



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

Case No. EA/2009/0064

ON APPEAL FROM:

Information Commissioner's Decision Notice No: FS50194697

Dated: 30TH July 2009

Appellant: Mr Nick Innes

Respondent: Information Commissioner

Heard on the papers at: Audit House

Date: 15th March 2011

Date of decision: 5th May 2011

BEFORE:

Fiona Henderson (Judge)

Nigel Watson

And

Dave Sivers

Subject matter:

FOIA - Whether information held s1
Advice and Assistance s16
Personal Data s40

Cases:

Berend v IC and LBRT EA/2006/0049, &50

Billings v The Information Commissioner EA/2007/0076

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

Case No. EA/2009/0064

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal in part and refuses the remainder of the appeal and amends the decision notice dated 30th July 2009 to the following extent:

SUBSTITUTED DECISION NOTICE

1. The fit between the alphanumeric and numerical grades is mapping data. It is held by the public authority by reference to comparison of the alpha numeric grade (provided to the parents) and the numerical grade (used as a management tool in the tracking data) for each child in each subject. In failing to disclose this information the public authority has breached s1 FOIA.
2. The column/row header information of the management data was part of the request. The subject headings (e.g. science, maths etc.) do not constitute personal data and were wrongly withheld under s40. Failure to disclose this information constitutes a breach of s1 FOIA.
3. The name of the teacher, or title of the class or set, in the context of the management data, constitutes the personal data of the teacher and has been properly withheld under s40 FOIA. However, whether the class/sets were being displayed as columns or rows would not be personal data and should also be identified.
4. In order to create the management summary it appears that each individual child's improvement would have been logged and this would be used to track teacher performance. If held at the time of the request this information forms part of information request 4 and should be disclosed subject to the application of any exemption under FOIA.

Action Required

Within 28 days of the date of this decision the public authority is ordered to:

1. Disclose the fit between the alphanumeric and numerical grades in relation to the tracking data.
2. Disclose the subject headers for the management information data and indicate whether the redacted information in the column or row represented the class/set.
3. The public authority should consider request 4 afresh in light of the Tribunal's findings (set out in the decision below) and
 - a) confirm or deny whether they hold any additional management information encompassed within the request pursuant to s1(1) FOIA, and
 - b) if additional information is held, provide it to the Appellant or serve a refusal notice in accordance with s17 FOIA.

Signed

Fiona Henderson (Judge)

REASONS FOR DECISION

Introduction

1. The Appellant made a series of requests for information under FOIA to a named primary school between July-November 2007 relating to: the performance of a specified year group in SAT tests and assessments, and some of the school's policies.

The request for information

2. On 14th July 2007 the Appellant asked for:
*“the number of children in year 5 that attained each of the science/English/maths SATs grades for the end of year in both test and teacher assessment together with the total number of pupils in Year 5...”*¹
This request was withdrawn after the public authority advised the complainants that a fee of £60 would be chargeable for this information².
3. On 16th July 2007 the Appellant asked for:
*“... copies of the teachers’ records for the tests [to] allow us to put together the information we need. We realize that the names of the children will need to be removed.”*³
4. On 19th July 2007 the school stated:
*“The information exists but it is not in a format that can be copied to you. **It is on the children’s annual reports** and so would need to be collated, names removed and sent to you. Grades are transferred from the test sheets directly to reports. **We track individuals rather than the year group.** It is much more important for us to ensure as far as we can that each individual child is making appropriate progress”*⁴

¹ Referred to as request 1 in the Decision Notice

² The Commissioner found that this fee should not have been charged under the regulations

³ This is referred to as request 2 in the Decision Notice

⁴ Emphasis added

In light of subsequent correspondence from the school, the Appellant considers this response to be incorrect and misleading. The school has denied any inconsistency between this and later correspondence.

5. The Appellant agreed to pay for a collated list of the children's Maths, Science and English results, but when the list arrived it did not include the combined English scores as these were not available to the teacher compiling the list. The school explained on 27th September and 4th October 2007 that these are only kept on the child's annual report.
6. The Appellant repeatedly asked the school what the person compiling the list had used to prepare the list he had paid for because:
 - He had been told that the list he paid for was being prepared from the annual reports,
 - In light of the absence of the combined English scores which the teacher had not had access to, he had clearly not used the annual reports.
7. The school denied any inconsistency and on 4th October 2007 said:

"The information exists in a number of formats. Some of it is on the children's annual reports some of it is stored elsewhere. I stated that this was not in a format that could be copied to you as additional work would have to be done to collate it. This was done."
8. By letter of 16th October 2007 the Appellant questioned why (alluding to the school's letter of 19th July 2007) the progress of the year group was not tracked. The school responded by letter dated 6th November 2007 stating:

"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."

9. By letter dated 18th November the Appellant asked for:
*“class and set analyses for ... year 5 2006/2007) please? Please also send the mapping of numerical values to grades, if this is required to understand the analyses”.*⁵

The Appellant also argued that it was not possible to monitor and assess a year group by considering progress of each child and asserted that the school would need management summary information.

10. The school replied by letter dated 21st November 2007 inter alia:
- A fee would be charged for provision of the tracking data,
 - They did not have the mapping of numerical values to grades in written format and would have to produce it for the Appellant for which they would charge a fee.
 - The school did have management data but:
“The analysis is not in a format that can be copied to you in a way that is useful... I suspect it will not make sense and it is not my responsibility to offer training to enable parents to understand internal management data. Again any data sent would not identify specific classes or sets to comply with the Data Protection Act”.

11. The Management data (a block of data from which the row column headers had been redacted) was supplied on 5th December 2007. The Appellant did not agree to pay for the tracking data and was not supplied with it at this time.

The complaint to the Information Commissioner

12. The Appellant complained to the Commissioner on 29th February 2008 in relation to the handling of these information requests and included complaints about:
- the procedures followed,
 - the levying of charges for anonymisation of information and provision of the mapping between numeric and alpha numeric grades.

⁵ This is referred to as request 4 in the Decision Notice. Request 3 is not material to the issues in this appeal and is not dealt with.

- Although the management summary data was provided, the school had refused to explain what the information meant:
“... *We believe that we should be supported in understanding the information provided – advice and assistance is surely required.*”

13. The Commissioner investigated the matter during which:

- The combined English test scores (pursuant to request 2) and
- The tracking data (a list of student scores in numeric form for the year group) were disclosed to the Appellant, the tracking data having been anonymised by the Commissioner on behalf of the public authority.

14. Following an investigation the Commissioner issued Decision Notice FS50194697 dated 30th July 2009 in which he found inter alia:

- a) The public authority correctly applied s40(2) to the information redacted from the tracking databases,
- b) The public authority correctly stated that it did not hold recorded information with regard to the mapping of numerical values to grades, if this is required to understand the analyses,
- c) The public authority did not breach s16(1) FOIA in failing to provide an explanation of management data.
- d) There were various procedural breaches in the way that the case had been handled including:
 - The failure to specify that information was being withheld under s40(2) relating to *class and set analyses for ... year 5 2006/2007*
 - The issue of non-compliant fees notices breached s9(3) FOIA.

The Commissioner required no further remedial steps to be taken.

The appeal to the Tribunal

15. The Appellant appealed to the Tribunal on 3rd August 2009. The appeal was struck out under Rule 10 Information Tribunal (Enforcement Appeals) Rules 2005 on 9th November 2009 but that decision was successfully appealed to the High Court (CO/15209/2009) and remitted for rehearing. A fresh panel was appointed to rehear the case.

16. At the telephone directions hearing of 14th January 2011 the grounds of appeal were provisionally clarified and 3 issues identified, the Appellant was given the opportunity to confirm these grounds of appeal or provide written amendments. This he did in writing on 21st January 2011 setting out 6 itemized grounds of appeal. In the same directions the Commissioner was directed to indicate whether he wished to apply for any of the grounds to be struck out. No such application was made.
17. The Commissioner in his submissions dated 25th February 2011 invited the Tribunal to confine its considerations to the 3 grounds of appeal identified at the directions hearing rather than the 6 amplified grounds supplied on 21st January 2011. The Tribunal is satisfied that this would not be in keeping with the over-riding objective as set out in regulation 2 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules (the GRC Rules) because:
- The amplified grounds were supplied pursuant to a direction of the Tribunal,
 - The Commissioner had an opportunity at the time to object to these grounds of appeal,
 - The Commissioner has suffered no prejudice in these grounds being considered by the Tribunal as he has had the opportunity to advance arguments in relation to these grounds (which he has done in his submissions).
18. For ease of reading and to enable the parties to identify the source of each issue to be determined by the Tribunal, the Appellant's grounds of appeal have been summarised and renumbered so that each issue is clear. They are set out in the analysis below. The Appellant provided notes on his grounds of appeal, where these constitute an additional issue for the Tribunal to consider they are itemized as such. Where his arguments are amplifications of the grounds, they are considered in the analysis set out at paragraph 21 et seq below.

19. Whilst the Appellant wishes the Tribunal to note his concerns as to the emphasis of the Decision Notice as set out in his original grounds of appeal, he does not dispute that section 40 FOIA was applicable to the student data and correctly applied to the information by the Commissioner.

The withheld information

20. The withheld information constitutes the redacted material from the tracking data (which the Tribunal has seen) and the redacted material from the management data which the Tribunal has not seen (but which is described in the letter of 5th December 2007) and in light of the description the Tribunal does not consider it necessary to view prior to determining this case. The Tribunal also considers whether all the material held pursuant to this request has been identified by the public authority and the Commissioner.⁶ The Tribunal is satisfied that the nature of the redacted material is such that there is no requirement for a closed schedule.

Legal submissions and analysis

Ground 1.

No outline of the data was provided to allow the Appellant to assess if the supplied data was the information sought. The Commissioner erred in law in finding that the Public Authority were not required to provide an explanation of the Management Data under s16 FOIA,

21. The Commissioner relies upon the Appellant's complaint as set out in his letter of 29th February 2008 and argues that the Appellant was not asserting that an "explanation" had not been provided in response to a specific request under FOIA but that it should have been provided under s16 advice and assistance. The Tribunal concurs with that reading of the Appellant's complaint to the Commissioner.

⁶ See ground 7

22. s16 of FOIA provides:

- (1) *It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.*
- (2) *Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.*

23. The Commissioner relied upon the terms of the s45 Code in reaching his conclusion that there was no breach of the Code and hence no breach of s16 by the public authority. The Tribunal notes that the purpose of Advice and Assistance is dealt with in Part II of the Code. At paragraph 9 it is made explicit that:

“ Authorities should be aware that the aim of providing assistance is to clarify the nature of the information sought... “

24. The Appellant relies upon paragraph 10 of the Code:

10. Appropriate assistance in this instance might include:

- *providing an outline of the different kinds of information which might meet the terms of the request;*
- *providing access to detailed catalogues and indexes, where these are available, to help the applicant ascertain the nature and extent of the information held by the authority;*
- *providing a general response to the request setting out options for further information which could be provided on request.*

This list is not exhaustive, and public authorities should be flexible in offering advice and assistance most appropriate to the circumstances of the applicant.

25. However, the Tribunal finds that the list as set out in paragraph 10 of the Code is aimed at assisting Appellants in identifying the information that they wish to request and not at explaining the information that they have requested.

26. Additionally the Appellant argues that unlike the first example given in paragraph 10, no outline of the data was provided to allow him to assess if the supplied data was the information sought. The Tribunal disagrees and notes that the management information when it was provided in the letter dated 5th December 2007 was accompanied with an explanation:

“The other data is management data which we use to measure the progress of a class or set...

You will note that this data is not for the year group but for individual classes or sets and indicates progress made in Year 5 (2006-07) in reading, writing science and maths”.

27. The Appellant argues that the code is essentially silent in relation to the nature of the advice and assistance that he required in that the information he received was meaningless to him in the absence of an explanation. His argument amounts to an assertion that if it is not dealt with in the Code (and consequently there is no breach), that does not mean that there is no obligation under s16 FOIA. The Tribunal notes that the provision of s16 is not unlimited, being restricted to “*so far as it would be reasonable*”. The Tribunal does not consider that it would be reasonable for Public Authorities to have to explain the information that they disclose. There are numerous circumstances where e.g. technical or scientific information is disclosed which is meaningless to the requestor, without an explanation. It may be that an explanation is not held and one would have to be created especially for the requestor for the public authority to fulfil any perceived obligation to explain the data. This goes beyond the terms of s1(b) FOIA which provides for the communication of information where it is held, and nothing else.

28. The Tribunal notes:
- i. that it would have been good practice for the public authority to have provided an explanation⁷.
 - ii. the comments by the school governors in their report of 28th September 2009 (after the Commissioner's decision) who notwithstanding the Commissioner's finding that there was no breach of FOIA were of the view that the management data:
"should have been accompanied by some explanation of what the figures represent. We believe this could have been simply done without it constituting the "training" [the headmaster] refers to".
 - iii. that a partial explanation was provided by the School to the Commissioner on this point in a telephone conversation in May 2008 (a note of which has now been provided to the Appellant through service of these case papers)⁸.
 - iv. The Tribunal observes that the redaction of the management data makes comprehension of the figures very difficult (it is not possible to ascertain whether rows represent subjects or class/sets) and at the least it would have been helpful where information is redacted to indicate the nature of the information redacted i.e. whether the columns were the subjects or the class/sets.

Ground 2:

The Commissioner erred in fact in finding that the information request 4 did not include a request for the explanation of the management data.

29. The terms of request 4 as set out in the letter of 18th November 2007 were in the context as set out at paragraph 9 above. The Tribunal is satisfied that the terms of the request were clear. It was not asking for a general explanation of the information, but specifically the mapping of numerical values to grades and only *"if this is required to understand the analyses"*.
30. From the explanation of the management data set out in the telephone record note between the Commissioner and the headmaster in May 2008, the Tribunal

⁷ As was noted by the Commissioner in his Decision Notice

is satisfied that the numerical figures in the management data do not themselves constitute a grade. They record the average improvement in 4 subjects for 4 sets. The highest grade apparent from the tracking data is a 5 (5c) which has a numerical equivalent of 5.0. The improvement at times exceeds this with figures being given of 5.76 and 6.14. As such the Tribunal is satisfied on a balance of probabilities that this figure does not map a grade and the mapping information requested would not apply to this information.

Ground 3

Tracking data mapping from numerical grades should have been disclosed pursuant to request 2 and 4.

31. In relation to the tracking data the grades have been provided in numerical format. The information that is more normally released to parents is in an alphanumeric format e.g. 3a 3b etc. This is the information that was disclosed by the school in response to request 2.

32. The Commissioner stated in his decision notice:

The Commissioner having analysed the tracking data against the grades believes that the fit between the grades and the marks is self explanatory in this case".⁹

And

*"the Headmaster is the only person that is required to use this data and 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"*¹⁰.

He went on to find that no further recorded information is held that is relevant to the request because of the *"nature of the figures and the explanation provided by the public authority"*.

⁸ See paragraph 51 below

⁹ Para 48 DN

¹⁰ Para 49 DN

33. In relation to the “*nature of the figures*” the Tribunal considers this to be a finding that the fit of the figures was so self explanatory that the mapping was not necessary to understand the tracking analyses. At para 46 of his submission dated 14th August 2009 the Commissioner explains that from his analysis 3a = 3.0, 3b = 3.3, 3c = 3.7 etc. The Appellant questions whether there is such a fit between the alphanumeric and numerical grades because he was told respectively:

- “*This information assesses children in decimal numbers up to 5 and is **not the same** as the information contained in the suspension files or the teacher’s records*” ¹¹
- *It is exactly the same information we have already supplied but in a numerical rather than alphabetical format*” ¹²

34. The Tribunal has viewed both sets of information and is satisfied on balance that it is the same information with the grade presented by a different method. The Tribunal accounts for the apparent discrepancy between the statements set out above because the Commissioner appears to be referring to the fact that the alpha numeric score has been converted into a numeric score for tracking purposes and therefore there are 2 types of information (defined by their presentation) whereas the school appears to be emphasizing that whilst it is a different presentation, the information is the same .

35. The Tribunal has undertaken an analysis of the grades and whilst it agrees with the apparent fit between the grades and the numerical values is of the view that the Commissioner has miscalculated the mapping as in the Tribunal’s view:

$$3a = 3.7, 3b=3.3 \text{ and } 3c=3.0.$$

36. It may well be that the reasoning or calculation behind the conversion is complicated and not written down, but the Tribunal is satisfied that the fit of the numerical to alphanumeric grades constitutes mapping data in that it enables one set of data to be understood with reference to the other.

¹¹ Paragraph 18 DN

37. The uncertainty around the exact fit between the numeric and alphanumeric scores suggests that regardless of the fit, mapping information would assist in the analysis of the tracking data. Additionally the Tribunal observes that the exercise of “finding the fit” has been made unnecessarily complicated by the way in which the material has been redacted. It is accepted that it was necessary to present both sets of information in a way that meant that no individual child was identifiable. The Commissioner in his letter to the Appellant dated 27th June 2008 has confirmed that the tracking information was “scrambled so no child could be identified” as presumably if one knew e.g. the first or last child alphabetically in the year it would be possible to establish their actual grades. The table of student data produced on 24.06.08 and the tracking data would originally have been cross referable e.g. Science grade for a named student on both lists would have referred to the same individual and so it would be obvious that e.g. a 4.0 =4.c, one would serve as the direct translation of the other.
38. The Tribunal is therefore of the view that whilst it appears to be the school’s case that there is no “key” available e.g. in their letter of 21st November 2007: *“We do not have this in a written format and would have to produce it especially for you. Again we would charge for this”.* and that consequently the information is not held, this is not an accurate reflection of the position.
39. Regardless of whether the software used could produce a report that would show the conversion from alpha numeric to numerical (upon which the Tribunal has heard no evidence), the Tribunal is of the view that the information e.g. 3.0 = 3c is held by reference to the individual case files and the tracking data. The request is not for a document but the information. The fact that the information would have to be typed out or photocopied in heavily redacted comparative documents does not mean that it is not held and is a matter of presentation under s11 FOIA. The question then would be whether supplying the mapping data would exceed the costs limit. Since there are only

¹² Letter from the school dated 5th December 2007

10 grades apparent within the tracking data the Tribunal is satisfied that it would not.

40. The Tribunal observes that disclosure of the 2 tables in the same order (albeit scrambled, but identically) would have met the request and incurred no additional cost. There is no danger in the tables remaining cross referable in this way as there is no way of establishing which child the figures in each table refer to. Since the information is essentially identical but with a different presentation of the same grades no new information would be derived.
41. The Tribunal is satisfied that the Commissioner erred in finding that the mapping information would not be of assistance to the analysis of the tracking data and in finding that it was not held. The Tribunal directs that the fit between the grades should be disclosed.

Ground 4.

The column/row header information exists, and was part of the request. The redaction of the column/row header information was not addressed in the DN. The information should be supplied to the Appellant.

42. The Tribunal notes that the redaction of the column/row headings was not dealt with explicitly in the Decision Notice. In his reply and submissions the Commissioner argues that it is dealt with at paragraph 19 et seq of the Decision Notice. The Tribunal does not accept that this relates to the redacted management data because:
 - i. the Commissioner says he has seen the unredacted information (the Commissioner did not see the unredacted management data)
 - ii. the Commissioner refers to this information being released in an anonymised version on 23rd July 2009 when in fact the management data was disclosed in December 2007.
43. In the letter from the school dated 5th December 2007 the Appellant was told:
The other data is management data which we use to measure the progress of a class or set [block of 16 figures in 4 columns of 4 rows supplied].

You will note that this data is not for the year group but for individual classes or sets and indicates progress made in Year 5 (2006-07) in reading, writing, science and maths.

... this is personal information for each teacher – it forms a significant component of their performance management and so is confidential. We cannot identify which figure represents which class or set- to identify the figures for, say maths would allow someone with knowledge of the school to establish the teacher of the most able or least able set.”

The Tribunal does not agree with this analysis and does not see how knowing which column or row represents each subject would assist anyone to identify either the teacher or the set. The information relates to progress which depends upon the starting point for each set. It may be that the least able set well taught makes more progress than the most able set badly taught. The Tribunal is not satisfied therefore that the subject headings (e.g. science) constitute personal data and concludes that they were wrongly withheld.

44. The Tribunal does accept that the **name** of the teacher or set in this context would constitute the personal data of the teacher as it would show how much progress their set had made and might enable the reader to make a value judgement of their performance. Additionally it might enable someone with knowledge of the school to identify which children were in which class. This does not mean that the fact that a row or a column is entitled generically “Class/set” should not be identified.

Ground 5

Provision of a block of data with no means to interpret that data is not a response to an information request, as it is not information.

45. The Appellant contends that he made a request for information and not a block of data. He argues that it was implicit within the request that a requester would want to understand the information requested. This is to add a subjective element to an information request which is not provided for in the statute. The Tribunal sees no reason to depart from the analysis in Berend v IC and LBRT EA/2006/0049, &50 at paragraph 46 et seq:

*“the request should be read objectively. The request is applicant and motive blind and as such public authorities are not expected to go behind the phrasing of the request. Indeed the section 45 Code at paragraph 9 specifically warns against consideration of the motive or interest in the information when providing advice and assistance. Additionally section 8 FOIA appears to provide an objective definition of “information requested”.
8. - (1) In this Act any reference to a "request for information" is a reference to such a request which- ..*

(c) describes the information requested

There is no caveat or imputation of subjectivity contained within that section. Section 1(3) FOIA provides for a situation where the request is not clear and further information is sought in order to comply with the request for information.”

46. Information is defined in s84 FOIA as:

“information.....¹³ means information recorded in any form;

Under s1 FOIA:

(1)Any person making a request for information to a public authority is entitled—

*(a) to be informed in writing by the public authority whether it holds **information of the description specified in the request, and***

(b) if that is the case, to have that information communicated to him.

47. The information is therefore that which has been requested by the applicant. There is nothing to prevent an information request being explicitly for raw data. In this case it is unfortunate that the redactions made the information harder to understand but the request is confined by its own terms.

Ground 6.

The public authority said that nothing was documented on the meaning of the figures in the management data, given the information received by the commissioner during

his investigation (eg., specialist training required to understand the data), it is not credible that nothing is documented on the meaning of the figures. The assessment – looking at the balance of probabilities has not taken all factors into consideration.

48. The Appellant relies upon reference to a video tutorial on the tracking data as evidence that explanatory material is available in relation to request 4. The Tribunal speculates from its context that this is a tutorial on how to use the software programme rather than an explanation of the figures themselves. Additionally the Appellant does not accept the assertion by the school on 13th June 2008:

“we have no recorded information that would assist [the Appellant] in understanding the management data that was disclosed to them on 4th December 2007”.

The Appellant challenges the bona fides of the school, relying on the apparent inconsistencies in other correspondence, e.g. the school appeared to be denying that it had any tracking data when in fact it did (as set out at paragraph 4 above).

49. The Commissioner at paragraph 54 of the decision notice:

“has not made any finding on this issue. This is because the complaint made to him on 29th February 2008 was that an explanation should have been provided under the section 16 duty to provide advice and assistance”.

The Tribunal agrees with this approach and does not consider it necessary to determine whether any explanatory material relating to the management data is held as it has already found (para 29 above) that this does not form part of the request. This is not a request for mapping data but a desire for an explanation of their significance and purpose of the figures.

Ground 7

Other management data exists. This was established during the Commissioner’s investigation but simply ignored in the DN.

¹³ Unrecorded information in the context of Information Notices and enactments prohibiting disclosure

50. In their letter dated 13th June 2008 in the context of the tracking data, the school told the Commissioner:
“We have no additional data on the Year 5 SATs”. They have also confirmed that they do not hold a copy of the “raw” scores from the children’s tests and assessments.
51. The Appellant points to the telephone call between the Commissioner and the school in May 2008 as discussing data not seen by the Appellant, and not the subject of a refusal notice which is contained within request 4 (class and set analyses):
“The [alpha numeric scores provided to the parents] are transferred again to numerical grades in order to review teacher performance (this is the information released on 5.12.07. [The school] will not give this information to the [Appellant] because it is held against each teacher to review their performance and as such it is considered to be their personal data. The scores show that a child scored 33.5. This will be compared with the previous year where they may have scored 30.5 There will be an expectation about how much a child should have improved e.g. by 2 points. In the case given here the teacher would have done well by getting the child to improve by an extra 1 point...”
52. The Tribunal considers it significant that this conversation refers to the individual improvement of each child as referenced to a particular teacher. This indicates that in order to make the management summary, each individual child’s improvement must have been logged which would be used to track teacher performance. If this information has been recorded either in teacher records, or in the children’s reports, or is held anywhere else by the school, the Tribunal is satisfied that it would be included within this request and should be disclosed subject to the application of any exemption under FOIA.
53. The Tribunal is satisfied that the Commissioner should have been alert to the issue of whether all the information requested had been identified and disclosed. It is acknowledged that this was not specifically highlighted by the Appellant in his letter of 29th February 2008, however, he was not privy to the

information received in the May 2008 conversation and would not have had an evidential basis for raising this.

54. S.58 FOIA provides for the Tribunal to :

“substitute such other notice as could have been served by the Commissioner”

Under Section 50(4) FOIA the Tribunal is satisfied that the Commissioner could have ordered the school to: confirm or deny whether they held any additional information in relation to the request, and if so disclose the information or provide a refusal notice pursuant to s17 FOIA:

50 (4)Where the Commissioner decides that a public authority—

(a)has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or

(b)has failed to comply with any of the requirements of section... 17,

the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.

Action Required

55. Consequently the Tribunal amends the Decision Notice to provide that the school should consider the request afresh in light of the Tribunal’s findings (set out above) and confirm or deny whether they hold any additional management information identified encompassed within the request, and if so provide it to the Appellant or serve a refusal notice in accordance with S17 FOIA within 28 days from today.

Ground 8

The Commissioner erred in fact in finding that:

“Request 4(a) - The public authority correctly applied section 40(2) to the redacted information extracted from the tracking database.”

a) Because the Appellant had excluded the names of the children from his request,

b) Because the Appellant had never objected to the redactions,

c) *Because the Public Authority did not apply s40 themselves, it was applied on their behalf by the Commissioner.*

56. The Tribunal accepts that the Appellant never wanted the personal data of the students. The original request was couched in collective terms which would have meant that no child was identified and the Appellant only asked for the scores from the teachers' records when told that the "group" information was not available. Additionally in correspondence as early as 16th July 2007 in relation to request 2 the Appellant acknowledged "*We realise that the names of the children will need to be removed*". The Tribunal accepts that this was before the complaint to the Commissioner.

57. The Tribunal understands that the Appellant believes that failure to refer to this in the Decision Notice is factually incorrect. The Tribunal is satisfied that this amounts to an argument that the history and presentation of the case is misleading, that this is not a material error of fact in that it did not inform the Commissioner's decision, and that it amounts to a complaint about the presentation of the case and not its conclusions. This Tribunal agrees with the approach identified in *Billings v The Information Commissioner EA/2007/0076* where the Tribunal concluded that:

"The Appeal process is not intended to develop into a joint drafting session, but only to provide relief if the Decision Notice is found not to be in accordance with the law.

58. The Commissioner relies on his dual role as regulator of both the DPA and FOIA as justification for the analysis of the application of s40(2) FOIA to the tracking material in the absence of an explicit complaint relating to material being withheld under s40 FOIA. The Tribunal is satisfied that it is right for the Commissioner to have considered the issue of personal data because:

- i. At the time of the investigation the tracking data had not been disclosed and the Commissioner was having to decide what if any of the tracking data should be disclosed or withheld and if so on what basis,
- ii. The redacted information includes more than the names of the children. It includes an indication of whether they are gifted or have other special needs,

iii. He may have disagreed that all of it was personal data, or that disclosure breached the first data protection principle.

59. There is no dispute that s40 has been properly applied to the identifying personal data redacted from the tracking database. Insofar as this ground argues that there was no proper refusal notice citing s40 FOIA in response to the request, the Commissioner has already found in the Appellant's favour, so it cannot constitute a ground of appeal, as it is not being argued that that decision is wrong.

60. The Appellant also asserts that the public authority had not identified that personal data would have to be withheld. He relies upon the letter of 5th December 2007 from the school, in support of his contention that he was not told that the information would need to be anonymised but simply that it would be provided if he paid the fee. The Tribunal disagrees. The 5th December letter followed on from the letter of 21st November 2007 when the school said in relation to the tracking data:

“To produce it in a format that can be sent home will require staff to spend 2 hours and we will charge £60 for this. We would have to amend it so that it is not possible to use the information to identify specific classes or sets to comply with the Data Protection Act.”

The Tribunal is satisfied that this shows that the school had identified s40 FOIA in relation to the tracking data (even if this was not appropriately worded in a refusal notice).

61. The Tribunal also notes that the data was not disclosed prior to the intervention of the Commissioner because of the school's misunderstanding of and inappropriate use of the fees regulations. In their correspondence with the Commissioner e.g. the letter of 13th June 2008 the Tribunal is satisfied that the School had identified that personal data would need to be withheld from the tracking data:

“I enclose a copy of the numerical data held on the school's data base for the year 5 Optional SATs tests and teacher assessments. This is confidential since it includes pupil names.”

From the Decision Notice it is clear that the disclosure of the redacted tracking information took place after the intervention of the Commissioner.

The Tribunal is satisfied therefore that this ground of appeal is not made out.

Other Matters

62. The Tribunal considers that this case has become unnecessarily protracted. The Tribunal understands that a school is a small public authority and may have very little experience in dealing with FOIA requests and notes the advice on practice and procedure given by the Commissioner. However, the Tribunal observes that FOIA is a legal requirement and if the school had been more accurate and taken greater care in its early responses much of the ensuing correspondence might have been avoided.

Conclusion and remedy

63. The Tribunal therefore allows the appeal in part as follows:
Ground 3: The Tribunal is satisfied that the Commissioner erred in finding that the mapping information would not be of assistance to the analysis of the tracking data and in finding that it was not held. The Tribunal is satisfied that the fit between the grades is held by reference to comparison of the alpha numeric grade and the numerical grade for each child in each subject and the fit should be disclosed.
64. Ground 4: The Tribunal is satisfied that the column/row header information was part of the request. The redaction of the column/row header information was not addressed in the DN. The Tribunal is not satisfied therefore that the subject headings (e.g. science) constitute personal data and concludes that they were wrongly withheld under s40 FOIA. The Tribunal does accept that the **name** of the teacher or set in this context would constitute the personal data of the teacher and has been properly withheld under s40, however, whether the class/sets were listed as columns or rows would not be personal data and should also be identified.

65. Ground 7: The evidence indicates that in order to create the management summary each individual child's improvement would have been logged and this would be used to track teacher performance. If this information has been recorded either in teacher records, or in the children's reports, or is held anywhere else by the school, the Tribunal is satisfied that it would be included within this request and should be disclosed subject to the application of any exemption under FOIA.
66. The Tribunal refuses the rest of the appeal and orders that the steps be taken as provided for in the substituted decision notice.

Dated this 5th May 2011

Fiona Henderson
Judge