Appeal Number: EA/2021/0262

First-Tier Tribunal

(General Regulatory Chamber)

Information Rights

Heard on the Tribunal CVP.

On: 24th May & 17th June 2022.

Panel: Brian Kennedy QC, Suzanne Cosgrave, and Dan Palmer-Dunk.

Between:

Department for Education

Appellant:

and

The Information Commissioner

Respondent:

:

Representation:

For the Appellant:

For the 1st Respondent: Khatija Hafesji, of Counsel

For the 2nd Respondent: Katherine Taunton of Counsel.

Decision: The Tribunal allow the appeal.

REASONS

Introduction:

[1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("the FOIA"). The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice ("DN") dated 27 July 2021 (reference IC-39657-R7T7), which is a matter of public record.

Factual Background to this Appeal:

[2] Full details of the background to this appeal, the complainant's request for information and the Commissioner's decision are set out in the DN. The appeal concerns a request for information relating to a report prepared by a School Resource Management Advisor ("SRMA"), recommending potential savings at a particular school. The Department for Education ("DfE") provided some redacted information and withheld other information in its entirety, citing all three limbs of the exemption at section 36(2) of the FOIA – prejudicial to the effective conduct of public affairs. In response, the Commissioner held that while the exemption at section 36(2)(b)(ii) is engaged, the balance of the public interest favours the disclosure of information. The Commissioner required the DfE to disclose the information to the complainant, subject to the redaction of personal data. The Commissioner informed the DfE that they have 35 calendar days from the date of the DN to comply.

[3] The Commissioner maintained that the public interest favours disclosure. Since being issued with the DN, the DfE has disclosed further information. The DfE appeals against the DN in respect of the balance of information which was considered by the Commissioner during her investigation. In the Grounds of Appeal, the DfE advanced the argument that section 36(2)(b)(i), (ii) and (c) applies. The Commissioner believes that it is unclear to what extent, if at all, the DfE seeks to rely on section 36(2)(b)(i) and/or (c) FOIA. The Response is filed on the basis that it is common ground that section 36(2)(b)(ii) is the only exemption engaged.

History and Chronology:

[4] On 10 November 2019, the complainant wrote to the DfE to request information of the following description:

"Please provide me with information relating to the School Resource Management Advisor ("SRMA") Report prepared by [name redacted] … in May 2019 on Kings Heath Primary School ("KHPS"), Valentine Road, Kings Heath, Birmingham, B14 7AJ. This report was delivered to the school at 16:02 on 4th November via email… I request as follows: (numbers added for ease of reference)

1) all versions of the report with comments, amendments and tracked changes;
2) all email correspondence regarding the SRMA visits to KHPS.
3) all correspondence relating to this report between the Department for Education, Birmingham Local Authority, the Education and Skills Funding Agency and the SRMA.
4) all meeting notes relevant to the SRMA process for KHPS.
5) transcripts of any telephone conversations/notes of those conversations where this report was discussed; and
6) all copies of supporting data used in compilation of the report."

[5] On 23 December 2019, the DfE responded and advised that it was intending to apply a qualified exemption to the information, and that it required more time to consider the public interest test. On 7 February 2020, it issued a further response, as follows:

" • It stated that no information relating to points 4-6 of the request was held;
- *It withheld the information requested at point 1 in its entirety under section 36(2) of the FOIA – prejudicial to the effective conduct of public affairs.*
- *It provided some information relating to points 2 and 3, but stated that some of the information had been redacted under section 36(2).*
- *It explained that, where correspondence was being provided, personal data had been redacted under section 40(2) – third party personal data."*

[6] Following an internal review, the DfE wrote to the complainant on 16 March 2020 and upheld its decision.

[7] Professor Hand complained to the Commissioner on 4 May 2020. Professor Hand requested that the Commissioner consider whether the information withheld under section 36(2) should be disclosed.

[8] The Commissioner conducted her investigation and issued the DN on 27 July 2021. She concluded that while the exemption in section 36(2)(ii) is engaged, the balance of the public interest favours disclosure.

Legal Framework:

[9] Section 36(2) of the FOIA states that that information is exempt from disclosure under the FOIA if, in the reasonable opinion of a "qualified person", disclosure of the information:

"(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 otherwise to prejudice, the effective conduct of public affairs."

[10] Section 36(2) therefore needs to be engaged in a different way from other qualified exemptions under the FOIA. In order to engage section 36(2), it is necessary for a public authority to obtain the opinion of its qualified person as to whether inhibition or prejudice relevant to the subsection(s) cited would be at least likely to occur, as a result of disclosure of the information in question.

[11] Section 36(5)(a) of the FOIA states that any Minister of the Crown is entitled to act as the qualified person in respect of a government department. The DfE confirmed that the request was considered by Lord Agnew, who was a Minister at the time. It

provided the Commissioner with a copy of the submissions provided to Lord Agnew for his consideration.

[12] In relation to qualified exemptions under FOIA, the public interest balance falls to be assessed according to the circumstances as they stood at the time when the public authority refused the request or at the time of its interview review: *R (Evans) v Attorney General* [2015] UKSC 21, [2015] A.C. 1787 and *All Party Parliamentary Extraordinary Rendition (APPGER) v IC and FCO* [2015] UKUT 377 (AAC), followed in *Maurizi v IC and others* [2019] UKUT 262 (AAC) AT §184.

Commissioner's Decision Notice:

[13] The Commissioner investigated the matter and held that the exemption in section 36(2)(ii) is engaged, the balance of the public interest favours disclosure.

[14] The Commissioner required the DfE to disclose the withheld information to the complainant, subject to the paragraphs which follow. The Commissioner noted that the withheld information includes some personal data. Specifically, it included names of the various individual correspondents, and their email addresses and other contact details, including telephone numbers. The names of certain other individuals, including students at the school, are also included within some of the draft reports. The Commissioner was satisfied that this information identifies and relates to living individuals, and therefore comprises personal data within the definition of personal data at section 3(2) of the DPA. She was also satisfied that it would not be lawful to disclose this information. The Commissioner instructed the DfE that, prior to disclosing the information, all personal data should be redacted.

Grounds of Appeal:

[15] The Appellant's Grounds of Appeal detailed that the Commissioner erred in that some information which she[1] directed to be disclosed falls outside the scope of the

[1] In the April 2022 the UTT decision UA-2020-00000324 Montague v ICO and Dept for International Trade superseded the earlier authorities on the date for the public interest test and this later decision was relied upon by the witness in her evidence and by the Tribunal.

Request. Further, that the Commissioner erred in failing to consider the public interest in withholding information concerning the internal DfE policy discussions about wider issues arising from the School Resource Management Advisor's involvement with Kings Heath Primary School. Finally, that the Commissioner erred in failing to distinguish between information which shows the School Resource Management Advisor report was altered over time and disclosure of the content of the draft reports themselves.

The Commissioner's Response:

[16] The Commissioner invited the Tribunal to dismiss the appeal and requested that the DfE provide the Tribunal (in CLOSED form) with the information originally deemed to be within the scope of the Request in the order of the six parts of the request and mark up what has been disclosed/withheld. Further, the Commissioner set out observations in respect of the Appellant's Grounds of Appeal. The Commissioner considered that the majority of the information sought to be excluded by DfE is properly within the scope of the Request and should be disclosed pursuant to the DN.

[17] In relation to Ground of Appeal two and three, the Commissioner did not accept the DfE's position and invited the Tribunal to uphold her conclusion that the public interest balance favours disclosure of all the Withheld Information which is within the scope of the Request. The Commissioner repeated her reasoning set out at §47 to §57 of the DN. The Commissioner believed that providing the Tribunal with the information in CLOSED form would enable the Tribunal to understand what information is within the scope of each part of the Request and the extent to which information pertaining to that part has already been disclosed. The Commissioner invited the DfE to consider whether any further information is held for the purposes of Ground one.

Appellant's Reply:

[18] In relation to the assertion that certain information is within the scope of the request, the Appellant stated that the Commissioner continues to err in this regard. The Appellant argued that this error is predicated on a fundamental conflation of

two distinct issues: on one hand, the issue of the SRMA visit to KHPS and on the other the school proposing to adopt a 4.5-day week and protests concerning the sufficiency of funding for schools in Birmingham. This request concerns the former and the latter is context to the former, but information concerning that context is not properly within the scope of the request. The Appellant submitted that this information is clear from the request itself. Further, that the request is not a generalised request for any information which the Appellant holds in relation to the funding issues faced by KHPS.

[19] The Appellant referred to §26 of the DN as the correct characterisation of the scope of the request:

"- having reviewed the withheld information, the Commissioner notes that the information concerns draft versions of, and correspondence relating to, a report which had been submitted in what was taken by all parties to be its final form to the school, just before the request was made. She also notes that, around the same time as the request was made…"

[20] In response to the contention that the public interest balance favours disclosure, the Appellant argued that the Commissioner erred in her assessment of the public interest test for the following reasons:

I. The disclosure of the withheld information is likely to have a chilling effect on future engagement with the SRMA programme, which is contrary to the public interest. The Commissioner is wrong in her understanding of the requirements and expectation around SRMA visits to schools as the success of the programme is significantly dependent upon the voluntary engagement of schools, who are in turn concerned to ensure that the sensitive information they disclose to the SRMA will remain confidential.

II. The Commissioner has failed to consider the wider impact of this chilling effect on outcomes of pupils and has failed to take this factor into account in her public interest balancing exercise. The Appellant submitted that the SRMA has been highly successful, delivering significant savings and

revenue-generation opportunities. Therefore, disclosure would be detrimental to educational outcomes for pupils.

III. The disclosure of information concerning the quality assurance process will reduce the effectiveness of the quality assurance process and the development of individual SRMA's.

IV. The disclosure of information contrary to the assurances of confidentiality given by the DfE to its stakeholders, is likely to undermine the assurances of confidentiality given to the stakeholders by DfE in other contexts and few would expect FOIA to require the disclosure of the most sensitive information regarding the running of schools which is not already in the public domain.

[21] Turning to the public interest factors which the Commissioner relied upon in favour of disclosure, the Appellant outlined that the DfE's position is that several of these should be entirely discounted as they are based on an erroneous understanding of the SRMA programme, whilst others should be given far less weight than the Commissioner has afforded them. Taking each in turn:

I. In relation to improving scrutiny of the roles and powers of the SRMA, the SRMA do not have 'powers' and whilst disclosure of information about how a specific SRMA engaged with a specific school at a specific point in time may marginally advance the public's understanding of the SRMA's role, the impact of disclosure is not sufficiently significant to outweigh the compelling public interest in maintaining the exemption.

II. Whilst it is the Commissioner's view that disclosure would materially improve public knowledge of the process following an SRMA visit, there is already information concerning this process available in the public domain. Further, the clear detriment caused to the public interest by disclosure, this publicly available information is sufficient to satisfy the public interest in understanding the quality assurance process.

III. The request does not concern the SRMA's pilot scheme.

IV. The request also does not concern recommendations made by SRMA's to other schools.

V. Further, the Commissioner has failed to appreciate that whether or not recommendations are actioned is irrelevant to the SRMA process and there is already information in the public domain which provides transparency around the savings identified by SRMAs.

VI. The disclosure of the withheld information would give the public a misleading impression of the level of expertise of individual SRMAs due to the exception and unrepresentative nature of the withheld information in this case. Further, there is already information in the public domain attesting to the demanding process which SRMAs must complete before obtaining accreditation.

VII. The Appellant accepted that there is a public interest in disclosure, however, the public interest is limited in circumstances where there is already significant information already in the public domain about the role of the SRMA, the programme, process, and savings realised as a result o the programme.

VIII. The public interest must be properly directed at the information which is within the scope of the request. The request does not seek information relating to the issue of why KHPS wished to adopt a 4.5-day week, nor does it address whether KHPS was in receipt of sufficient funding from its local authority.

[22] The Appellant considered the public interest favours in favour of withholding the information to outweigh those in favour of disclosure and invites the Tribunal to allow the appeal.

Commissioner's Skeleton Argument:

[23] The Commissioner considered that the approach the Appellant invites the Tribunal to adopt in respect of the scope of the Request is unduly narrow and does not properly reflect the context of the Request nor its express terms. The Commissioner determined that the email correspondence in which the proposal for the SRMA to be deployed to KHPS is discussed are plainly within the scope of the Request.

[24] Whilst the Commissioner agreed that some of the information concerning internal discussions falls outside the scope of the Request on the basis that it is not directly connected to the Appellant's approach to the SRMA deployment at KHPS other, information (green) is either correspondence regarding the SRMA visits, or correspondence relating to the SRMA report (relevant to parts two and three of the Request). Although it may be characterised as internal policy discussions, this does not automatically take it outside the scope of the Request.

[25] The Commissioner accepted that the public interest test needs to be considered in light of the fact that many schools which engage with the SRMA Programme do so voluntarily. However, the voluntary nature makes it all the more important that schools have confidence in the process they are considering volunteering for, and access to information about how it has operated. The Commissioner refused to accept the chilling effect argument and averred that it could be mitigated by the Appellant providing an explanation to its submissions and evidence.

[26] The Commissioner disagreed with the reasoning which appears to underpin the Appellant's position in respect of the public interest test. The Commissioner noted that the time at which the public interest falls to be considered is the time at which the Appellant responded to the Request. Disclosure at that time would have advanced the public's understanding of how the SRMA programme had been operating in the previous year. It would have been open to the Appellant to explain, in February 2020, that the process of quality assurance was evolving based on feedback, and that it would not typically follow the process adopted in respect of KHPS. However, this: (i) does not equate to disclosure being misleading, it would reflect the reality, and (ii) the calculation of potential prejudice must be done in light of the fact that the Appellant had recognised a need for improvement and would have to explain and rely upon the same at the time of disclosure.

[27] The withheld information was colour coded to assist the Tribunal Panel by drawing distinctions between the nature of the content, one such grouping (orange) was material which showed the extent of the Appellant's consideration and involvement in the SRMA process and the reasons which lay behind its approach to the SRMA report. The Commissioner submitted that there is a strong public interest in

disclosure of this. Another grouping (blue) showed how the report changed over time from the initial draft to the involvement of the Appellant. Therefore, according to the Commissioner, this showed the impact which that involvement had on how the SRMA presented the information in the report, and on his recommendations.

[28] The Commissioner did not consider that disclosure in this case would be likely to cause prejudice to such an extent as to outweigh the strong public interest in disclosure on the facts of this case.

Appellant's Skeleton Argument:

[29] The Appellant outlined that the following forms of prejudice which, taken together or separately, should be accorded significant weight by the Tribunal:

a. Prejudice to the success of the SRMA Programme.
b. Prejudice to outcomes for pupils.
c. Prejudice to the quality assurance process undertaken by the Appellant.
d. Prejudice to relationships between the Appellant and key stakeholders and, therefore, prejudice to the quality of the Appellant's future decision-making.

[30] The Appellant contended that the impact of disclosure is not sufficiently significant to outweigh the compelling public interest in maintaining the exemption. Further, the Appellant argued that the withheld information is not representative of how the quality assurance process operated at the time of the Request and internal review, nor indeed how the quality assurance process operates at the present time. Therefore, disclosure would be misleading.

[31] The Appellant averred that the request does not concern the SRMA pilot, nor does it concern recommendations made by SRMAs to other schools. Further, the Commissioner failed to appreciate that whether or not recommendations are actioned is irrelevant to the SRMA process. In addition, there is already information in the public domain which provides transparency around the savings identified by SRMAs and the savings which have been realised. The Appellant contended that the disclosure would give the public a misleading impression of the level of

expertise of individual SRMAs due to the exceptional and unrepresentative nature of the withheld information.

[32] The Appellant stated that the public interest is limited in circumstances where there is already significant information already in the public domain. In relation to the assertion that certain information is within the scope of the request, the Appellant stated that the Commissioner continues to err in this regard. The Appellant argued that this error is predicated on a fundamental conflation of two distinct issues: on one hand, the issue of the SRMA visit to KHPS and on the other the school proposing to adopt a 4.5-day week and protests concerning the sufficiency of funding for schools in Birmingham. This request concerns the former and the latter is contest to the former, but information concerning that context is not properly within the scope of the request. The Appellant submitted that this information is clear from the request itself. Further, that the request is not a generalised request for any information which the Appellant holds in relation to the funding issues faced by KHPS.

[33] The Appellant submitted that the public interest balance resounds strongly in favour in withholding the information pursuant to section 36(2)(b) FOIA and the appeal should be allowed accordingly.

Scope of request - broad or narrow:

[34] Professor Hand's actual request on 10 November 2019, said clearly that he wanted; *"information relating to the School Resource Management Advisor report prepared by....in May 2019 on Kings Heath Primary School."*

[35] The detail in a letter written by Professor Hand, dated 11 November 2019 (the day after the FOIA request) and available to the Tribunal within the Closed Bundle at C047-C051 provided context through greater detail as to his concerns about the report and the changes from the first draft in May 2019 to the final version in November 2019. Taken together this seems to be a narrowly focussed request on the specifics of the changes from the first draft KHPS report to its final version not

as the ICO have interpreted it the issues concerning broader policy concerning deployment of SRMA's in schools nor the political issues affecting KHPS and other schools considering a move to a 4 1/2-day school week.

[36] The substance of Professor Hand's lengthy letter of 11 November shows an interest in the detail of the changes to KHPS report. The DfE has provided Professor Hand with considerable amounts of information - we have significant evidence of that in the Open Bundle. There is no evidence of contact from Professor Hand of ongoing engagement with DfE nor the ICO in search of more information than he has been provided.

[37] The Tribunal take the view that the narrower view of the scope of the Request is the relevant scope for the purposes of this appeal.

Evidence heard on 24th May and 17th June 2022:

[38] The Tribunal have had the advantage of taking the oral evidence of Ms. Tanya Arkle[2] under extensive, thorough, and forensic cross examination and after further questioning by the Tribunal. This evidence was in support of and expanding upon her witness statements (Dated 21st February 20222 at "OB E001 to E035" and 19th May 2022 at ("CB D001 to D035"). We heard Ms Arkle at length and observed her competent, exhaustive commitment and intimate understanding of the complex issues pertaining. We found her evidence in her role and position as the Deputy Director of the School Resource Management Division within the Education and Skills Funding Agency (an executive agency sponsored by the Appellant), to be compelling. The Tribunal further heard comprehensive submissions on the oral testimony and on all matters raised throughout the appeal hearing and met again on 4th July 2022 to deliberate and determine their decision herein.

[39] Inter-alia, Ms Arkle[2] stressed the importance of the Confidentiality as it appears within the SRMA Contract and through assurances given in discussions by DfE

[2] Ms Arkle's initial witness evidence was prepared in Feb 2022 before the UTT decision in Montague see para 12 above. She provided a second witness statement (19 May 2022) updating the evidence to reflect the decision in Montague concerning the date for the public interest test.

with schools. In relation to the important evidence provided by Ms Arkle and without prejudice to the extremely wide and helpful arguments she made in support of the Public Interest favouring non-disclosure, we noted the following as particularly pertinent:

a) Ms Arkle opined that the chilling effect of disclosure would be severe and would significantly damage engagement of the sector with the SRMA. Programme. She reiterated that the SRMA programme is largely voluntary and is reliant on sector engagement. She explained that if the DfE tried to explain the exceptional nature of this particular case and why it is unrepresentative (as suggested by the Commissioner), that in itself could have a chilling effect as it would go against the very premise of the SRMA programme, which has confidentiality and discretion at its core, both now and at the point of the Request.

b) Ms Arkle opined that the release of this information would inhibit the free and frank exchange of views between the schools and SRMA's and its impact would still be considered severe. She explained how schools and local authorities engage with the programme on the understanding that sensitive information and their particular circumstances will be kept confidential and the disclosure or even the risk of disclosure would be likely to have a detrimental impact on the engagement of the sector and engagement with DfE. She based this opinion on the level of concern schools have expressed about confidentiality and indicated that in her judgment, disclosure of the withheld information, the SRMA reports, in response to a FOIA request would effectively result in the end of this programme. This, she stated would not be in the Public Interest as it would be to the significant detriment of the schools who the DfE seek to support and the consequential impact to the education outcomes of the pupils the schools seek to educate. In demonstration in support of this opinion she observed and stated that the impact would be that the schools discussions with SRMA's would be less candid in future if it were the case that information or reports were known to be likely to make their way into the public domain , and further there would be a chilling effect on the conduct of the SRMA's themselves

who would become more circumspect about their discussion with schools or local authorities or what would be included in such reports.

c) Ms Arkle disagreed with the Commissioners' views as expressed in Para. 43.1 of their skeleton argument, in that she argued that disclosure of the withheld information at the time of the request would not have advanced the publics understanding of how the SRMA Programme had been operating in the previous year. She explained that the SRMA visit to KHPS was not reflective of the programme or the challenges faced by schools, local authorities and SRMA's, neither at the time of the request nor in the previous year. Ms Arkle confirmed her view that the case of KHPS was exceptional, in both the extent of the DfE's involvement in the SRMA process and the surrounding context. She explained that no other similar set of circumstances had taken place before, during or indeed since and she opined that it could not be said to be in the public interest that an exceptional case, which could potentially provide an inaccurate and distorted view of the programme as a whole is deemed as reflective of the true nature of the Programme.

d) Ms Arkle further challenged the Commissioners' argument that the quality assurance process applied to the case of KHPS reflects the reality which had pertained until that point. Ms Arkle explained that whilst the DfE endeavoured to maintain the quality assurance principle of independence of the SRMA, the uniqueness of this case required a heightened and exceptional degree of scrutiny of this report. It was, she explained, not reflective of the quality assurance process at that time and was not applied to any other case. She reiterated that the aim was to ensure the school had a report which would prove helpful to it, which would in turn maintain the good reputation of the SRMA Programme amongst schools and ultimately support pupils.

Conclusions:

[40] The Tribunal note that the exemption being claimed is s36(2) (b) ii. It is the only one supported by Qualified Opinion (which has been provided in this case) – the

test - would or would be likely to cause inhibition in free and frank discussion for the purposes of our deliberations.

[41] The Tribunal having the view that the correct interpretation of the request is that it is narrowly focussed on the specific changes made to the SRMA's report arising from the visit to KHPS much of the information supplied within the Closed bundle is, the Tribunal considers, out of scope of the request.

[42] Hearing the evidence of Ms Arkle in relation to the tests we have to apply, the Tribunal are left in no doubt that the Balance of the Public Interest test favours non-disclosure of the withheld information in this case. It is difficult to imagine how anyone could be better placed than this witness to assist in the determination of this, the most fundamental issue in this appeal. Her compelling evidence speaks for itself, and we unanimously accept and adopt it as justification for the arguments that the Public Interest favours non-disclosure of the withheld information herein.

[43] In contrast we find that the Public Interest in favour of disclosure of the request, whether narrowly interpreted or in the wider sense, so ably and conscientiously argued before us, we find to be low in all the circumstances. Apart from the interest expressed by Professor Hand and his school, there is little or no evidence of a wider public interest in seeing the iterations of the SRMA report for KHPS. Further, the information which the DfE had initially identified as being withheld information does not, suggest a smoking gun i.e., revealing something which is counter to all that the DfE have advanced as to how the process of SMRA's works or any overt interference by the DfE.

[44] We wish to thank both Counsel before us for their comprehensive and able submissions. Having considered all the evidence and those submissions before us, and for the reasons expressed above, we unanimously allow this appeal.

Brian Kennedy QC

Judge of the First Tier Tribunal 11th July 2022

Promulgation date 19th July 2022