



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2009/0064
Information Commissioner's Ref: FS50194697

Considered on the papers
on 19 October 2009

Decision Promulgated

9 November 2009

BEFORE

CHAIRMAN

ROBIN CALLENDER SMITH

and

LAY MEMBERS

DR HENRY FITZHUGH
PIETER DE WAAL

Between

NICK INNES

Appellant

and

INFORMATION COMMISSIONER

Respondent

Subject matter:

Rule 10 Information Tribunal (Enforcement Appeals) Rules 2005

Case:

Tanner v ICO EA/2007/0106

Representation:

The Appellant presented his own written representations
For the Respondent: Mark Thorogood (Solicitor for the Information Commissioner)

Decision

The Tribunal upholds the decision notice dated 30 July 2009 and dismisses the appeal.

Reasons for Decision

Introduction

1. This appeal case relates to a series of four separate requests made by Mr Nick Innes ("the Appellant") to Bedgrove Junior School about the results of Standard Assessment Tests ("SATs") for pupils in Year 5 of the school.

The request for information

2. **Request 1:** On 14 July 2007 the Appellant wrote to the School to ask for "the numbers of children in Year 5 that attained each of the science/English/maths SATs grades for the end of the year in both test and teacher assessment." The School replied on 16 July 2007 that "we do not have the composite chart of the results you have requested for Year 5. This would have to be created especially ... we would need to charge you the cost ... this would be £60".
3. **Request 2:** on 16 July 2007 the Appellant wrote to the School replying "we do not wish to pay £60 for the information ... Copies of the teachers' records for the tests will allow us to put together the information we need ... We realise that the names of the children will need to be removed." On 17 July 2007 the School informed the

Appellant that it "would still need to compile" this information and "take steps to make sure individual children cannot be identified". For that the School stated that the Appellant would need to pay a £15 fee.

4. On 19 July 2007 the Appellant wrote to the School making it clear he did not accept that the fee charged was acceptable but, because it was close to the end of the school term, agreed to make that payment. The Appellant confirmed that the information requested was "copies of teachers' records for the SATs tests and teacher assessments for Maths, Science, English for Year 5 for the end of this academic year (2006/7) with names removed". The Appellant also indicated that his request for the summary analysis composite chart of results (Request 1) was withdrawn.
5. On 25 September 2007 the Appellant pointed out to the School that the information provided in response to Question 2 did not include "the combined scores for English" and asked that this information be provided. On 26 September the School advised the Appellant he would need to pay a further £60 for that information.
6. **Request 3:** on 11 September 2007 Appellant requested the monitoring and marking policy documents referred to in the School's publication scheme and that information was provided by an e-mail dated 28 September 2007.
7. **Request 4:** on 6 November 2007 the School informed the Appellant by letter that "By looking at individual children we can understand the progress of the year group. If all children make progress, the year group makes progress. In addition to each class' and set's data is analysed each year to establish progress. However this data is based on numerical values as opposed to National Curriculum levels and would not be relevant to parents".
8. The Appellant responded to that on 18 November 2007 by asking: "Can you please send these class and set analyses for the year group of [interest to the Appellant] (Year 5 2006/2007) please? Please also send the mapping of numerical values to grades, if this is required, to understand the analyses?"

9. The Appellant challenged the School's suggestion that it was possible "... to assess the progress of the year group as a whole by considering the progress of each individual child ... you need management information".
10. The School's response to that came on 21 November 2007 when it stated: "The new data requested is in a different format to the one you requested in July ... we will charge £60 for this." In relation to the mapping of numerical values to grades the School advised that "we do not have this in a written format and would have to produce it especially for you. Again we would charge for this." In relation to the Appellant's question concerning "Management Information" the School indicated to the Appellant that it would send him the data free of charge but that it considered "it will not make sense and it is not my responsibility to offer training to enable parents to understand internal management data." That information was actually provided by the School on 5 September 2007.

The complaint to the Information Commissioner

11. The Appellant's complaint to the Information Commissioner ("IC") was made on 25 February 2008 and related to the way in which the School had dealt with his requests for information.
12. The IC wrote to the Appellant on 15 April 2008 stating that the investigation would focus on what information fell within the scope of the four requests and remained to be disclosed under section 1 FOIA and what procedural breaches may have occurred.
13. In an e-mail dated 23 April 2008 the Appellant confirmed that the outstanding issues arising out of his requests for information were as follows:
 - "1. The numerical information that can be found in the year group database which relates to results of year 5 for the academic year 2006/7 with the names removed and the mapping of the numerical mark to SATs grade for this data.
 - "2. The English Overall results for Year 5 for the academic year 2006/7 with the names removed.

- "3. Explanation of provided 'internal management data provided on 5th December 2007."
14. Following the IC's intervention the School disclosed the English Overall results for Year 5 for the academic year 2006/7 to the Appellant on 19 June 2008.
15. As a result of all of that the IC concentrated on three issues:
- (i) the School's compliance with section 1 FOIA in relation to Request 4
 - (ii) the School's compliance with section 16 FOIA in relation to any explanation relating to the "management data" provided to him on 5 December 2007, and
 - (iii) other procedural issues raised by the Appellant in his complaint.
16. In relation to the first part of Request 4 the School agreed to disclose a copy of this information to the Appellant on 23 July 2009, suitably redacted to protect personal data of pupils and teachers. The IC concluded that those parts of the information that had been redacted were exempt under section 40 (2) FOIA but -- in the light of the School's delay in responding to the first part of the request -- the IC found that it had contravened sections 10 (1) and 1 (1) (b) FOIA. The IC also found that in failing to issue a refusal notice citing section 40 (2) FOIA the School had breached section 17 (1) (b).
17. In relation to the second part of Request 4 the School had informed the Appellant on 21 November 2007 that no information was held. In the course of the IC's investigation the School provided a detailed explanation as to how it held information relating to SATs. Having analysed the tracking data against the grades the IC considered that the "fit" between them was self-explanatory and concluded -- on the balance of probabilities -- that no information was held by the School falling within the scope of this part of the request.
18. In relation to the Appellant's complaint that the School should have provided an explanation of the "Management Data" provided to him on 5 September 2007 by way of advice and assistance, the IC concluded that there had been no breach of section 16 FOIA.

19. The IC concluded the School had contravened section 19 (1) (a) because it had failed to obtain approval for its publication scheme and the IC also concluded that the School had contravened section 9 (3) FOIA in relation to all four requests.

20. In addition there were a number of areas of concern mentioned by the IC in the "other matters" section of the decision notice.

The appeal to the Tribunal

21. The Appellant appealed to the Tribunal on 3 August 2009.

22. In terms of the management data the Appellant considers the School should have provided an explanation of this data under its duty to provide advice and assistance in section 16 FOIA (the IC had concluded that the Code of Practice issued under section 16 FOIA did not require such an explanation to be given). The Appellant is not satisfied that the IC's interpretation of the Code is correct and believes it was "wrong".

23. In terms of the tracking data -- where the IC focused on the wording of the actual request -- the Appellant regards the IC's conclusion as "plain wrong". The Appellant also believes the Decision Notice was inaccurate and misleading and that the reasons for the decision should have been expressed differently.

24. The Appellant is also not satisfied about the extent of the analysis of section 40 (2) FOIA and states that a refusal notice was not issued to him explaining that section 40 FOIA applied (the IC agreed and accordingly found that the school was in breach of section 17 (1) (b)).

25. In relation to the mapping of numerical values to grades the Appellant does not accept the IC's conclusions and does not believe it is credible that there is nothing written on the meaning of the numbers. The Appellant believes that the explanation from the School is inconsistent and not credible. The Appellant does not believe that the Headmaster is the only person who uses -- and is required to use -- the data or that the reason that no further recorded information is held is because the Headmaster is able to analyse the information without the need to refer to any additional explanatory information. He does not believe it was credible that in a

school with over 400 pupils there was only one person (and one person only) who needed to understand the data. The Appellant believes the IC was not entitled to find that no information was held.

The questions for the Tribunal

26. The Tribunal has to consider whether, in all the circumstances of this appeal, the provisions of Rule 10 of the Information Tribunal (Enforcement Appeals) Rules 2005 apply. The test used by the Tribunal in dealing with Rule 10 issues – which allow for summary disposal of any appeal - has been the threshold test developed in Part 24 of the Civil Procedure Rules of the Supreme Court and considered by the Court of Appeal in **Swain v Hillman and Gay [2001] 1 All E R 91** in terms of any decision to make any Summary Order and, in particular, Rule 24.2.

27. Since **Tanner v ICO EA/2007/0106** the Tribunal has adopted the Court of Appeal test from **Swain v Hillman and Gay** that the words in Rule 24.2 “no real prospect of being successful or succeeding” spoke for themselves and meant that the Tribunal had to decide whether there was a “realistic” as opposed to a “fanciful” prospect of success in terms of any appeal before it.

28. The substance of this appeal – in its various points - is that the IC was incorrect and not entitled to come to the various conclusions that he did.

29. If the Tribunal's conclusion was that the IC had acted incorrectly or irrationally then the Rule 10 procedure would not be appropriate and the Tribunal's duty would be to decide the appeal on the material before it on the papers or consider adjourning the matter for fuller argument (written or oral).

Conclusion and remedy

30. The Tribunal notes at the outset that the School could and should have been more helpful in respect of the various requests made by the Appellant.

31. The IC has recognised this in the Decision Notice. Paragraphs 77 to 83 deal with other matters the School should consider, address and take to heart. At paragraph 77, specifically: "The Commissioner notes that the public authority did not conduct

its internal review into its handling of the complainants' requests in accordance with the recommendations of part VI of the section 45 Code of Practice.”

32. The Tribunal can understand that the Appellant feels that the School may appear to have got off very lightly in respect of the IC's reactions. Fundamental to the appeal, however, is whether the IC's decisions in respect of the matters under appeal are ones which are reasonable and correct in all the circumstances.

33. A significant point in this appeal revolves around Paragraph 54 of the Decision Notice. That states:

"The Commissioner notes that in an e-mail to him on 25 June 2008 the complainants stated that they did not find it credible that no recorded information existed which provided the explanation they required. The Commissioner has not made any finding on this issue. This was because the complaint made to him on 25 February 2008 with an explanation should have been provided under the section 16 duty to provide advice and assistance. The complaint was not that the public authority had failed to provide this information in response to a specific request made under the Act and the complainants did not specify that any such request had been made to the public authority."

34. The Appellant says in effect that the IC has either been duped by the School in respect of this point, or should have made greater and further enquiry, and -- in any event -- has reached a conclusion which is not correct.

35. There is no evidence before the Tribunal that the School has not acted properly (rather than in matters of helpfulness). The IC has been in a position to consider everything that the School had done, and did so while this series of complaints was live. The Tribunal is satisfied that when the IC applied the balance of probabilities test in respect of the questions he was having to consider, that was the correct test for him to adopt and that he applied it correctly.

36. The Appellant may not be happy with the conclusions drawn by the IC but the Tribunal is satisfied that those were reasonable conclusions, validly drawn from all the evidence before him.

37. The Tribunal concludes that the IC has acted correctly in reaching the conclusions he did. If it had any doubts the Tribunal would have adjourned the matter and would not have immediately applied Rule 10.

38. The Tribunal had to decide whether there was a “realistic” as opposed to a “fanciful” prospect of success in relation to this appeal and concludes that there is no realistic prospect of success because the Appellant’s line in this appeal boils down to nothing more than “the IC was wrong”.

39. There is no prospect of this appeal succeeding and it is dismissed under the provisions of Rule 10 of the Information Tribunal (Enforcement Appeals) Rules 2005.

40. There is no order as to costs.

41. Our decision is unanimous.

Signed

Robin Callender Smith

Deputy Chairman

9 November 2009