as an “apples and pears” comparison.

[75] In our view correctly, it was accepted before us by the FCO and the IC

that when assessing competing public interests under section 27 of FOIA

the correct approach is to identify the actual harm or prejudice that the

proposed disclosure would (or would be likely to or may) cause and the

actual benefits its disclosure would (or would be likely to or may) confer

or promote. This equates to the approach now taken in PII claims. Also, it

is in line with the approach that the FTT explained it had adopted
in
deciding that section 27 was engaged, namely that a real and
significant
risk of that disclosure would prejudice relations with another State
had to
be established and the FTT's acknowledgement in paragraph [166]
that the
public interest factors against disclosure require definition.”

39. The Ofsted assessment of prejudice appears to be entirely class – based and is not linked to the facts of this particular case in any way. It is not based on any evidence as to the reaction of parents and the local community to the report and its consequences; nor does it draw on any comparable experience with another school. It appears to be based on some theoretical notion as to how parents might behave and a general sense that this sort of material ought not to be open to public scrutiny at such a time (see the Ofsted letter to the DfE quoted at §18).

40. Charles J. made clear that the public interest in disclosure must also be measured by reference to the specific facts of the case.

“33 The benefit of disclosure. The approach described by the Upper Tribunal in APPGER v ICO and FCO and in FCO v IC and Plowden (see in particular at paragraph 15) and indeed the wording of s. 2(2)(b) show that the public interest assessment is a two way street and so that both sides of it should be assessed on a contents basis.

34 This again does not mean that the general public interests in favour of disclosure that underlie FOIA are not taken into account. I have referred to them at paragraphs 9 and 10 above”.

41. As the judgment acknowledges, the requester cannot specify advantages based on the content of documents that he has not seen. The ICO can but, in this case, did

not do so beyond the usual high – level benefits of transparency and accountability. Whether he saw the requested material is not clear to the Tribunal.

42. The Tribunal considers that PB identified a public interest in disclosure, specific to the facts of this case, in particular to the recent history of Ely College. He contended that disclosure of the underlying evidence would enable a diligent and fair – minded observer from the local community (a role which he filled admirably, to judge by his evidence and submissions at the hearing) to satisfy himself that the report did or did not explain the dramatic change in the assessment of the school' s performance. If it did, that would do much for parental and community confidence in the adoption of special measures; if it did not, then it would enable those concerned with the future of the school to challenge what was taking place at Ofsted' s behest. That is a practical application of the general interests in accountability and transparency, which play some part in the balancing of public interests. It may be said that the inexperienced reader would not be able to gauge how far the inspection logs supported the conclusions of the report but there was no evidence to that effect and we cannot say that that is so.

43. Whilst the public interest in disclosure is not overwhelming, it is, in the Tribunal' s judgment, much stronger than the public interest in maintaining the exemption, which we have already assessed as slight, whether assessed on a class or a content basis.

44. We therefore find that, if the exemption were engaged, the public interest in maintaining the exemption would not outweigh the public interest in disclosure.

Data protection issues

45. The question of s.40(2) and the protection of personal data requires consideration, though not the subject of any finding in the DN. It is important that any direction now given by the Tribunal, whilst protecting legitimate rights to the confidentiality of personal data, is proportionate to the sensitivity of those data and the need to conclude this appeal with the minimum of delay. The identities of the inspectors and the Head and Deputy Head Teachers are clearly in the public domain. The identities of individual parents or officers of Ofsted and the DfE are, so far as we can judge, of no public significance anyway in the context of this appeal.

46. Given that Ofsted cited s.40(2) at the outset, it is reasonable to suppose that some consideration has already been given to the question of which people named in the closed bundle should be protected and which should not. Hence, the Tribunal will grant Ofsted twenty – one days to serve on PB, the ICO and the Tribunal a memorandum of its proposals for the redaction of the requested information for the purposes of s.40(2) of FOIA. We do not envisage a prolonged debate thereafter. The Tribunal will rule, if necessary, on any disputed redaction but it is confident that this can be resolved without adjudication.

47. This appeal is allowed for the reasons stated.

48. Our decision is unanimous.

David Farrer Q.C.

Tribunal Judge,

16th. May, 2016

