



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2016/0023**

**Heard at Field House  
On 5<sup>th</sup> July and thereafter upon the papers**

**Before**

**JUDGE MS FIONA HENDERSON**

**TRIBUNAL MEMBERS**

**MS MELANIE HOWARD  
AND  
MR ANDREW WHETNALL**

**Between**

**MR CHRIS WHEAL**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

**and**

**THE LEATHERSELLERS' FEDERATION OF SCHOOLS**

Second Respondent

**Subject:** s1 FOIA – information held  
s42 FOIA- legal professional privilege

**Case Law:**

APPGER v ICO and Foreign and Commonwealth Office (UKUT 0377 (ACC),

R(Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax [2003]1AC 563

R v Cox and Railton 1884 14 QBD 153

Attorney General's Reference No.3 of 2003 [2005] QB 73

DBERR v O'Brien EWHC 164 QB

## **DECISION AND REASONS**

1. The appeal is allowed in part in that additional information within the scope of the requests was held. However, the Tribunal upholds the application of s42 FOIA.

### Introduction

2. This appeal is against the Information Commissioner's Decision Notice FS50587134 dated 17th December 2015 which held that The Leathersellers' Federation of Schools<sup>1</sup> (the School) correctly applied s42(1)1 FOIA to the request and that no further information was held.

### Background

3. Prendergast School (to whom the original information request was made) is part of The Leathersellers' Foundation of Schools which encompasses 3 schools. Since 2008, the Federation has been a "hard federation" meaning that there is a single governing body for all of the schools within the Federation though each school continues to be a distinct legal and financial entity. In 2014 the Board of Governors began to consider alternative structures of governance.
4. The chronology insofar as it is relevant to the matters before the Tribunal is:
  - On 14<sup>th</sup> October 2014 an extraordinary Board of Governors' meeting was called for 6 November "*The purpose of the meeting is to consider conversion of the Leathersellers' Federation of Schools to a Multi Academy Trust. Given that governors must consider all the implications of becoming an academy we shall ask you on 6<sup>th</sup> November for your approval to establish a working group. That working group would gather the information evaluate the options (in terms of governance structure and other matters) and prepare the case before proceeding to the Governing Board, at a later date, for a decision on whether to progress with an application*"<sup>2</sup>
  - On 16<sup>th</sup> October 2014 the Federation's Solicitors (Stone King) were emailed to ask for a meeting to obtain advice on specified issues relevant to the Governors' meeting on 6<sup>th</sup> November.

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<sup>1</sup> See Case Management Note 9.3.16 for the legal status of the 2<sup>nd</sup> respondent p30 OB

- On 31<sup>st</sup> October 2014 the Governors were sent a copy of the agenda and attached background documents.
- On 4<sup>th</sup> November 2014 correspondence took place between Stone King and the School before the planned meeting.
- A meeting was held between the School and Stone King on 4<sup>th</sup> November 2014.
- On 5<sup>th</sup> November 2014 additional correspondence took place between Stone King and the School.
- On 6<sup>th</sup> November 2014 a Governors' Meeting was held where it was determined that the governing body should set up a working party to examine governance structures including conversion to a Multi Academy Trust. The minutes are publicly available.
- The working party first met on 17<sup>th</sup> November 2014. The working party's last meeting was on 30.1.15 following which a recommendation and report to the Board of Governors was made.
- On 12<sup>th</sup> February 2015 the Governors voted in favour of application for Academy Orders and the receipt of the Academy Orders was announced on 6<sup>th</sup> March 2015.
- The Federation undertook a period of consultation from 19<sup>th</sup> March 2015 (the extended close of consultation date was intended to be 8<sup>th</sup> June 2015).
- On 21<sup>st</sup> May 2015 there was a meeting with unions and the Chair of Governors and other interested parties.
- On 22<sup>nd</sup> May 2015 a letter was sent from the Chair of Governors to DfE formally advising of questions raised about regulations. The same day the DfE formally advised of their decision to rescind the order in respect of Prendergast School only.

#### Information Request

5. On 5<sup>th</sup> May 2015 the Appellant wrote to the School and requested:
  - 1) *"A copy of the request to law firm Stone King requesting the advice they provided referred to in the Governors minutes of the meeting on 6<sup>th</sup> November 2014.*

- 2) *A copy of the response/advice/correspondence provided by law firm Stone King referred to in the Governors' minutes of the meeting 6 November 2014.*
  - 3) *A copy of any request to law firm Stone King by the Governors working party established at the meeting on 6<sup>th</sup> November 2014 – this to include requests by any member of that working party or on behalf of that working party.*
  - 4) *A copy of any advice or correspondence provide by law firm Stone King to the working party established at the Governors' meeting on 6 November 2014.*
  - 5) *A copy of the notice and any attached or connected correspondence (agenda, reports etc) calling the extra Governors' meeting of 6 November 2014. These are referred to in the minutes of that meeting under section 1.4 as: "Governance proposal papers that had been circulated and tabled".*
6. On 20<sup>th</sup> May 2015, the school refused the request in relation to requests 2 and 5 relying upon legal professional privilege (but disclosed the notice and agenda for the additional meeting as requested with a document entitled draft Proposals for Governance Structure<sup>3</sup>) and stated that information relating to requests 1,3 and 4 was not held<sup>4</sup>.

#### Complaint to the Commissioner

7. The Appellant complained to the Commissioner on 26.06.15. By agreement the Commissioner investigated the case without the school undertaking an internal review. The issues before the Commissioner were:
- a) whether the information in requests 1,3 and 4 was held. The Appellant specified in his letter of 6.8.15 that:  
  
*"I do not believe the school when it says it has no record of commissioning legal advice from lawyers. It would be remarkable to commission legal advice from lawyers not in writing. ... The lawyers would at least send a confirmation note before commencing work."*<sup>5</sup>
  - b) whether the school was correct to withhold the information in requests 2 and 5 under s42(1) FOIA. In his complaint to the Commissioner the Appellant did suggest that he was prepared to accept the advice being seen by an independent member of the

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<sup>3</sup> P58-63 OB

<sup>4</sup> P55 OB

<sup>5</sup> P99 OB

judiciary who could state if the advice was only about becoming an MAT or if it covered a wider range of options and to whom the advice was addressed. This suggestion was not addressed in the Commissioner's decision notice.

8. The school provided a copy of what they had identified as the disputed information to the Commissioner. There has been some confusion about whether the right copy of a document was sent to the Commissioner. The School has a record that an email was sent with an attachment and it may be that the wrong document was sent with that email, unfortunately they are no longer able to retrieve the original attachment. We are satisfied however, that we have received the information that was in fact sent to the Commissioner and this has formed the basis of the original closed bundle of material before the Tribunal.

#### Appeal

9. The Appellant appealed on 2.2.16 on the following grounds:
  - i. Although he sought disclosure of the legal advice, as an alternative he wanted to know whether the advice covered only the MAT or provided equal advice on a range of alternative governance options.
  - ii. Public interest favours disclosure on the grounds of:
    - a) Transparency - disclosure would show whether the Governors told the truth about the options explored.
    - b) The issue was no longer live now that the order had been withdrawn.
    - c) The School's management had since been criticized by Ofsted (for 2 out of 3 schools) so the public interest in probity of governance was even more important.
  - iii. In his response dated 25<sup>th</sup> April 2016<sup>6</sup> he challenged the credibility of the school's assertion that no information was held e.g. he argued that the matter could not proceed on a purely verbal basis as this would be contrary to best practice as the Law Firm would be expected to confirm the request for advice and its scope in writing, the name of the person who will do it and the likely costs.<sup>7</sup>
  - iv. At the oral hearing of 5<sup>th</sup> July it became apparent that the Appellant also sought to argue that s42 was not engaged as LPP could not be maintained in a Court of Law.

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<sup>6</sup> P25 OB

<sup>7</sup> In accordance with the Solicitors Regulation Authority's code of Conduct

10. The Commissioner opposed the appeal relying upon the reasoning in the decision notice. His position was that confirming whether the legal advice related only to MAT or not would be a breach of LPP.
11. The School applied to be joined as second respondent and opposed the appeal on the grounds that:
  - i) s42 was engaged and a “yes/no” answer to whether the advice related only to MAT would breach LPP,
  - ii) the public interest test was correctly determined by the Commissioner and the School can evidence that it examined and published its examination of other governance options.

Scope

12. The Appellant has raised 2 issues which were not in his original grounds of appeal, namely:
  - i) That additional information was held,
  - ii) That regulation 42 is not engaged as the LPP could not be maintained in court proceedings.
13. We are satisfied that these amendments should be permitted under rule 5(3)(c) GRC Rules 2009. In reaching this conclusion we have had regard to the overriding objective as set out in rule 2.
  - i) In relation to the first additional ground this was set out in the letter of 25.4.16 at a very early stage of proceedings, The respondents have not objected to this and were on notice of this issue in good time prior to the oral hearing where evidence was heard on the point.
  - ii) In relation to the second ground this was raised at the oral hearing and the parties were not on notice of the shape and scope of this argument. The Appellant is a litigant in person and this is a technical issue. We are satisfied that this was an important issue upon which the Tribunal would need to satisfy itself in assessing the ground and that as this ground does not turn upon the evidence but upon the law, any disadvantage from lack of notice was avoided by enabling the 1<sup>st</sup> Respondent the opportunity to provide written submissions with all parties having the right of reply.

14. The Appellant indicated that if the Tribunal held that the legal communication was privileged, he would be content with a yes/ no answer to the question of whether the advice “*covered only the MAT option or provided equal advice on a range of alternative governance options*”<sup>8</sup>. We are satisfied that:
- a) The Appellant’s primary position is that he seeks disclosure of the full advice,
  - b) A response to the “yes/no” question still would reveal the contents of the legal advice and as such would be capable of attracting privilege (if the exemption is engaged in relation to the source material).
  - c) We do not consider it a fresh request since it is arguable that the Tribunal is being asked to provide an extremely redacted version of the information in order to address what the Appellant considers to be the strongest element of the public interest.

#### Whether further Information is Held

15. It is not in dispute that where no exemption is relied upon:

*1(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.*

It is not disputed that the Tribunal must be satisfied on a balance of probability.

16. This case was first considered at an oral hearing on 5<sup>th</sup> July 2016 when it was adjourned as the Tribunal did not have sufficient information to determine the case. The case has subsequently required several sets of directions during which time significant additional documentary evidence has been provided by the School which quite clearly fell within the ambit of the requests. The Tribunal finds it inexplicable that this information was not unearthed either before the Commissioner or during the preparation of this appeal and the Tribunal has found it necessary to view additional associated documentary evidence which was not in scope, in order to check the factual position.

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<sup>8</sup> P12 OB

17. Request 1 - *“A copy of the request to law firm Stone King requesting the advice they provided referred to in the Governors’ minutes of the meeting on 6<sup>th</sup> November 2014.*

The Commissioner’s letter of 7<sup>th</sup> August 2015 stated:

*“Mr Wheal has argued that the school must have requested legal advice from Stone King and that there should be a written record of this request.*

*Please therefore explain how the legal advice was requested from Stone King and confirm whether the School does hold a recorded request for legal advice which was sent to the law firm”.*<sup>9</sup>

18. The School’s case before the Commissioner in their letter of 1.9.15 was the advice *“was as the result of a discussion in a meeting. There was then no written record this request held by the School”.*<sup>10</sup>

This was maintained throughout the oral hearing with Mr Sheppard the Executive Head Teacher of the Federation giving oral evidence to the effect that the information provided was as a result of a conversation so there was no written request for information. This was maintained notwithstanding a thorough challenge to this at the oral hearing from Mr Wheal who had persistently argued that this was incredible<sup>11</sup>. During the oral evidence it was clear that the school had not checked the emails arranging the meeting. When this was done at the Tribunal’s request pursuant to an adjournment email correspondence was found in which it was apparent that the ambit and scope of the advice sought was defined.

19. The Tribunal is satisfied that this was in scope and should have been provided to the Commissioner for his determination and ought to have formed part of the Tribunal’s closed bundle. The School now rely upon s42 FOIA Legal professional privilege to withhold this information.

20. The School’s evidence was that it searched its records of governance, files and papers, the email account of the Clerk to the Governors, Chair of the Governors and Executive Head Teacher and it contacted its lawyers Stone King. The school explained<sup>12</sup> that:

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<sup>9</sup> P104 OB

<sup>10</sup> P109OB

<sup>11</sup> *“ Maybe they asked verbally in the meeting and the lawyers put confirmation of the request in writing and the school confirmed. That is in my opinion evidence of the request. They should provide that. Can you ask if such a document exists”* p 173 OB

<sup>12</sup>As referred to in the redacted version of the August 2016 submissions from the School disclosed pursuant to rule 14 ruling of December 2016



*“Mr Sheppard now recognises that he was copied in to the email of 16 October which requests a meeting with Stone King.*

*When Mr Sheppard searched his email at the time of the initial request and to respond to the Commissioner he did not discover this email. Mr Sheppard recognises this as an oversight. This document is not discovered on the email system Mr Sheppard uses if the search is made ‘From’ and ‘To’ which is the way Mr Sheppard searched his system to determine if such an email invitation to the meeting had been sent.”*

In light of the thoroughly articulated requests for additional searches to be made by Mr Wheel who set out the types of information he would expect there to have been, the Tribunal finds it inexplicable that this documentary evidence was only unearthed when it was and that no consideration was given at an earlier stage to reviewing the email chain arranging the meeting.

21. Request 2 - *A copy of the response/advice/correspondence provided by law firm Stone King referred to in the Governors’ minutes of the meeting 6 November 2014.*

From the email correspondence that was provided pursuant to the adjournments we are now satisfied that there was additional advice contained in email correspondence that was never provided to the Commissioner or originally to the Tribunal<sup>13</sup>. The School now rely upon s42 FOIA Legal professional privilege to withhold this information

22. Request 3 – *A copy of any request to law firm Stone King by the Governors’ working party established at the meeting on 6<sup>th</sup> November 2014 – this to include requests by any member of that working party or on behalf of that working party.*

The school’s case is that no member of the working party requested advice from Stone King with regard to Working Party Matters.<sup>14</sup> The school have been asked to re-check their records and the Tribunal has sought to cross reference this response through associated documentation. On a balance of probabilities there is no evidence that any such request was made.

23. Request 4 - *A copy of any advice or correspondence provide by law firm Stone King to the working party established at the Governors’ meeting on 6 November 2014.*

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<sup>13</sup> August 2016 as above

<sup>14</sup> P56 OB

The School's interpretation (as per letter of 20.5.15 p56 OB) interprets that request as "no request was made to Stone King by the Working Party<sup>15</sup>". Our view is that this interpretation of the request is too narrow. This interpretation would be the same as that envisaged in request 3 which is limited to requests by or on behalf of that working party. Request 4 in our judgment would include any pre-existing advice relied upon by the working party that emanated from Stone King and would include any advice that was requested by the School from Stone King that was then provided to the working party. Legal advice from Stone King, received by the working party does not have to be specifically created at the request of the working party.

24. Mr Sheppard's evidence to the Tribunal at the oral hearing was that whilst there may have been continuing discussions between lawyers and the School during the period of the working party none of it was given to the working party. This supported the more general view of the request provided by the School that no information was provided to the working party by Stone King.<sup>16</sup> The Tribunal notes that the following references to legal advice from Stone King are inconsistent with the School's evidence and the Tribunal's construction of the request namely:

- i) There is reference in the working party report to: The working party received advice from Buzzacott [chartered accountants] and Stone King. P143 OB
- ii) P 136 OB referring to sources for HR Employment and operational programme: "*The Governing Board have a developed relationship with Stone King Solicitors who specialise in the charity and education setting.*"
- iii) The essence of the structure is that suggested by Stone King p118 OB
- iv) "*However, the most significant risk arises from the PFI contracts. Advice from Stone King is that they are particularly complex and that it would take some months for any transfer to the board of governors to be completed*" p145 OB

25. The Tribunal adjourned the case for the School to make specific enquiries as to the source of these legal references and to cross check that with billing and file names as detailed in the closed material. Their open response as set out in their letter of 9<sup>th</sup> January 2017 has been:

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<sup>15</sup> The letter to the Commissioner of 1.9.15 specifies that they were considering "requests made for advice to the working party established on the 6 November 2014 either by individual members of the committee or on behalf of the working party".

<sup>16</sup> P109 OB

*“The 2nd respondent wishes to be clear that with the exception of iii) which refers to a paper provided to the Governing Board which has been cited ‘in essence’ that there was no other advice obtained from the solicitors Stone King provided to the working party.*

*The 2nd respondent does not believe that that these generalised references are inconsistent with the position that no further legal advice was passed to the working party. There is no record of any further material being requested by the 2nd respondent and passed to the working party.”*

26. The Tribunal has to be satisfied on a balance of probabilities that further information is held. In relation to the Tribunal’s specific enquiries the dates and topics either indicate that the work concerned was out of the scope of the Working party or its evidence is that the school holds no evidence that any work was copied to the working party. The Tribunal has found no evidence beyond the assertions in the working party report of the involvement of Stone King, that any additional legal advice was passed to the working party.
27. We do not agree that e.g item iv) is a “generalised reference” as this is reference to a specific piece of advice, however, we have to look at whether the information was held in recorded form at the relevant date. It is apparent from the evidence of the meeting with Stone King prior to the Governors’ meeting that advice does on occasion take place in meetings, this remark would be consistent with recall of previous oral advice which is not recorded elsewhere. Whilst it is arguable that the extent to which the working party report was informed by legal advice has been overstated, that does not alter the evidence which on balance does not satisfy us that additional information is held.
28. Request 5 - *A copy of the notice and any attached or connected correspondence (agenda, reports etc.) calling the extra Governors’ meeting of 6 November 2014. These are referred to in the minutes of that meeting under section 1.4 as: “Governance proposal papers that had been circulated and tabled”.*

Mr Wheal has provided a copy of a document that he has received, the Tribunal is satisfied that this document was attached to the agenda calling the extra Governors' meeting of 6<sup>th</sup> November 2014 and should have been provided in response to this element of the request.

Legal Professional Privilege<sup>17</sup>

29. s42 FOIA provides:

*(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.*

30. The legal advice in this case is advice privilege. There is no dispute that to fall within the exemption the communication must be confidential, made between a client and professional legal advisor acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.

31. Privilege covers the entirety of the communication. It is not just the final answer to a request for advice. It includes the request for advice, any associated confirmation or clarifications of the request as well as the final advice. Amendments to a draft document which reflect and demonstrate legal advice would be capable of falling within this category. Similarly, the information that is provided by way of background even if not itself privileged can be included within this exemption because it demonstrates the topic upon which advice has been sought and so the fact that the document has been provided to lawyers by a client would be privileged however, that does not mean that the document is not disclosable in other circumstances. For example; Minutes of a local authority committee meeting that would ordinarily be published, cannot be withheld under legal professional privilege just because they have been submitted by way of background information to lawyers who are advising on the issues raised at that meeting. However, the fact that they were included in the documents attached to a request for legal advice or were commented upon or appended to the legal advice is capable of being withheld under LPP.

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<sup>17</sup> The Tribunal's discussion of the general principles of LPP should not be taken as an indication of the contents of the withheld information in this case which is referred to in more detail in the closed annex to this decision.

Whether the Exemption is engaged

32. The Tribunal has to look at the status of the privileged material at the relevant date<sup>18</sup> in particular whether privilege has been waived or the information is no longer confidential. Although the fact of legal advice being taken prior to the Governors' meeting on 6<sup>th</sup> November was in the public domain along with the general topic as set out in the minutes and there are some general references to legal advice<sup>19</sup> in the working party reports (including some detail at p 118 OB) we have had regard to the legal advice itself and are satisfied that privilege had not been waived and the legal advice was not in the public domain. The legal advice was not in general circulation and only provided to the Governors in connection with their official duties. The "Code of Conduct for Members of the Board of Governors" is such that we accept that they were not entitled to disclose this further and the information was confidential at the relevant date<sup>20</sup>.
33. Mr Wheal argued that the legal professional privilege could not be maintained in legal proceedings. As these arguments were fresh at the hearing, the ICO helpfully provided written submissions at the invitation of the Tribunal dated 25<sup>th</sup> July. The other parties had the opportunity to respond in writing and Mr Wheal responded on 29<sup>th</sup> July 2016:
34. Mr Wheal's arguments dealt with the hypothetical situation whereby the school chose to sue Mr Wheal for libel if he suggested that the school had not considered alternative options in their legal advice. We agree with Commissioner that it is unlikely that it would constitute defamation. s1(1) Defamation Act 2013 provides that "*a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant*". The schools' case is that regardless of any legal advice they can be demonstrated to have considered other options as set out in the sources relied upon in the working party papers.
35. If Mr Wheal's defence relied upon substantial truth (s2(1) Defamation Act) and he asserted that this was evidenced in the legal papers we agree with the Commissioner that this could be dealt with either by allowing the School to elect to waive privilege or

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<sup>18</sup> APPGER v ICO and Foreign and Commonwealth Office (UKUT 0377 (ACC), 2 July 2015) the relevant date is at or around the time that the request was considered by the public authority.

<sup>19</sup> See paragraph 24 above

<sup>20</sup> As per redacted open submissions of August 2016 served pursuant to rule 14 ruling of December 2017

by striking out the claim as the lacuna in the evidence which was in the hands of the Plaintiff to the detriment of the Defendant would make a fair trial impossible.

36. We note the extremely artificial nature of the analysis of a hypothetical case for a Prosecution for misconduct in public office whereby the conduct complained of must be:

*“a serious departure from proper standards before the criminal offence is committed; and a departure not merely negligent but amounting to an affront to the standing of the public office held...A mistake even a serious one, will not suffice<sup>21</sup>”.*

37. In the absence of evidence that the legal advice was part of a crime or fraud or sought to give legal advice on how to facilitate the commission of a crime or a fraud<sup>22</sup>, we are not satisfied that the Court could require privilege to be waived. We have had regard to the closed material in reaching this conclusion and also repeat our observations that the quality and scope of legal advice is not the only factor in determining whether the school can be demonstrated to have considered other options.

38. Having had regard to our analysis above we are satisfied that s42 is engaged in relation to the disputed information.

Public interest.

39. Having determined that the exemption is engaged the Tribunal goes on to consider the balance of public interest as provided for in s2(2) (b) FOIA namely whether:

*“in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”*

40. Mr Wheal argued that public interest favours disclosure on the grounds of:

- a) Transparency - disclosure would show whether the Governors' told the truth about the options explored.
- b) The School's management had since been criticized by Ofsted (for 2 out of 3 schools) so the public interest in probity of governance was even more important.
- c) The issue was no longer live now that the order had been withdrawn.
- d) the legal advice was sought on behalf of and paid for by the taxpayer and should be regarded as owned by the taxpayer, not the governing body for the time being running the

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<sup>21</sup> Attorney General's Reference No.3 of 2003 [2005] QB 73

<sup>22</sup> R v Cox and Railton 1884 14 QBD 153

school. It should stay with the school as the form of governance changes from time to time. He describes himself as asking to see something that he as a taxpayer pays for and owns and argues that preventing access to the advice is an injustice no English Court could contemplate

41. We accept that there is a public interest in transparency and knowing whether the school had fully investigated all alternatives before deciding on the chosen model. The Appellant argues that the advice would allay fears that this was not the case as the advice would show the pros and cons of all options. He argues that if the original legal advice included a thorough investigation of all the options, including the two alternatives outlined in the working party's report, it might be reasonable to conclude the investigation had been fair and impartial. If, however, the original legal advice only concerned becoming a MAT then no legal advice was sought on any of the options dismissed by the working party. This would be evidence that the working party had not seriously considered the alternatives and had not put them under the same level of scrutiny.<sup>23</sup>
42. The Tribunal has had regard to the narrow ambit of the request which is confined to a particular set of legal advice and makes the observation that the Appellant's arguments necessarily speculate as to the advice sought. The School's case is that disclosure of the legal advice would not alter the position namely that the working party did consider alternative governance options. They argue that the extent to which this was considered is demonstrated from "*all the advice and research undertaken and received by the Governing Body from whatever source*"<sup>24</sup>.
43. The Tribunal has considered whether the legal advice contradicts the school's official position (rather than confirming it or not advancing information on that point). Whilst it is striking that the impression given in the report is that the working party's views have been informed by legal advice in relation to specified aspects, the School has now confirmed that this is not the case and legal input was limited to the legal advice before the Governors' meeting of 6<sup>th</sup> November<sup>25</sup>. The public are now in a position to hold them to account in this regard and there is no need for the substance of the legal advice to be disclosed in order to take this argument forward.

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<sup>23</sup> P25

<sup>24</sup> P33 OB

<sup>25</sup> Which is referenced at p 118 of the OB

44. The Tribunal was not impressed by the School's handling of the information request, in particular the failure to identify material in scope, however, we repeat our findings relating to the evidence in the public domain showing the scrutiny and consideration that was given to alternative options. We are satisfied that these arguments can be raised without disclosure of the legal advice and that this does not add significant weight to the public interest in disclosure.
45. We accept that the issue was live at the date of the request as although the Order was withdrawn it related to an ongoing process which was not yet concluded. Disclosure would undermine the willingness and ability to obtain legal advice and might prejudice its conduct of the process. The argument that legal advice to a public body is owned by and should therefore be seen on request by concerned taxpayers is not compatible with the approach of FOIA to Legal Professional Privilege and would undermine its purpose, namely the ability of public authorities to obtain frank legal advice.
46. In favour of withholding the information we accept that there is a strong public interest inherent in the importance of safeguarding the confidentiality of communications between a lawyer and client. Full and frank disclosure is necessary to ensure the best possible advice is given and this is in the public interest and fundamental to the administration of justice<sup>26</sup>. We have had regard to *DBERR v O'Brien* EWHC 164 QB and acknowledge that whilst there is a strong inbuilt public interest which is a weighty factor in favour of withholding information it is not an absolute exemption and can be outweighed by factors favouring disclosure however, as set out above we are satisfied that these are not strong on the facts of this case.
47. It is argued that the public interest is already satisfied by the extensive information already disclosed. The school provided the "Multi Academy Trust Table of Events and Publication Schedule in Consultation and Pre Consultation"<sup>27</sup> and relied upon in particular the publication of:
- The report of the Governors' Working Party into Status and Governance (including four studies on: legal structures and governance, finance, HR employment and operational programme curriculum and community relations).
  - The report and recommendation to the Governors by the Working party,

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<sup>26</sup> R(Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax [2003]1AC 563 at 7

<sup>27</sup> Pursuant to the School's submissions of 9.9.16



- The Report of the Academies Commission 2013 (an independent review of Governance status),
- A pre-consultation message from Governors,
- A frequently asked questions document,
- Minutes of all Governing Board meetings.

We have had regard to the information already in the public domain and the legal advice and are satisfied that the public interest favours withholding the information.

#### Conclusion

48. For the reasons set out above:

- i) We allow the appeal in part as:
  - a) We are satisfied that further information was held that was in scope and was not disclosed to the Commissioner, this now forms part of the closed bundle.
  - b) The document attached to Mr Wheal's email of 29.7.16 fell within the scope of request 5 and should have been disclosed to Mr Wheal. He now has a copy and we do not therefore require any further steps to be taken.
- ii) We refuse the appeal in relation to the withheld material itemised in the closed schedule, as we are satisfied that s42 FOIA is engaged and the public interest favours withholding the information.

49. This decision is unanimous.

Judge Fiona Henderson

Judge of the First-tier Tribunal

Date: 22nd February 2017

Date Promulgated: 22<sup>nd</sup> February 2017