FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Information Rights

Tribunal Reference:	EA/2013/0270
Appellant:	Department for Education
Respondent:	The Information Commissioner
Second Respondent:	Laura McInerney
Judge:	NJ Warren
Member:	N Watson
Member:	S Shaw
Hearing Date:	4 and 5 June
Decision Date:	2 July 2014

DECISION NOTICE

1. On 1 October 2012 Ms McInerney made a request to the Department for Education (DFE) under the Freedom of Information Act (FOIA). It reads as follows:-

> "Please could you:
>
> (1) release the completed application forms for Free School applicants where the school is now either open or if the school did not proceed to the next stage (i.e. it is no longer still in planning); and
>
> (2) release the letters sent to all Free School applicants 2010-2012 informing them of the decision either to accept or reject their application and the reasons why.
>
> It will be entirely appropriate to redact the name and addresses of applicants, receivers of letters and/or remove other details that could identify individuals.

> I would also be happy to accept data where the school name has been removed although I would expect an explanation for why it was felt necessary to complete this step."

2. DFE supplied some generic acceptance letters together with a list of recipients but refused to disclose any other information relying on Section 36 FOIA, an exemption designed to prevent prejudice to the effective conduct of public affairs. Ms McInerney complained to the ICO who issued a decision in her favour on 18 November 2013. Pausing there, had the request been confined to a single application, we would have agreed with the conclusion reached by the ICO on the public interest balance in relation to Section 36 FOIA. The request was, however, much wider. As the ICO accepts, the steps which the DFE are directed to take in his decision relate to the disclosure of 839 letters. Each letter is one to one and a half pages in length excluding annexes. There are also 322 expressions of interest, on average eighteen pages in length, excluding two annexes. There are also 266 applications, on average 76 pages in length, excluding four annexes. Although the documents will of course be held electronically, they amount to over 25,000 pages.

3. The steps directed by the ICO include the following statement:-

> "The DFE is not required to disclose the names addresses or other personal data of individuals contained within any of the above documents where it believes that the information is exempt from disclosure under Section 40(2)."

The DFE had 35 days in which to comply.

4. The DFE have now appealed to the Tribunal. They rely additionally on Section 43 FOIA which deals with prejudice to commercial interests; Section 12 FOIA which, together with Section 13, deals with the cost limit above which information is not provided free of charge; and Section 14 FOIA which deals with vexatious requests.

5. There was a hearing of this appeal on 4 June. Mr Sharland appeared for DFE. Mr Hopkins appeared for the ICO. Ms McInerney conducted her own case. We express our thanks to all three and to those involved in preparing the different cases.

6. We have concluded that this appeal succeeds under Section 14 FOIA.

7. In reaching that conclusion we followed the guidance given by the Upper Tribunal in the case of Dransfield.

8. There is no question here of anything in the tone of the request tending towards vexatiousness; nor does anyone doubt Ms McInerney's genuine motives. She has written a book on charter schools in the USA. She is proposing to write a thesis for a PhD on charter schools in the course of which she wishes to compare experiences in various states of the USA with the introduction of free schools in England. There is value in openness and transparency in respect of departmental decision-making. That value would be increased by the academic scrutiny which the disclosed material would receive.

9. In our judgment, however, these important considerations are dwarfed by the burden which implementation of the request places on DFE.

10. It has often been observed that FOIA is a statute dealing with the disclosure of information, not the discovery of documents. A request which "describes the information requested" by reference to a set of documents often requires a public authority to consider its duties as a controller of personal data. The disclosure of documents, if they contain personal data, will amount to a processing of that data and must therefore comply with the Data Protection Act (DPA). The right to information under FOIA does not trump the rights to privacy contained in the DPA.

11. Although the burden is less significant in respect of the letters than in respect of the applications, we accept that in order to comply with the request DFE would need to read the material and consider whether personal data should be redacted.

12. Inevitably, estimates of the extent of the burden are merely estimates. On that basis, we accept the evidence of Ms Watts on behalf of DFE assessing the burden as follows:-

    (a) It would take 54 hours' work to locate and retrieve the information.

(b) The workload if redaction were done in-house would occupy eleven middle rank civil servants for three months. This is costed at £171,875.

(c) If the redaction were outsourced, DFE has received an estimate of £343,620. The company making the estimate viewed a sample of the material and based their costings on projected timings of over 500 hours to redact and check the letters and over 9,000 hours to redact and check the applications.

13. We noted that it was originally intended to publish the first wave of expressions of interest on the DFE website. A somewhat ambiguous note indicated that submission of the form would be treated as consent "from both you and anyone else whose personal data is contained on this form" to this. We were told by DFE that their intention originally was to publish only successful expressions of interest. That policy was reversed because of the unexpected significant amounts of personal data including the names and dates of birth of children contained in the expressions of interest. In the end, it did not seem to us that the notes on the form reduced the burden on DFE.

14. At the hearing, Counsel for the ICO canvassed the possibility of cheaper ways of carrying out the redactions. Might it be possible, for example, to email the proposer and ask them for consent for themselves and for persons on the form; alternatively, might not the proposers carry out such redactions as they felt necessary? It is right of course to look for reasonable alternatives but, in our judgment, such procedures would carry too much risk. There would be no guarantee that the Free School proposers would redact correctly. There would remain the burden of checking the proposed redactions.

15. We therefore concluded that the request was vexatious because the scope and size of the requested material imposed a wholly disproportionate burden on the public authority. In our judgment, this is one of the many forms of request from which Parliament intended to protect public authorities when enacting Section 14 FOIA.

16. We had before us a bundle of closed material. These were sample documents. They gave us an idea of the range of personal data contained in the requested information

including its level of unpredictability e.g. named children's exam results. We were satisfied from this material that all the letters and applications would have to be scrutinised. Otherwise the closed material did not play a part in our decision-making.

17. In the course of the hearing questions arose as to whether DFE were entitled to rely on Section 14 FOIA or whether the permission of the Tribunal was first required. This matter is dealt with in the appendix.

NJ Warren
Chamber President
Dated 2 July 2014

Appendix

1. Some years ago, some Tribunals developed a rule to the effect that a public authority could not, without the Tribunal's permission, advance "exemptions" or "defences" which had not been raised by them during the investigation of the complaint to the ICO.

2. This practice was challenged in a decision written by Judge Farrer QC which concluded that the Tribunal had a duty to listen to what became known as a "late exemption". There was no room for any discretion.

3. The ICO appealed against that decision. The Upper Tribunal heard the appeal with another case raising the same issue on the Environmental Information Regulations (EIR). The references are Information Commissioner v Home Office [2011] UKUT 17 (AAC) and DEFRA v Information Commissioner and SB [2011] UKUT 39 (AAC). Judge Jacobs decided that public authorities were entitled to raise late exemptions. They did not need the permission of the Tribunal to do so. This of course was subject in any one individual case to the case management powers of the Tribunal to regulate its own procedure, strike out cases, bar participation or limit evidence and submissions.

4. There was an appeal in the DEFRA case, but not in the Home Office case, to the Court of Appeal. That appeal was dismissed.

5. It is conceded by the ICO that both the UT decisions given by Judge Jacobs are correct in law. It follows that if this case were being decided under EIR, the public authority would be entitled to rely as of right on the provisions in Reg 12(4) relating to unreasonable requests.

6. But the ICO submits that the position is different under FOIA and that the UT decision in Home Office is limited to a claim for a "late exemption" under part 2 FOIA – broadly those exemptions which deal with the public interest. It does not extend to Section 12 FOIA (the cost limit) or Section 14 FOIA (vexatious requests).

7. The ICO relies on remarks in another Upper Tribunal decision, APPGER v IC and MOD [2011] UKUT 153 (AAC). That case, which was heard after Judge Jacobs' decisions, but before the Court of Appeal decision, doubted the UT decision in Home Office and suggested that, in any event, the cost limit in FOIA should be treated differently. It advanced the proposition that it was the duty of the public authority to 'claim' Section 12 when first reaching its decision on the request.

8. APPGER suggested practical arguments in favour of this approach; there are, it seems to us practical arguments going the other way. For example, what if a public authority mistakenly thinks it does not hold the information? Why should a public authority have to go through the effort and expense of preparing a costs estimate in every case? What happens to Section 13? We need not discuss these in detail.

9. It is common ground that a public authority is entitled to raise a Part 2 exemption as of right. This necessarily involves the proposition that Section 17(1) FOIA, which requires a public authority promptly and in any event within twenty working days to give notice of any Part 2 exemption relied on, does not prevent a public authority from later relying on another exemption.

10. Section 17(5) FOIA lays down a similar time limit for giving the applicant notice that the authority is relying on either Section 12 or Section 14. We can find no basis in the statutory language to distinguish the effects of a public authority's mistake or omission when applying Section 17(5) from the effects of such an error when applying section 17(1); nor for that matter is there any indication in the statute that the protections afforded by Sections 12-14 should ever be available only at the discretion of the ICO. It follows that it would be inconsistent with the reasoning in Home Office for us to hold that DFE were not entitled to rely on section 14 as of right.