IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL

Appeal No: EA/2010/0164

BETWEEN:

NICK INNES

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

BUCKINGHAMSHIRE COUNTY COUNCIL

Second Respondent

Decision and Reasons

Heard in public at: Bedford Square
On 21 April 2011

By: Alison McKenna, Tribunal Judge
Pieter De Waal, Tribunal Member
Jean Nelson, Tribunal Member

The Appellant appeared in person. The First and Second Respondents did not attend the hearing, with the consent of the Tribunal.

Decision dated: 12 May 2011

Subject Matter:

S. 1(1)(a) Freedom of Information Act – duty to confirm or deny
S. 58 Freedom of Information Act – Information Commissioner's discretion.

DECISION

This appeal is hereby dismissed.

REASONS

1. This appeal concerns the Appellant's Freedom of Information Act ("FOIA") request to the Second Respondent for information concerning its 11+ examination system.

Procedural History

2. The First Respondent issued a Decision Notice FS50288798 dated 6 September 2010 which is now the subject of an appeal to this Tribunal. In his Decision Notice, the First Respondent concluded that the Second Respondent had issued a denial that it held the requested information which complied with s.1(1)(a) FOIA and further, that the Second Respondent did not hold the requested information.

3. This appeal was made to the Tribunal on 29 September 2010. It was struck out by Tribunal Judge Hamilton on 8 December 2010 but that decision was set aside by Principal Judge Angel on 26 January 2011 so that the appeal was reinstated. Principal Judge Angel issued directions on 26 January which, inter alia, joined the Second Respondent to the appeal. Judge McKenna issued further rulings and directions on 25 March and 11 April 2011, for which see paragraphs 9 to 11 below.

Perception of Bias

4. On 11 February 2011, Judge McKenna informed the parties that she had a family connection at the Local Government Ombudsman's Office ("LGO"). The Appellant had made a complaint to the LGO which she thought may have been handled by that person. The parties confirmed they had no objection to Judge McKenna proceeding to hear this case.

5. In his skeleton argument, the Appellant asked the Tribunal to confirm that it had received no "secret" evidence in this case. The Tribunal confirmed to the Appellant at the hearing that it had received (a) no closed material and (b) no other material that had not been disclosed to him, in this case.

Mode of Hearing

6. The Appellant requested an oral hearing of this appeal in his Notice of Appeal dated 29 September 2010. In the First Respondent's Response dated 8 November 2010, the First Respondent stated that he did not consider that an oral hearing was warranted because the appeal raised no novel points of law and because there was no evidential dispute between the parties. The First Respondent requested the Tribunal to agree that he need not attend the oral hearing (if one were to take place) but be permitted to send written representations only.

7. The Second Respondent wrote to the Tribunal on 11 February 2011 indicating that it supported the First Respondent's case and did not propose to attend an oral hearing. The Second Respondent repeated this submission in an e mail

of 23 February and again in a letter dated 17 March, in which it referred to the disproportionate costs involved in requiring its attendance.

8. The Tribunal had indicated on 23 February that it would consider the issue of the Respondents' attendance after the close of the time for the filing of evidence. The First Respondent accordingly wrote to the Tribunal on 17 March 2011 pointing out that no witness evidence had in fact been served by the deadline set so that, as the hearing would comprise submissions only, the First Respondent now sought a direction from the Tribunal that he need not attend the oral hearing. The Second Respondent also applied by letter dated 17 March for a direction that the hearing be on the papers only and, further, for a direction removing it from being a Respondent to the proceedings. The Tribunal invited and considered the Appellant's comments on these applications before ruling on them.

9. In a ruling dated 25 March 2011, Judge McKenna noted that under rule 32 of the Tribunal's procedural rules[1], the Tribunal must hold a hearing (by which it is meant an oral hearing) unless each party has consented to the matter being determined without a hearing and the Tribunal is satisfied that it can properly determine the issues without a hearing. She concluded therefore that the Tribunal had no discretion to order a paper hearing of this appeal unless all the parties agreed to it and, conversely, that if only one party required an oral hearing the Tribunal had no option but to arrange one[2]. Accordingly, she refused the Second Respondent's application for a paper hearing.

10. In respect of the applications not to attend the oral hearing, Judge McKenna also ruled on 25 March that, in a situation where (a) a party has provided written submissions for the hearing and (b) where there is no disputed evidence before the Tribunal, it would be fair and just to direct that the Respondents need not attend provided that the Appellant would not be prejudiced by such an arrangement. She concluded that the Appellant would not, in the circumstances of this case, be prejudiced if the Tribunal were to proceed to determine the appeal on the basis of written evidence and submissions and accordingly directed that the First and Second Respondents need not attend the hearing on 21 April and that, pursuant to rule 15(1)(g) of the Rules, they were permitted to provide written submissions to the Tribunal.

11. Having sought further representations, Judge McKenna declined to remove the Second Respondent as a party to these proceedings. In a ruling dated 11 April, she noted that the Tribunal has power under rule 9 of its Rules to remove a party as a Respondent. She also noted that this power must be exercised so as to give effect to the overriding objective in rule 2 of the Rules. She further noted that the Second Respondent was not required to attend the oral hearing but still had an opportunity to assist the Tribunal by making written representations and that, as a party to the hearings, the Second Respondent

[1] The Tribunals Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended.

[2] The Upper Tribunal recently confirmed this interpretation of the rules (in the context of the analogous Social Entitlement Chamber Rules) in *AT v Secretary of State for Work and Pensions* (ESA) [2010] UKUT 430 (AAC).

was itself subject to the overriding objective in rule 2 and to an obligation to co-operate with the Tribunal and assist it to do its work. As the time for the filing of written submissions had not yet arrived, she remained of the view that the Tribunal could yet be assisted by the Second Respondent's submissions in due course and that it should therefore remain a party to the proceedings.

The Facts

12. On 29 May 2009, the Appellant made eight information requests to the Second Respondent under FOIA. The terms in which he made those requests are relevant to the Tribunal's considerations, and so the request is reproduced in full in annexe A to this decision.

13. The Second Respondent replied to all eight requests on 3 July 2009, as follows: "*It is the council's view that this is not a request for information, but rather a question the answer to which is an opinion or judgement that is not already recorded".* The Second Respondent also voluntarily provided some material to the Appellant which it maintained fell outside the terms of the requests but which it provided by way of advice and assistance. Following further correspondence between the Appellant and the Second Respondent, and following an internal review, the Second Respondent informed the Appellant on 21 September 2009, *inter alia*, that "*where we do not provide any information it is because no information is recorded or held*".

14. The Appellant contacted the First Respondent on 8 January 2010. Following his enquiries, the First Respondent issued the Decision Notice dated 6 September 2010 which is now appealed.

The Hearing

15. The issues before the Tribunal at the hearing were:

    a. Whether the First Respondent had been right to treat the Second Respondent's response to the Appellant as a "denial" that it held the requested information for the purposes of s.1(1)(a) FOIA;

    b. Whether the First Respondent had properly concluded on the balance of probabilities that the Second Respondent did not hold the information requested.

Preliminary Applications

16. The Tribunal was provided with an agreed bundle for the hearing which ran to over 250 pages. There was a dispute between the parties as to the inclusion in the hearing bundle of a letter dated 7 Jan 2009. The Second Respondent had asked the Tribunal in its written submissions to exclude this letter from its considerations on the basis that (i) it was irrelevant to the issues before the Tribunal and (ii) that in any event it pre-dated the Appellant's FOIA requests which are the subject of this appeal. The Appellant had asked the Tribunal to

admit the letter in evidence and had provided the Tribunal with a copy of it as an attachment to his skeleton argument.

17. The Tribunal asked the Appellant how he had come into possession of a letter sent from the Second Respondent to the First Respondent and which was headed "Sent in Confidence". He explained that it had been sent to him by the Tribunal as one of the papers in a separate appeal to which he was a party but which had subsequently been withdrawn. (The Tribunal has, subsequent to the hearing, taken steps to confirm this account and also to confirm that the document had been provided to the Tribunal by the Second Respondent as a disclosable document in another case involving the Appellant. The Tribunal is satisfied that there has been no wrong-doing by any person which resulted in the Appellant being in possession of this document). The Appellant argued that the letter was relevant to the proceedings because it provided evidence of the Second Respondent's negative attitude towards him so that, by the time he made the information requests which are the subject of this appeal, it had no intention of providing him with the information he had requested.

18. The Tribunal considered whether to allow the Appellant to admit the letter into evidence in support of his case. The Tribunal has power to consider evidence which would not be admissible in a civil trial – see rule 15(2)(a)(i) of the Rules[3]. The Tribunal also noted that the use of the words "in confidence" on the letter did not necessarily bind the Tribunal: *Science Research Council v Nasse* [1980] A.C. 1028. In this case, the Second Respondent had not sought to argue that the Tribunal was bound by a duty of confidentiality, but rather that the letter should be excluded from evidence on the basis of lack of relevance to the issues before the Tribunal. The Tribunal concluded that the allegation that the Second Respondent was determined not to provide him with information was one that the Appellant was entitled to make, and that he was therefore entitled to produce evidence in support of that argument. The Tribunal accordingly admitted the letter into evidence and deals with the argument advanced by the Appellant in its conclusions below.

The Law

19. Section 1(1) (a) of FOIA provides that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request.

20. This appeal is brought under s.57 FOIA. The powers of the Tribunal in determining an appeal under s.57 are set out in s.58 of FOIA, as follows:

> *"If on an appeal under section 57 the Tribunal considers -*
>
> *(a) that the notice against which the appeal is brought is not in accordance with the law, or*

[3] Cited at footnote 1 above and available at http://www.justice.gov.uk/downloads/guidance/courts-and-tribunals/tribunals/tribunals-rules-2009-at010411.pdf

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

The Appellant's Case

21. In his Notice of Appeal to the Tribunal and his subsequent written submissions, skeleton argument and oral argument before the Tribunal, the Appellant argued that (i) the Second Respondent's responses do not constitute a confirmation or denial that the information is held for the purposes of s.1(1)(a) FOIA and (ii) that the information sought is in fact held. The burden of proof to establish these arguments rests with the Appellant.

22. The Appellant argues that the First Respondent was wrong to conclude that the Second Respondent's responses constituted a denial that it held the requested information. He takes the view that the Second Respondent's responses were ambiguous and argues that he should not be put in the position of analysing with a fine tooth comb whether the response was a confirmation or a denial.

23. The Appellant also asserts that he has evidence that the requested information does in fact exist because (i) it is referred to in the Manual for Head Teachers; (ii) it must exist as a consequence of a literature review which had been undertaken and (iii) the local press reported that the Council's Overview and Scrutiny Committee intended to look a the issues he had raised so there would have been some information held in relation to that decision. He provided the First Respondent with a copy of the relevant press report, however, the First Respondent did not find it persuasive and accepted the Second Respondent's explanation that, at the time of the information request, that Committee had not yet considered the matter. The First Respondent had seen the relevant Committee minutes before reaching that conclusion. The Appellant argues that the First Respondent is biased in favour of the Second Respondent and further that the First Respondent's enquiries were inadequate as they did not require the Second Respondent to conduct any searches for the requested information.

The First Respondent's Case

24. In his Decision Notice, the First Respondent comments that the information request could have been better worded. He referred the Appellant to the Information Commissioner's Guidance note "*How Can I Access Official Information?*" which recommends the use of "straightforward, polite language" and the avoidance of requests based on assumptions or opinions and the mixing of requests with complaints and comments. The Decision Notice also notes, however, that the Second Respondent had been involved in a lengthy

correspondence with the Appellant about the 11+ test so that, despite its terms, the Second Respondent was able to interpret the Appellant's request in the light of that correspondence. The First Respondent took the view that, although the Second Respondent had originally suggested that the requests did not comply with the requirements of FOIA, it had later treated the requests as such by considering them at an internal review and had, at that stage, issued a clear denial that the information was held.

25. The First Respondent then went on to consider whether, on the balance of probabilities, he was satisfied that the information sought was not in fact held. In this regard, he asked various questions of the Second Respondent and established that no searches for the information had been conducted. This was because the Second Respondent had been in correspondence with the Appellant for some years by this point and stated that it knew what information it held about the 11+ system without undertaking a fresh search.

The Second Respondent's Case

26. The Second Respondent has throughout these proceedings relied upon the First Respondent's case. The only point at which the Second Respondent has made independent submissions is in respect of the issue dealt with at paragraphs 16 – 18 above.

The Tribunal's Conclusions

27. The First Respondent had to decide in this case whether, on an objective reading, the Second Respondent's response amounted to a denial that it held the information requested so as to comply with the requirements of FOIA. In his Response, he referred us to some decisions of differently constituted panels of this Tribunal in order to illustrate his approach to that task.

28. The Tribunal has concluded that, although the Second Respondent's initial response left much to be desired in terms of clarity, by the time of its internal review it had issued a clear statement that "…*no information is held*" – see paragraph 13 above. The Tribunal has concluded that it was reasonable for the First Respondent to have taken the view that this statement complied with s.1 (1) (a) FOIA and none of the Appellant's arguments has persuaded the Tribunal to the contrary. The Tribunal accordingly dismisses this aspect of the appeal.

29. The First Respondent was also required to decide whether, notwithstanding its denial, the Second Respondent did hold recorded information in relation to the Appellant's requests at the time they were made. The Decision Notice demonstrates that the First Respondent found as a matter of fact that:

(i) the Manual for Head Teachers to which the Appellant has referred was not information within the scope of the Appellant's requests;
(ii) the literature review referred to in the correspondence also did not constitute recorded information within the scope of the Appellant's requests;

(iii) the accepted fact that an Overview and Scrutiny Committee had been established was not in itself evidence that information within the scope of the requests existed;
(iv) it was not necessary for the Second Respondent to conduct a fresh search in respect of the requests to ascertain what information it held, in view of the lengthy correspondence that had preceded the requests.

30. Based on these findings of fact, the Respondent concluded that on the balance of probabilities no recorded information relevant to the information request was held by the Second Respondent at the relevant time. The Appellant now challenges those findings of fact and the decision based upon them. As mentioned above, the burden of proof in this appeal lies with the Appellant, who must satisfy the Tribunal that it is more likely than not that the response given by the Second Respondent and upheld by the First Respondent was wrong. The Appellant has not adduced any independent evidence, but argues that the Second Respondent's denial is not credible in view of (i) the other information available and (ii) his allegation of "bad faith" on the part of the Second Respondent. Having considered the Appellant's arguments carefully, the Tribunal has concluded that he has not discharged his burden of proof in this appeal and so it must be dismissed. The Tribunal has concluded that the First Respondent's findings of fact (outlined at paragraph 29 above) were reasonable findings on the basis of the evidence before him and that they were properly relied upon to support his conclusions in the Decision Notice. In particular, the Tribunal does not accept that the First Respondent's enquiries were flawed due to the absence of specific searches for the information requested by the Second Respondent. The Tribunal has concluded that, in the circumstances of this case, the Second Respondent gave the First Respondent a perfectly reasonable explanation for why searches had not been necessary and the Tribunal does not take the view that public authorities should be required to "go through the motions" of performing a specific search in every case, provided there is a good reason not to do so – as there was here.

31. The Tribunal has considered carefully the Appellant's arguments as to "bad faith" on the part of the Second Respondent and in particular his argument that the letter dated 7 January 2009 is evidence of an intention not to comply with FOIA. The Tribunal notes that the letter explained, over some thirteen pages, the history of the Appellant's dealings with the Second Respondent over the 11+ issue and that it sought to inform the First Respondent of the administrative burden that the Second Respondent felt it was under, in view of the volume of correspondence and the number of complaints that the Appellant had made. The Tribunal also notes, however, that the letter assures the First Respondent that the Council *"remains ready, if reluctant, to assist further*". The Tribunal is not persuaded by the Appellant's argument that the letter shows that the Second Respondent never intended to supply him with the information he sought or that it demonstrates the alleged animus towards him. The letter does not, in the Tribunal's view, assist the Appellant with his argument that relevant information was indeed held but not disclosed. It follows that, having considered all the evidence carefully, the Tribunal is not persuaded on the balance of probabilities that the Second Respondent did hold information which it would have been required to disclose in response to the Appellant's request of 29 May 2009.

32. The Tribunal notes that, included in the hearing bundle, was the Second Respondent's Literature Review, entitled "*What is the impact of coaching on selective testing at 11+?*" dated February 2009. The Appellant told the Tribunal that the first time he saw this document was when it was included in the hearing bundle for this appeal. Given that the Second Respondent had, in July 2009, provided the Appellant with certain information on a voluntary basis by way of advice and assistance, the Tribunal was surprised that this document had not also been sent to the Appellant, in the same spirit, at that time. The Tribunal agrees, however, with the First Respondent's submission that this document did not fall within the terms of the information request made by the Appellant because the request asked whether the Council had "*independently verified that coaching is not a factor…"* whereas a review of literature produced by others cannot reasonably be said to constitute "independent verification" of anything. The Tribunal notes that whilst this document might have been disclosed earlier, it fell outside the terms of the information request so that its disclosure at an earlier stage would, in any event, have been voluntary rather than as a requirement of FOIA.

33. The Tribunal asked the Appellant to explain why he had made the information requests in the terms that he had. The Tribunal noted that, in the letter which *inter alia* contained the information requests, the Appellant referred to the Second Respondent as "*dishonest", "smug", "self-satisfied*" and "*arrogant*" and that he had also in that letter suggested that the Second Respondent had "*lied", "abused trust*" and behaved in a "*generally corrupt manner*". The Appellant told the Tribunal that he accepted that his letter had been highly inflammatory. The Tribunal endorses the Information Commissioner's Guidance (referred to at paragraph 24 above) advising that it is inappropriate to use FOIA requests as a means of conducting an argument with a public authority and observes that the Appellant might be more successful in obtaining the information he seeks in future if he does not make his requests in letters using insulting terms. This is not because his lack of courtesy affects the legal duty of the Second Respondent to comply with FOIA, but rather because in this case he implicitly limited the scope of his own requests by basing them on argumentative assumptions and opinions and by mixing his information requests with complaints and comments. The Tribunal commends to the Appellant the Guidance referred to above in respect of the terms of any future FOIA requests he might make.

Signed:

Alison McKenna
Tribunal Judge

Dated: 12 May 2011

Annexe A – the Information Request

Extract taken from letter dated 29th May 2009

"••• Freedom Of Information Request. ...

Our complaint of 24 Oct 2006 raises several issues. We have not had a reply to these issues and we aim here to understand what, if anything, you have done regarding these issues. We will summarise them here but refer you to the original complaint for the details:

• Coaching

The assumption that saturation familiarisation is reached with only a handful of practice tests is based on very old research and not relevant to the children in Bucks taking the 11 +; research was based on subjects familiar with testing in the first place and this is not the case for Bucks children. This is compounded by the fact that you have also **misrepresented the guidelines given to you by NFER, they do NOT state that further testing would have a negligible effect.**

From NFER

"Furthermore the typical gains in test scores resulting from practice were in the region of 4 to 5 standardised score points and the gains in score resulting from coaching were also around 4 to 5 standardised score points. "

From BCC Guide for Parents September 2007 -August 2008 Entry, page 20

"We suggest that you follow this guidance as NFER research has shown that extra familiarisation or coaching makes only a slight (if any) difference to the final score".

We also note form the NFER website the following:

"More recently, research has also *been conducted by Bunting & Mooney (2001) into the effects of familiarisation/practice and coaching on verbal and numerical test scores. The scores obtained from the tests which were originally developed for the Northern Ireland transfer procedure in the 1980s, found that coaching for a period of three hours can significantly improve pupils mean test scores. This research also found that sustained coaching over* a *period of nine months can result in more significant gains in mean test scores; however standardised-score point score gains are not discussed in this study. "*

(FOI Request Part 1). Have you corrected the false statements made to schools on this issue? Please provide evidence of this.

(FOI Request Part 2), Have you independently verified, with the vast amount of data that you have at your disposal or by any other means that coaching is not a factor in achievement and that an unfair advantage is not gained through coaching? Please provide any information related to this,

(FOI Request Part 3\. What have you done, intend to do, to take into account the

factors related to coaching highlighted above (particularly the Bunting & Mooney research)? Please provide any information related to this.

• Consistent underperformance of certain schools and certain areas.

The Bucks County Council 11+ selection process leads to a very unbalanced distribution of places; certain area/schools consistently underperform in a way that is well, well beyond simply statistically significant. Attachment 2 shows these unbalanced results, based on your own data. I have asked local councillors and the MP for Aylesbury to take this up with you, but you have refused to provide any explanation to them either.

It is very important that we know, given the clear and consistent underperformance (in terms of 11+ and consequent acceptance to a local Grammar School) of certain schools and certain areas, exactly what the council has done:

A. To understand why this discrepancy exists and

B, What has been done to address this discrepancy.

(FOI Request Part 4), Please proved any information in which you have addressed these issues, For example have you tried to understand why the problem exists? Have you done anything to remedy the problem?

It is important to understand that we are not addressing the academic achievement, but the level of achievement in the 11 +tests.

• Inconsistency between Order of Suitability and Strength of Recommendation Matrix

(Head Teacher's manual for 2006 intake) Children higher in the order of suitability may be lower in the recommendation matrix. This is clearly a muddle and is described with an example in *our letter.*

(FOI Request Part 5). What have you done to understand and correct this inconsistency? Please provide any information related to this.

• Current Appeal system is based on a false statement

(Head Teacher's manual for 2006 intake)

The submission deadline for the order of suitability from the schools is *after* the 11+ results are available to the schools, This is contrary to advice given to appeals panels, and is an unnecessary anomaly, as we have pointed out in *our letter* (see "Current Appeal system is based on a false statement").

(FO! Request Part 6), Please provide any information in which you have addressed these issues.

• 11+ Communication and Messaging

(See *our letter* '11+ Communication and Messaging)

We have shown in *our letter just* how much a head can influence parents and children in their 11+ experience, we have also given several REAL examples of how heads can stamp their own beliefs and biases on the 11 + process.

(FOI Request Part 7). With the problems raised in our letter and the recommendation made what have you done to remedy these problems? Please provide any information related to this.

• 11+ Appeals

(See *our letter* 11+ Appeals + Annex 1 'no Guidelines to Heads').

We have pointed out *specific problems* with the lack of guidelines to Head teachers in filling out the head teacher's summary sheet and the unprecedented lack of standardisation over the subjective assessment of 180 Head teachers. We have constructively pointed out specific areas that require attention.

(FOI Request Part 8). Please provide any information in which you have addressed these issues.

Note that this is a formal information request. For each part of the FOI request identified above, we require the appropriate, precise, documentation extract.

We do not want to receive documents that simply *might* contain the information requested (we have, on previous requests, received many documents that were not requested and were of no value).

We also make it clear here that we are not interested in the endeavours' to boost academic performance in general. It is the administration of the selection process and the imbalance of 11+ test results that is the driver for these requests.

***** End of Freedom of Information Request. ***”**