



Case Reference: EA-2023-0079
Neutral Citation Number: [2024] UKFTT 314 (GRC)

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: On the papers
Heard on: 10 April 2024
Date of Decision: 18 April 2024

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER ROSALIND TATAM
TRIBUNAL MEMBER KATE GRIMLEY-EVANS

Between

JAMES HASLAM

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision: The appeal is dismissed.

REASONS

Introduction

1. The appellant initially requested an oral hearing in his notice of appeal. He did not reply to an order dated 12 January 2024 permitting him to confirm that he was content for the appeal to be heard on the papers by 26 January 2024. The oral hearing was listed to take place on 10 April 2024. The clerk was asked to contact

him on the morning of the hearing and the appellant confirmed that he did not intend to attend the hearing 'due to unforeseen work commitments'.

2. In the circumstances it was in the interests of justice to proceed with the appeal in his absence. Given that no parties attended, the matter was determined on the papers.
3. This is an appeal against the Commissioner's decision notice IC-241862-N3M2 of 14 February 2023 which held that Ofsted was entitled to rely on section 33(2) (audit functions) of the Freedom of Information Act 2000 (FOIA).
4. The Commissioner did not require the public authority to take any steps.

The request

5. On 22 December 2022 Mr. Haslam made the following request ('the Request') to Ofsted:

"Under the Freedom of Information Act, I would like to request the following information on behalf of Denton Community College (URN: 135122).

- Evidence Forms and relevant notes completed during the OFSTED inspection [of Denton Community College (URN 135122) on the 14th December 2022 or 15th December 2022]. Either in paper or electronic form.

These records and documents will have been taken by the following Inspectors during the inspection of Denton Community College URN on either 14th December or 15th December: [8 names redacted]."

The response to the request

6. On 9 January 2023 Ofsted responded to the Request. It confirmed that it held information within the terms of the request. Ofsted refused to disclose this information, applying section 33(2) FOIA. It upheld its position on internal review.

The decision notice

7. In a decision notice dated 14 February 2023 the Commissioner decided that Ofsted was entitled to rely on section 33(2) FOIA. The tribunal adopts the Commissioner's summary of his decision notice from paragraph 9 of his response:
 - Ofsted is a public body which has audit functions and has received and gathered information from and about the college which was the subject of the inspection relevant to this FOIA request during the exercise of its functions falling within section 33(1)(b) FOIA (DN11-12);
 - Disclosure of the requested information would be likely to harm and disrupt Ofsted's ability to carry out its inspection functions if the underlying

evidence of this inspection were disclosed prior to publication of the final inspection report (DN13-20);

- After weighing the competing public interest arguments the Commissioner noted that the timing of the request is key to the Commissioner's decision. At the time of the request the inspection report had not been published and given that publication of the inspection report is integral to Ofsted's functions, the Commissioner determined that in this case the public interest favoured maintaining the exemption from disclosure (DN21-25);
- Ofsted was therefore entitled to rely on s.33 FOIA and that the public interest test favoured maintaining the exemption.

Notice of appeal

8. In essence, the grounds of appeal are that the Commissioner was wrong to conclude that the public interest favoured maintaining the exemption.
9. This is based primarily on what Mr Haslam termed a 'suspicion of wrongdoing' as follows:

"The suspicion of wrongdoing relates to a concern that the evidence collated by OFSTED for an inspection is inconsistent. The evidence specifically differs between the two days of an inspection, and this was due to the inspection team being reconstituted part way through the inspection. This means that two different teams were inspecting an establishment, producing two different sets of notes, and possibly two different evidence bases. The interest, therefore, lies in the consistency of the teams as to whether they applied the handbook correctly."

10. Mr Haslam submitted, in relation to the fact that the inspection report had not yet been published at the relevant time, that "OFSTED only provides a factual accuracy check before the complaints process meaning that any suspicion of wrongdoing can not be challenged until after the report is published". Further it is submitted that the inspection report does not allow the public to scrutinise the process followed and there is a public interest in transparency in relation to the evidence base.

The Commissioner's response

11. The Commissioner accepted Ofsted's view that if it were to disclose inspection evidence to the public under FOIA, at the time of the request which was before the publication of the related inspection report and before the outcome of the inspection has been confirmed, it would cause speculation about the outcome of the inspection; this would disrupt Ofsted's audit function. Publication of the inspection report is an integral aspect of Ofsted's audit function and is set out at section 11 of the Education Act 2005.

12. In relation to the public interest the Commissioner submitted that Mr Haslam has not provided any evidence of wrongdoing or basis for his suspicion of such other than noting a change of inspection team. For the Appellant to say there is no avenue of recourse is incorrect. There is a complaints process which is the correct route by which these concerns should be raised.

Legal framework

Section 33

13. Section 33 provides as follows:

Section 33 audit functions

- (1) This section applies to any public authority which has functions in relation to –
 - (a) the audit of the accounts of other public authorities, or
 - (b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.
 - (2) Information held by a public authority to which this section applies is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1)
14. A public authority's "functions" are any power or duty exercisable by it for a specified purpose whether conferred by or under statute, common law or royal prerogative: **Stevenson v Information Commissioner** [2013] UKUT 181 (AAC).
 15. The exemption is prejudice based. 'Would or would be likely to' means that the prejudice is more probable than not or that there is a real and significant risk of prejudice.

The role of the tribunal

16. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Evidence and submissions

17. We read and took account of an open bundle. We were not provided with a copy of the withheld material. In our view it was not necessary to see the withheld material to resolve the issues before us.

Discussion and conclusions

Is the exemption engaged?

18. We accept that Ofsted has functions in relation to the examination of the economy, efficiency and effectiveness with which other public authorities, i.e. schools and colleges, use their resources in discharging their functions.
19. We have considered whether disclosure of the information would be likely to prejudice the exercise of any of Ofsted's functions in relation to the stated matters.
20. The applicable interest within the exemption is ensuring that public authorities can effectively exercise their function of examining the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.
21. The claimed prejudice is as follows:
 - 21.1. If the information was published before the related inspection report it would cause speculation about the outcome of the inspection which would disrupt the relevant function.
 - 21.2. Publication would cause confusion and undermine the authority of the judgments.
 - 21.3. Processes allowing challenge have to be given adequate time and space to ensure that any concerns raised are thoroughly investigated and addressed.
 - 21.4. Making public the underlying evidence from the inspection would be perceived to indicate Ofsted's view of the school, and the information would be scrutinised on that basis.
 - 21.5. Disclosing the requested information to the public prior to Ofsted's publication of the finalised report would result in the public forming their own conclusions from the evidence, attributing meaning to that information which was not intended by the inspectors recording it.
22. We accept that the claimed prejudice relates to the applicable interest. All these matters would, we find, disrupt Ofsted's ability to effectively exercise their audit functions.
23. Although Ofsted has not explained in detail how the functions would be disrupted, the panel considers that there are a number of ways in which this could occur. First, we accept that public commentary and/or speculation about the outcome of the inspection has the potential to influence or deflect to those engaged in drafting the final report because they will be required to put out of their mind that public commentary/speculation. Second, the publication of contemporaneous notes which might contain the initial thoughts of inspectors based purely on observations without having been considered carefully in the round with all the available evidence is likely to undermine the integrity of the process. The evidence

notes are a frank and contemporaneous record, and their usefulness is likely to be undermined if publication is expected. Third, disclosure might affect the way in which schools/colleges behave during inspections if they anticipated that not just the final report but also any evidence notes would be published. This would make the inspections less effective. Fourth, the evidence notes are raw non-contextual data. They do not contain the considered final views of the inspectors. Disclosure carries a risk of damaging the relationship between schools /colleges and Ofsted, which would make inspections less effective. Finally we accept that undermining the integrity of the final report undermines the effective exercise of the relevant functions, which include issuing a final report.

24. We accept that there is a causative link between disclosure and the claimed prejudice and that there is a real and significant risk of prejudice to the relevant functions. As a matter of common sense, we accept that disclosing the evidence forms and notes of the inspectors before the final report has been published would be likely to lead to difficulties identified above, including confusion and speculation and would undermine the authority of the final report. Further, we accept that publication of evidence and notes, before final conclusions have been reached, would be likely to undermine the procedures which are set up to allow challenge by schools and colleges at the appropriate time.
25. For those reasons we conclude that the exemption is engaged.

Public interest balance

26. There is very strong public interest in ensuring that Ofsted can carry out its audit functions effectively, because there is a very strong public interest in ensuring that schools/colleges are using their resources effectively and efficiently. There is a particularly strong public interest in not disclosing the information before the final report is published, for the reasons set out above.
27. We accept that there is, and was at the relevant time in January 2023, a heightened public interest in transparency in relation to the outcomes of and the conduct of inspections by Ofsted given that a coroner has found that the suicide of Ruth Perry was contributed to by an Ofsted inspection carried out in November 2022. However, this must be balanced against the potential risks to the education of students, the reputations of schools/colleges and the reputation/well being of its employees by publishing the initial contemporaneous notes of the inspectors before they have been reflected on and considered in the round, and without any opportunity for correction of or challenge to the evidence notes by those affected.
28. Further we accept that there is a general public interest in transparency and accountability in relation to Ofsted following the correct processes and procedures when carrying out inspections.

29. In our view both these interests could be met to a greater extent by disclosure of evidence once the final report has been published, because the evidence notes would be more useful when seen in the context of the final conclusions.
30. In terms of the specific matters relied on by the appellant, we are not persuaded that they add anything of significance to the public interest in disclosure at the time of the response to the request. Apart from a complaint that there was a change in the inspection team, the allegations of wrongdoing made in the grounds of appeal are purely speculative, and no basis for those suspicions has been provided. In our view there is no plausible suspicion of wrongdoing.
31. For example, there is no basis for the appellant's concern that the evidence was inconsistent, or that there were two different evidence bases. There is no basis to suggest that the work of the inspectors was not based on the consistent and correct application of the inspection handbook, or that the evidence was not used in a way which reflects the procedures and protocols of the inspection handbook. There is nothing to support his speculation that there might be 'selective or confirmation bias'.
32. We accept, on the basis of the notice of appeal, that the inspection team was changed part way through the inspection. We do not know whether there is provision for this to happen within Ofsted's rules and procedures, although we assume that there is. In any event, even if this is a procedural irregularity, this is something that the appellant and the college in question, are already aware of and are able to raise via the normal complaint processes. The withheld information does not assist with this issue.
33. For all those reasons, whilst we accept that there is some public interest in disclosure, we conclude that it is outweighed by the public interest in maintaining the exemption. We find accordingly that the exemption in section 33(2) applies and the appeal is dismissed.

Signed Sophie Buckley

Date: 17 April 2024

Judge of the First-tier Tribunal