First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision Notice FS50661730

Appeal Reference: EA/2017/0169

Decided without a hearing
On 11 June 2018

Before

CHRIS HUGHES

DAVID WILKINSON & ANDREW WHETNALL

Between

BUCKINGHAMSHIRE GRAMMAR SCHOOLS

Appellant

and

INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

1. The appeal is dismissed.

Introduction

2. On 6 November 2016 the Buckinghamshire Grammar Schools (TBGS – a company set up by the Buckinghamshire Grammar Schools to administer 11+ testing in the County) received a request for information from Mr Skipper:-

"I would be grateful if you could supply minutes of TBGS meetings from 2013 onwards."

3. TBGS replied providing the requested information on 5 December 2016 having made certain redactions to the information relying on exemptions to disclosure contained in sections 36, 41 and 43 FOIA. TBGS maintained this position on review. Mr Skipper complained to the Information Commissioner (IC) who investigated. During the course of the investigation TBGS also relied on the exemption in section 42 and following consideration released further information to Mr Skipper.

4. The IC analysed the material and considered the arguments of TBGS. With respect to material for which TBGS relied on s41(1) (information obtained in confidence) the IC upheld the application of the exemption to some of the material and directed the disclosure of other material. She did not find it necessary to consider whether the further exemptions claimed for this material, s43(2) and s42 were established.

5. The IC considered the claims for exemption under s36(2)(c) (prejudice to the conduct of public affairs) with respect to certain material and concluded that the material should be disclosed.

6. Mr Skipper did not challenge the findings of the IC and has taken no part in the proceedings before this tribunal. TBGS accepted the decisions of the IC with respect to the application of s41 but has appealed against the determination with respect to s36.

7. The material in dispute in these proceedings was described by TBGS in the decision notice (paragraph 18):-

   A substantial amount of meeting time is given over to discussion of the test, how it is constructed and the statistics and methodology used to analyse test data and produce results. Section 36(2)(c) has been applied where the information details the methodology of setting the secondary transfer test (STT) qualification mark. [TBGS] said that this information is highly technical and open to misinterpretation by non-specialists and is also subject to change on an annual basis. Additionally, the clarity and depth of the information as presented in the minutes is insufficient for a third party to have a fully rounded understanding of the information. Based on previous and recent experience it is the qualified person's opinion that if this information was released it would be used negatively to undermine the test in Buckinghamshire. If this happened it would cause significant distress and concern to children and their parents."

8. The IC considered the opinion of the qualified person reasonable and concluded that the exemption was engaged. In weighing the competing public interests between upholding the exemption and disclosing the information she recognised the public interest in transparency with respect to public money

and that the STT has a significant impact on the lives of many. She noted that TBGS in seeking not to disclose was concerned that disclosure could interfere with the integrity of the test and the information disclosed could, without technical understanding be misunderstood leading to anxiety among parents and children.

9. The withheld information relates to the methodology behind setting the STT qualification mark – the pass/fail mark for the 11+. The IC recognised that the arguments against disclosure were strongest where the information was still relied upon:-

   "In this case the redacted information dates back to late 2013/early 2014 and whilst the Commissioner would not conclude that the methodology has absolutely no bearing upon discussions going forward to 2016. TBGS has said itself that the methodology is subject to annual change….that is not to say that it wouldn't give some form of indication as to how the methodology has worked previously and therefore some of this may be relevant in the future but as the impact is less direct given the lapse of time, the weight given to this public interest argument is reduced for this reason."

10. In considering the question of anxiety the IC:-

    "*does not consider the information so complex that the public would have no comprehension of its meaning without technical expertise. Furthermore TBGS is able to provide any further explanation it deems appropriate to aid in understanding and reduce misinterpretation should this information be disclosed."*

11. The IC considered that there was a strong public interest in disclosing the information to promote openness and transparency in the use of public funds and also that disclosing any information which sheds light on the process will be in the public interest in this case, particularly for the local population who may have been involved in the testing process in this area. She recognised some weight in TBGS contentions for non-disclosure but in the light of the age of the information concluded that the public interest required disclosure.

<u>The arguments of TBGS</u>

12. In its appeal TBGS reiterated its view that the information was highly technical, the minutes did not provide a fully rounded explanation of the information they contain and the material would be used to undermine the STT. The experience of TBGS was that campaigning groups (one of which Mr Skipper belonged to) would use the information selectively which could alarm parents. TBGS emphasised the difficulties of providing the information to non-specialists and the problem of accessing relevant targets for the information – parents of primary school children. Release of the information could undermine confidence in the test and lead to children being withdrawn from

the test and so not being able to attend a grammar school. On a proper balance the interest in withholding the information outweighed that in disclosure.

13. In a further document TBGS explained that the underlying methodology did not change from year to year but adjustments were made year to year according to the demographics of the children.

14. TBGS argued that s36(4) should have been applied to the redacted information.

15. In resisting the appeal the ICO maintained her position that the decision notice was correct. She did not consider that the redacted information was so complex as to require technical expertise to understand it. She noted that while TBGS stated that it would not be easy to provide an explanation for non-specialists, it had achieved this in its grounds of Appeal. She could not see why if organisations opposed to the 11+ could use information to influence parents TBGS could not do the same.

16. With respect to the s36(4) point the IC noted the effect of this was, with respect to statistical information to remove the need for a qualifying persons opinion that disclosure would be likely to prejudice the effective conduct of public affairs conduct of public affairs. Since she had concluded that s36(2) was engaged there was no substantive dispute on this point.

Consideration

17. The question for this tribunal is whether the IC's decision is correct in law in the light of the underlying facts, more particularly whether the prejudice to the conduct of public affairs which TBGS apprehended from the disclosure of this statistical information outweighed the public interest in a fuller understanding of the process by which children in Buckinghamshire move from primary to secondary education.

18. The tribunal is satisfied that the parties caused needless confusion for themselves by not considering the application of s36(4) to what they agreed was statistical information. The ICO approach reflects an error of law. It should have been a first step to consider whether or not the requested information was statistical, and if so, there was no basis for seeking the opinion of the qualified person or for accepting that the qualifying person's opinion was engaged in the sense that usually applies under s36. The effect of s36(4) goes beyond saying that the qualifying person's opinion is not necessary: it determines that it cannot be engaged in respect of statistical information. The effect is that the Information Commissioner is able to review a decision not to disclose statistical information as a simple matter of public interest balance, need not look at any additional weight conferred by the opinion, and need not assess whether the qualified person's opinion is

reasonable. Once it is established that the opinion relates to disclosure of statistical information, it can be set aside.

19. The IC states accurately that there was no issue between the parties that the Qualfied Person's Opinion is engaged and was reasonable. Our view is that there should have been: the Information Commissioner should have pointed out that the Opinion cannot stand in relation to statistical information. The Information Commissioner can properly address the matter on the basis of a simple prejudice test. This is what she has done, drawing on the views expressed in the Opinion but reaching a different view on the balance of public interest, as she is entitled to do. It would be pedantic to insist that new submissions should have been required from the public authority, in a form not purporting to offer a Qualified Person's opinion. Noting that the effect of s36(4) is to reduce the test in this case to a simple public interest balance, shorn of any additional weight that a Qualified Person's opinion might have added in other circumstances, we follow the Information Commissioner in relying on the Opinion simply as a statement of the public authority's reasons for non disclosure, and no more than that.

20. The tribunal is unconvinced by the argument as to complexity. The IC is correct to consider that it does not require technical expertise to understand it, any deficit in the explanations within the minutes could be readily rectified. If stakeholders could be influenced by those organisations which TBGS considers are hostile to the 11+ then they are equally accessible to TBGS to provide what it considers to be more balanced explanations should it choose. Furthermore the tribunal can see little substance in the discussion of the extent to which the adjustments are made according to the demographics of the peer group justifying non-disclosure.

21. On the other side of the balance the IC is correct to identify the considerable public interest in understanding how children in Buckinghamshire move into secondary school. A proper understanding of that, which affects so many children and involves the expenditure of the millions of public funding is a matter of substantial local importance.

22. The fear of TBGS that the information could be misinterpreted and therefore should not be released arises, perhaps, from a feeling of being unfairly criticised. However in an open society such criticisms are inevitable where issues of substantial public interest such as the organisation of education are being considered. The purpose of FOIA is to ensure that public bodies put significant information into the public domain so that citizens can understand and comment on policies which affect them. The IC is entirely correct to place substantial weight on this. In the current instance that weight far outweighs any conceivable prejudice envisaged by TBGS. In the words of Pericles, *"Although only a few may originate a policy, we are all able to judge it"*.

23. Although there was an error of law in accepting that the Qualifying Person's Opinion was or could be engaged in respect of statistical information, we find that the reasoning of the IC is essentially correct, and the appeal is dismissed.

Signed Chris Hughes

Judge of the First-tier Tribunal
Date: 17 July 2018

Promulgation date: 18 July 2018