



Appeal number: EA/2017/0002

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

**DURAND ACADEMY TRUST
DURAND EDUCATION TRUST**

Appellants

- and -

THE INFORMATION COMMISSIONER

Respondent

**TRIBUNAL: JUDGE ALISON MCKENNA
Ms ALISON LOWTON
Mr DAVID WILKINSON**

Heard in public at Field House London on 26 April 2017

**Gerard Clarke, counsel, appeared for the Appellants
The Respondent did not appear**

DECISION

1. The appeal is dismissed.

REASONS

Background to Appeal

2. The Appellants made a request to The Education Funding Agency (“EFA”) on 17 December 2015 for information relating to correspondence between the EFA and the Charity Commission. The EFA disclosed some of the requested information, confirmed that it did not hold information relating to one part of the request and refused to disclose the remainder of the information in reliance upon sections 36 (prejudice to effective conduct of public affairs), 40 (2) (personal data), 41 (1) (information provided in confidence) and 42 (1) (information subject to legal professional privilege) of the Freedom of Information Act 2000 (“FOIA”).

3. The Respondent issued Decision Notice FS50626959 on 6 December 2016, upholding EFA’s decision that sections 36 and 42 (1) applied to the withheld information. The Respondent required no steps to be taken by EFA.

Appeal to the Tribunal

4. The Appellant’s Notice of Appeal dated 5 January 2017 challenged the Decision Notice on grounds that: (i) the Decision Notice had erroneously named the legal representatives rather than their clients as the complainant; (ii) the engagement of s. 36 FOIA was disputed in circumstances where the requested information was the minutes of a meeting at which the complainants had been present; (iii) the Decision Notice did not specifically consider the application of the claimed exemptions to the requested minutes; (iv) the engagement of s. 42 (1) FOIA was disputed; (v) there is a substantial public interest in disclosure of the minutes of the meeting of 8 December 2014. The Tribunal gave the Appellants permission to appeal out of time.

5. The Respondent’s Response dated 17 February 2017 maintained her analysis as set out in the Decision Notice. She notes that the Charity Commission had opened a statutory inquiry into Durant Education Trust in February 2015 and that the report of that inquiry is now in the public domain, having been published in October 2016. EFA also had a regulatory role in relation to the Appellants so the Charity Commission and EFA had had exchanged information pursuant to a Memorandum of Understanding between them. It was submitted that section 36 FOIA was engaged in these circumstances (a Qualified Person’s opinion having been obtained) and that the public interest favoured maintaining the exemption in order to encourage open information sharing between regulators. It noted that a substantial amount of information about the issues of concern was already in the public domain at the date of the request, following the publication of a National Audit Office Report and proceedings before the Select Committee of the House of Commons on Public Accounts.

6. With regard to the requested Minutes of the meeting on 8 December 2014, it is submitted that the information held consisted of the note taken by one official which had not been circulated for agreement. The contents of that note may or may not be an accurate reflection of what was said at the meeting.

7. The Appellants' Reply dated 10 March 2017 confirmed that the Appellants did not seek disclosure of any information subject to legal professional privilege and that it was also accepted that s. 36 FOIA was engaged, but that the public interest favoured disclosure of the minutes of the meeting on 8 December 2014.

8. The Respondent notified the Tribunal that she would not be represented at the hearing but relied on her Response. Mr Clarke appeared for the Appellants and we were grateful to him for his written skeleton argument and oral submissions.

9. By the time of the hearing, there was only one issue in dispute, which was the Appellants' request for "*b) Minutes of meetings held with DET, [name redacted] as legal advisers, Lord Nash and various EFA officials held on 8 December 2014*".

10. The Tribunal considered an agreed Open Bundle of evidence comprising some 130 pages. We were also provided with a Closed Bundle of 120 pages, containing the withheld information. The entire hearing took place in open session.

The Law

11. A public authority is under a duty to comply with s. 1(1) (a) of FOIA, which provides that a person making a request for information is entitled to be informed in writing by the public authority whether it holds information within the scope of the request. S. 84 of FOIA defines information as "information recorded in any form". There is no requirement for a public authority to take steps to record information if none is held at the time of the request.

12. The duty of a public authority to disclose information which it holds is set out in s.1 (1) (b) FOIA. The exemptions to this duty are referred to in section 2 (2) as follows:

"In respect of any information which is exempt information by virtue of any provision of Part II, section 1 (1) (b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

13. The categories of exemption relied upon under FOIA in this case were s. 36 (prejudice to effective conduct of public affairs), 40 (2) (personal data), 41 (1) (information provided in confidence) and 42 (1) (information subject to legal professional privilege). S. 40 (2), where engaged, provides an absolute exemption falling under s. 2 (2) (a). The other exemptions relied on here are so-called qualified

exemptions giving rise to the public interest balancing exercise required by s. 2 (2) (b).

14. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

“If on an appeal under section 57 the Tribunal considers -

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

15. We note that the burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellants.

Conclusion

16. As noted above, the only issue that the Appellants asked the Tribunal to decide was in relation to the requested minutes of the meeting on 8 December 2014. On the assumption that the Decision Notice had decided that s. 36 FOIA was engaged by those minutes and that the Information Commissioner had concluded that the balance of public interest favoured maintaining that exemption, the Appellants asked us to find that the Decision Notice was erroneous and asked the Tribunal to order disclosure of the minutes.

17. It seemed to us that the parties have been at crossed purposes for much of this case. EFA’s position was that it did not hold minutes of the meeting because none had been created. This position was not initially communicated to the Appellants, as EFA’s first response to the request on 3 February 2016 (page 51 Open Bundle) was that it held the requested information. On internal review (page 57 Open Bundle) and in correspondence with the Information Commissioner (page 87 Open Bundle) EFA stated that no minutes had been created. The submission to the Minister for the s. 36 opinion (disclosed prior to the hearing) refers to the informal notes being withheld under s. 36 (2) (b) (i) and (ii) FOIA, and states that there were no formally agreed minutes. The internal review letter to the Appellants stated that the personal record

taken by the official at the meeting had been correctly withheld from disclosure¹, but that statement was made in response to an assertion made in a letter dated 15 February 2016 from the Appellants to the effect that the hand-written notes were within the scope of the original request.

18. The Appellants did not accept EFA's statement that the requested information (the minutes of the meeting) was not held. They made this clear in their complaint to the Information Commissioner (page 70 Open Bundle). It is unfortunate in these circumstances that the only reference to that issue in the Decision Notice is at paragraph 1, where it is said that "*The EFA...confirmed that it did not hold information relating to one part of the request...*". There is no finding in the Decision Notice as to whether the scope of the original request included the hand-written notes, or whether the request was for a set of formal minutes only. There is also no finding that, if the scope of the request was for formal minutes only, the information requested "was not held" by EFA.

19. There is also no clear application in the Decision Notice of the s. 36 FOIA criteria to the requested minutes of the meeting of 8 December 2014. It would be surprising if there were, given that the Information Commissioner had been told by EFA that such a document was not held and had apparently accepted EFA's statement to that effect. As the dispute about the scope of the request had not been addressed, the Decision Notice also failed to consider the exemption relied on by EFA in relation to the hand-written notes.

20. The Appellants maintain that minutes *were* taken of the meeting on 8 December 2014. They point to a number of factors which support their view: the terms of an agenda for the meeting, also that at the meeting minutes were verbally promised to them, also that they saw notes being taken by an official, and finally that it is in their submission more likely than not that a formal record of the meeting was made and kept. Whilst the nature of the dispute on this issue was made clear for the Tribunal, it is less clear that it was articulated for, and understood by, the Information Commissioner.

21. Mr Clarke recognised that his position at the hearing owed something to Lewis Carroll. He was asking us to dis-apply an exemption to a document (the formal minutes) which the evidence before us suggested did not exist. Yet, as the Information Commissioner's Decision Notice had not made a formal finding of fact on the question of whether formal minutes of the meeting of 8 December 2014 were held by EFA or not, Mr Clarke was unable to challenge the Decision Notice in that regard by asking us to find on the balance of probabilities that minutes were held. He submitted that the hand-written notes taken by an official at the meeting were within the scope of the Appellants' original information request. We note that EFA internally appears to have regarded the information request as having been clarified by the Appellants to include both a request for the formal minutes and the hand-written notes (this was the approach taken on internal review and in the submission to

¹ Nevertheless, the "personal note" taken at the meeting was subsequently disclosed to the Chair of DAT under cover of a letter dated 22 March 2017.

the Minister) and that EFA had apparently applied a s. 36 exemption to the hand-written notes. However, the Decision Notice is silent on the issue of the scope of this part of the request notwithstanding the existence of a dispute between the parties on that issue.

22. We doubt that a request for the minutes of a meeting would ordinarily be understood by a public authority to include the hand-written notes on which a formal minute would be based. We doubt that the Appellants' comments on that issue at internal review stage were effective to widen the scope of the original request. The Decision Notice is silent as to whether the Information Commissioner took the view that the scope of the request had been clarified in this respect and, if so, whether and why she took the view that the hand-written notes were exempt from disclosure. We note that it would be open to the Appellants even now to make a clearly-worded request for formal minutes of the meeting of 8 December 2014 in order to clarify EFA's and, if necessary, the Information Commissioner's position.

23. In all the circumstances, and whilst we regard the Decision Notice as unsatisfactory in a number of respects, we have concluded that we should dismiss this appeal. There is no challenge to the majority of the Decision Notice and we are not satisfied on the balance of probabilities that the Decision Notice is erroneous in the conclusions it does reach. To the extent that it fails to deal with some of the issues put before us at the hearing, we are not satisfied that they were clearly articulated by the parties in advance of the Decision Notice. Accordingly, the Decision Notice stands.

24. Finally, we were surprised that, in circumstances of a request for information held in connection with a Charity Commission inquiry, s. 32 (2) FOIA and the Supreme Court's approach to such information in *Kennedy v The Charity Commission* [2014] UKSC 20 was not apparently considered by anyone involved in this case.

(Signed)

ALISON MCKENNA

DATE: 23 May 2017

PRINCIPAL JUDGE