



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

Appeal No: EA/2016/0035

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50567761

Dated: 13 January 2016

Appellant: Linda Hacker

Respondent: The Information Commissioner

2nd Respondent: Neath Port Talbot Council

Heard at: Swansea Civil and Family Justice Hearing Centre

Date of Hearing: 20 September 2016

Before

Chris Hughes

Judge

and

Suzanne Cosgrave and Gareth Jones

Tribunal Members

Date of Decision: 27 October 2016

Date of Promulgation: 16 November 2016

Attendances:

For the Appellant: in person

For the Respondent: did not appear

For the 2nd Respondent: Mr Hopkins

Subject matter:

Freedom of Information Act 2000

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 13 January 2016 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. The Appellant in these proceedings was deeply concerned about proposals to reorganise education in catholic schools in the Neath Port Talbot area and on 27 October 2014 wrote to the Second Respondent (the Council) and asked for:-

“Copies of all the minutes of meetings dating back to January 2012 held between the LEA and/or the LA and/or their representatives with the Bishop of Menevia – Thomas Burns and/or the Trustees and/or their representatives (some meetings could possibly have taken place without either the Bishop or the trustees in attendance) so any and all minutes relating to the proposed closure of the Sixth Form at St Josephs Catholic Comprehensive in Port Talbot and the proposed 21st Century new build school since January 2012...

Copies of all letters and/or emails dating back to January 2012 from and to the LEA and/or the LA and/or their representative from and to the Bishop of Menevia and/or the Trustees and/or their representatives concerning the proposed closure of the Sixth Form at St Joseph’s RC Comprehensive in Port Talbot and the proposed 21st Century New Build School...”

2. The Council initially refused the request on the grounds of excessive cost; however in response to her pressure the Council reconsidered and provided some information. The Appellant was dissatisfied and in correspondence between January and May 2015 made a number of further requests for information. On 11 May 2015 the Council wrote confirming that it had disclosed all the information it held save where it relied on section 43 (the protection of commercial interests) in respect of financially

significant information contained in its Statement of Case (a document jointly submitted by the Council and the diocesan authority to the Welsh Assembly Government on the future arrangements for catholic schools), a redacted copy of which was supplied to the Appellant. The document indicated two different approaches to the way forward, one favoured by the Council and the other by the Diocese.

3. The Appellant complained to the First Respondent (the ICO) who investigated. During the course of the investigation the Council disclosed an unredacted copy of the Statement of Case; accordingly the ICO did not consider further whether reliance on the exemption, at the time of the request, was justified.
4. The ICO considered an argument by the Appellant that one email disclosed indicated that further undisclosed evidence existed, that a complaint against the head teacher which was disclosed must be based on a written record and that further information giving the perspective of the Diocese must be held (dn paragraphs 17:21). He examined the explanations given by the Council of the searches carried out, the requests made to relevant officers and the specific searches made for information which had been held but could not be found at the time of the requests (dn 23-26). He accepted that the Council did not minute meetings with the Diocese and the educational establishments, that no formal note was taken of the original complaint and that a scribbled note was used as the basis of the email which resulted from the complaint. He concluded that the Council only held the email and it no longer held two of the three letters referred to in the Statement of Case (dn 27-31). He concluded on the balance of probabilities that no further documents were held.
5. In her appeal the Appellant argued that all areas of dispute had been explored and wished that the Council be held to account. She did not accept that the two letters were not held, she criticised the statement that the hand-written note of the complaint had been destroyed, she cast doubt on the Council's claims that there were no further notes and minutes of meetings, she indicated a desire to have a decision with respect to the reliance on s43 with respect to the unredacted Statement of Case.
6. In his response the ICO maintained the position adopted in the decision notice and justified the decision not to further consider the application of section 43 on the

grounds that it was now a theoretical point as the information had been disclosed and to further consider the issue would be poor stewardship of scarce resources.

7. The Council supported the ICO's position and applied for the striking out of the appeal as having no realistic prospects of success with respect to whether further material was held and being academic with respect to the section 43 point. The application was unsuccessful.
8. Aled Evans, Director of Education, Leisure and Lifelong learning at the Council gave evidence on the issue of whether the Council held further information. He gave details of the searches undertaken by himself and the steps taken by one of his officers to contact relevant officers including the Chief Executive and other senior officers to ensure that appropriate searches were carried out. He and other officers had spent approximately 50 hours searching for the information. His practice was to take notes of discussions and use them to create reports, emails and other documents. The notes were not retained once the relevant content had been communicated. The complaint had been taken down as a hand-written note which was used to draft an e-mail to the Diocese' Director of Education and the note had then been discarded. The process of preparing the Statement of Case had been carried through in a similar way and there were no formal agendas and minutes prepared by the Council of the various officer meetings or meetings with outside bodies which had formed part of the process. Formal project management procedures would begin once the Statement of Case had been approved by the Welsh Assembly Government. Searches had been made for the missing letters from the Diocese referred to in the statement of case but it had not been possible to track them down. The contents of one were reflected in a reply from the Council which had been disclosed and the overall approach of the Diocese was apparent from the Statement of Case.
9. Simon Brennan, Head of Property and Regeneration of the Council gave evidence with respect to the possible financial implications of releasing the un-redacted Statement of Case at the time of the request. He had not been in post at the time of the request and supported the decision made before he joined the authority. However he had knowledge of the preparation and use of Statements of Case such as this. The request was made the day after the Statement of Case was submitted to the Welsh Government and therefore could not have been more current. There is in place a West Wales framework agreement among a group of local authorities in the area to

facilitate the letting of contracts for major building works. The area was relatively sparsely populated and there were not many contractors who would, in practice, bid for contracts for the Council. On one of the last tenders conducted by the Council there had been only one tenderer. It might cost a tenderer of the order of £15,000-£20,000 to put together a bid for a substantial project. He was aware of the risk that in any tender process there could be collusion or price fixing between possible contractors and it was important to minimise the risk. Releasing the financial information had the potential for risking the tender process itself and creating a price / cost risk to the Council of potential contractors having knowledge of the Council's estimate and opportunistically pricing tenders accordingly to the known estimate. The financial information in the Statement of Case could be useful to potential contractors but could also be misleading, since it was not based on a detailed site examination and the information could "set hares running with contractors". He and his colleagues took the view that it was better to encourage the potential contractors to set a price by looking at the task – this would result in a "cleaner" figure and often a lower figure. The full Statement of Case was disclosed to the Appellant once the commercial sensitivity had ceased.

10. In her arguments to the Tribunal the Appellant emphasised her wish to understand why the Council had taken the stance that it did and that she felt that she was arguing on behalf of her community. She was not satisfied with the explanations given and felt that there was more information.

Issues for the Tribunal

11. There were two issues for the tribunal to resolve. The first was whether the unredacted Statement of Case should have been released to the Appellant when she requested it. The second was whether further information was held – specifically whether the two letters from the diocese of were held and whether any further information was held.

The Commercial Interests of the Council

12. The Tribunal has considerable sympathy with the ICO's desire not to exhaust scarce resources on theoretical disputes between parties which underlay the decision not to rule on the section 43 issue. However it also understands the concern that an improper reliance on an exemption for a period of time might be used inappropriately

as a means of delay in according a citizen the right of access to information that is held and should be disclosed promptly. However each case needs to be treated on its merits and the Tribunal, in this case, has considered that it should resolve the question of section 43 on its merits.

13. Although the Appellant argued that she has examples of local authorities being entirely prepared to release an un-redacted Statement of Case and also she stated that the Bishop had released an overall figure for the cost of works in November 2014, the Tribunal was satisfied that the stance of the Council was justified. The financial information would be of significant value in the tendering exercise and the Council had taken a realistic view of the possible risks to the tendering exercise in terms of requiring a re-run of the exercise with consequent delays or of the distortion of the exercise with consequent additional costs to the Council. Their stance was correct and their subsequent release of the information, when the period of sensitivity of the information was over, was correct. The question of whether the disclosure of information would prejudice a commercial interest is a question of the consideration of the facts and circumstances surrounding that information and therefore any decision is circumscribed by the factual basis and should not be seen as creating a precedent applying in all circumstances.

Was further information held

14. While the Appellant expressed dissatisfaction at the outcome of the Council's efforts to find material within the scope of the request; the tribunal as satisfied by the oral and written evidence of Mr Evans as to the extent and relevance of the searches carried out. It was somewhat surprising that two letters from the Diocese of sufficient significance to be referenced in the Statement of Case submitted to the Welsh Assembly Government could not be found shortly after that document was submitted, but the explanation given was credible and any suggestion of suppression of the letters was inherently improbable in the context of an explicit disagreement between the Council and the Diocese on the way forward contained in the document itself. Similarly the absence of formal minutes and agendas for a range of meetings of various kinds though surprising was comprehensible in the light of the preliminary nature of such meetings and the practice (entirely common) of recording the

substantive issues discussed in subsequent emails. The tribunal as satisfied, on the balance of probabilities that no further information was held.

Conclusion and remedy

15. The tribunal is therefore satisfied that the decision of the ICO is correct in law and dismisses the appeal.

16. Our decision is unanimous

Judge Hughes

Date: 11 November 2016

Date of Promulgation: 16 November 2016