IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

Case No. EA/2011/0244

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FS50370717

Dated: 26 September 2011

Appellant: **Family Education Trust**

First Respondent: **The Information Commissioner**

Second Respondent: **Department for Education**

On the papers

Date of decision: **18 May 2012**

Before

Chris Ryan

(Judge)

and

Gareth Jones

Michael Jones

Subject matter: Public interest test s.2

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2011/0244**
GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

REASONS FOR DECISION

1. We have decided that the exemption under section 35(1)(a) of the Freedom of Information Act was correctly applied when the Appellant was refused information about policy formulation and development in respect of the age up to which parents are able to withdraw their children from sex and relationship education lessons. It was accepted that the exemption was engaged and accordingly our decision has been determined by our conclusion that the public interest in maintaining the exemption outweighed the public interest in disclosure.

Background

2. Under section 405 of the Education Act 1996 any parent has the right to withdraw a child from sex education at a maintained school up to the age of 19, except to the extent that the subject is covered in a science lesson that forms part of the national curriculum. On 5 November 2009 the Labour Administration, which was then in power, announced that a proposed new bill, the Children Schools and Families Bill ("the CSF Bill") would include a provision that would remove a parent's right of withdrawal once a child had reached the age of 15 years.

3. On 6 November 2009, just one day after that announcement the Appellant e-mailed a request for information to the Department that is now called the Department for Education but will be referred to in this

decision simply as "the Department". The request was for *"correspondence, notes of meetings, discussion papers, file notes and all other documents in relation to discussions about the age up to which parents should be able to withdraw their children from sex and relationship education lessons."* The request was made under the Freedom of Information Act 2000 ("FOIA"), under which a public authority is obliged to provide information in response to a request unless the circumstances in which the request has been made, or the nature of the information, justify refusal.

4. The Department refused the request on the basis that some of the information was exempt from disclosure under FOIA section 35 (formulation or development of government policy) and some under section 42 (legal professional privilege). The refusal was upheld, following an internal review. Mr Wells, Director of the Appellant, complained to the Information Commissioner about that refusal. He did so in his own name but gave his address as the Family Education Trust. A similar confusion of identities occurred in later documentation, including the Notice of Appeal to this Tribunal. However, it was agreed in the course of the pre-hearing review referred to in paragraph 12 below, that we should regard the Family Education Trust as the Appellant and we will refer to it throughout simply as the Appellant.

5. Ultimately, the Appellant did not press the Information Commissioner to issue a final decision notice once it had received a communication from the Information Commissioner on 1 November 2010, which included the following passage:

> *"As discussed I think it was appropriate for* [the Department] *to apply the section 35 exemption with regard to the information you requested. However as I explained, I have talked to* [the Department] *and explained that if you were to make this request again it would need to consider it afresh. We also discussed the*

possibility that the passage of time would have an influence on what may or may not be disclosed now."

6. The Labour Party Administration came to an end with its electoral defeat in May 2010. In the period of time between the election being called and Parliament's dissolution an attempt was made to agree the content of the CSF Bill with the other political parties. The Labour, Liberal Democrat and Conservative Parties all held different views on the part of the bill dealing with sex and relationship education and were unable to reach agreement. Accordingly the relevant clauses, including the one limiting a parent's right to withdraw, were ultimately removed before the bill was enacted.

The Request for Information and Complaint to the Information Commissioner

7. On 1 November 2010, immediately after the first information request had been disposed of in the manner described in paragraph 4 above the Appellant submitted a second request. It was in identical terms to the first, except that it was limited to the period of time prior to 6 May 2010. That, of course, had the effect of limiting the information requested to that which had come into existence before the coalition government came into office. The request was refused, again relying on FOIA sections 35 and 42, and the refusal was substantially upheld following an internal review within the Department. The outcome of the internal review was communicated to the Appellant by a letter from the Department dated 20 January 2011. We take that date as the one at which the refusal to disclose must be judged, although events that had occurred during the period between that date and the date of the request obviously have a bearing on the assessment we are required to make.

8. The Appellant complained to the Information Commissioner about the Department's refusal on 24 January 2011. During the course of the

subsequent investigation the Appellant accepted that FOIA section 42 had been applied appropriately. Accordingly it was only the section 35 exemption that remained in issue. The part of that section on which the Department relied reads as follows:

> *"Information held by a government department …is exempt information if it relates to –*
> *(a)The formulation or development of government policy…"*

9. Section 35 is classified as a qualified exemption and accordingly the information covered by it may still have to be disclosed unless, pursuant to FOIA section 2(2)(b), the public interest in maintaining the exemption is found to outweigh the public interest in disclosure.

10. The Information Commissioner's Decision Notice on the complaint was published on 26 September 2011 and concluded that the exemption was engaged and that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The Department's refusal to disclose was therefore found to have been justified.

The Appeal

11. The Appellant filed an appeal to this Tribunal on 21 October 2011. The Grounds of Appeal did not challenge the Information Commissioner's conclusion that the exemption under FOIA section 35(1)(a) had been engaged. The only issue raised was whether the public interest test had been properly applied.

12. The Appellant opted for a paper determination, rather than a hearing, which we consider is an appropriate means of handling the appeal. It was also accepted on all sides that the true identity of the appellant was the Family Education Trust, rather than Mr Wells in person.

13. A direction was made to join the Department as Second Respondent and all parties filed written submissions and co-operated in the preparation of an agreed bundle of documents. The Department also filed evidence. This took the form of two witness statements by Ms J Loosley, who is the Deputy Director of the Curriculum Policy Division within the Department. She was also in that post in November 2010 when the information request was submitted. One of Ms Loosley's witness statements was submitted on a closed basis and, having considered its content (including a number of documents exhibited to it) we were satisfied that it was appropriate for it to be included in a closed bundle, along with the withheld information itself. Although this meant that Appellant did not see all the material that we have taken into consideration in reaching our decision, we concluded that its disclosure to the Appellant would have had the effect of pre-judging the decision we are required to make and that it was therefore appropriate for it to be treated as closed material.

14. Ms Loosley's open witness statement explained that the Curriculum Policy Division had responsibility for sex and relationship education, including the right of withdrawal, and set out the history of the CSF Bill, as summarised above. It then set out the following facts:

    a. The right of withdrawal is a controversial issue, with strong views held on both sides of the debate as to whether it should be retained, removed or limited.

    b. A degree of consultation took place before the CSF Bill was promulgated.

    c. After the coalition government came into power the right of withdrawal issue remained a live policy issue with Ministers considering it during the months between the general election in May 2010 and the date when the information request was submitted in November of that year. This was in the context of consideration being given to the content of the National Curriculum generally, with particular reference to the

Conservative Party's manifesto pledge that the school curriculum should include teaching about sexual consent. The discussions also took place against a background of attempts by the Conservative and Liberal Democrat components of the government to build and maintain consensus on education issues, on which they had previously proposed conflicting solutions. (This part of Ms Loosley's evidence was supplemented by detail in her closed witness statement, which has assisted us in seeing the full picture of events at the time).

d. On 8 September 2010 Chris Bryant MP introduced a private member's bill which, if passed into law, would have created a rather different limitation on the right of withdrawal (only children themselves would have had the right to request that they be excused from sex and relationship education). The bill was ordered to be read a second time in February 2011 and, before that occurred, the government decided that it would not support the bill, a decision that it communicated to the Leader of the House of Commons on 14 July 2011.

e. On 24 November 2010 the government published a White Paper entitled "The Importance of Teaching". It included a proposal to review personal, social, health and economic education, but the government had not, at that stage, decided whether sex and relationship education should fall within the remit of the review.

f. An Education Bill was introduced into Parliament for its first reading on 26 January 2011, a few days after the Appellant had been told the outcome of the Department's internal review of its original refusal of the information request. During the summer of 2011 an amendment to the bill was proposed in the House of Lords, which would have had a serious impact on the right of withdrawal. This, of course, occurred some months after the information request had been rejected but Ms Loosley suggested that it demonstrated that the issue of a parental right

of withdrawal continued to be an issue of live policy debate after, as well as up to, the date of refusal.

g. Disclosure of the requested information at the relevant time would have had a particularly serious effect on the willingness of those consulted by the Department to engage with it on future consultation exercises. (This, again, was an area covered in more detail in Ms Loosley's closed witness statement, in terms which provided a helpful insight into the detail of the consultation process and the attitudes of those contributing to it.)

Discussion

15. The Appellant criticised the Information Commissioner for having, in its view, based his decision in part on the transparency of policy development in respect of sex and relationship education generally, rather than the narrower issue of a limit on the right of withdrawal based on a child's age. It also criticised the Information Commissioner for confusing the right of withdrawal with the issue of whether sex and relationship education should form part of the national curriculum. However, in our view the issues are interwoven with one another (so that, for example, including a topic within the national curriculum would have the effect of removing the right of withdrawal in respect of it, regardless of the age of the affected child). It follows, we believe, (as asserted in the Department's open and closed evidence as well as its written submissions) that a policy debate on the more general issue would inevitably result in the issue of right of withdrawal being raised. We therefore reject this criticism of the Decision Notice. In our view the Information Commissioner was entitled to have regard to the right of withdrawal within the context of the broader debate on the policy of which it formed part.

16. The more significant arguments on which the Appellant relied were:

    a. there had been a lack of transparency in the decision-making process that led to the inclusion of a limitation on the right of withdrawal in the CSF Bill and that the proposal had been based on inadequate prior consultation; and

    b. after the May 2010 election the issue of right of withdrawal did not remain an issue of sufficient immediacy to justify maintaining secrecy over the disputed information.

We will deal with each of these in turn.

17. The 2009 Policy Proposal.

    a. The Appellant suggested that previous policy statements and reviews had indicated that the right of withdrawal would be retained and that such policy consultation as had taken place earlier in 2009 had not been balanced, open or comprehensive and had not provided support for the proposed limitation on right of withdrawal. The Department argued that there had been nothing unusual about the process undertaken at that time and that the proposal was exposed to the normal processes of Parliamentary deliberation.

    b. Although we can envisage cases in which public dissatisfaction with the rigour or comprehensiveness of a public consultation may add weight to the public interest in having information disclosed, we do not think that the Appellant's criticisms in this case point to irregularity or unfairness of such a degree that we should accord particular weight to it.

18. Live issue after May 2010.

    a. The Appellant argued that the relevant policy making process came to an end when the proposed limitation on right of withdrawal was included in the CSF Bill presented to Parliament in November 2009, and that it certainly could not be relied on

once the relevant provision had been abandoned during the "wash up" of outstanding legislative business immediately before the May 2010 election. The Department challenged this, arguing that the "safe space" to which ministers and their advisers are entitled to ensure good decision-making in policy formulation and development, continued up to and beyond the date when the information request was made. We accept that argument, basing our decision on the evidence filed on the Department's behalf, which demonstrated to our satisfaction that the right of withdrawal continued to be a live issue in the policy discussions that continued within Parliament and the coalition government (albeit in a slightly different context).

b. It does not follow, from our conclusion on this aspect of the case, that the period during which the "safe space" must be protected will be without limit. Some elements of the public debate on sex and relationship education may be perennially controversial but, in the event of a further information request being made at any time in the future, it will be necessary for the Department to consider the state of policy development at that time.

19. It was also argued on the Department's behalf that there was a public interest in protecting from disclosure contributions made by those consulted on policy matters in this area. We consider that this factor carries less weight, in that those submitting views with the intention of influencing policy decisions by government should in most cases accept that the consultation process will be conducted in public view. We nevertheless accept that a degree of protection may be required in the context of a particularly contentious issue, such as the right of withdrawal and that, had we been inclined to order to disclosure generally, it might have been appropriate to make special provision for some elements of the consultation process.

Conclusion

20. In light of our conclusions on each of the arguments put to us we have determined overall that the public interest in maintaining the exemption outweighs the public interest in disclosure and that the Information Commissioner was therefore entitled to conclude that the Department had been entitled to refuse the information request.

21. Our decision is unanimous.

Chris Ryan

Judge
18 May 2012

(Amended 20 June 2012)