



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

Appeal Reference: EA/2019/0009

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50724017

Dated: 18 December 2018

Date of Hearing: 11 September 2019

**Before
JUDGE ROBERT GOOD**

**TRIBUNAL MEMBER(S)
MARION SAUNDERS AND PIETER DE WAAL**

Between

CLARE MCARTHUR

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

Subject Matter:

Freedom of Information Act 2000 (FOIA),

S 36(2) (Conduct of Public Affairs), S43(2) (Commercial Interests), S40(2) (Personal Information)

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal dismisses the appeal.

REASONS FOR DECISION

Factual background

1. The appellant, Ms Clare McArthur has concerns about the closure of Woodlands Academy.
2. Ms McArthur initially made a request for information from the Regional Schools Commissioner West Midlands (RSCWM) in March 2016. In the absence of any response she made a request under FOIA on 6 April 2016 for the following information: (p65)

“What applications in respect of Woodlands Academy have been made to your board?

What were your decisions regarding these applications?

What were the reasons for any decisions made?”

3. There was no response to this request. Ms McArthur then made a formal complaint about the lack of response. There was no response to this complaint. On 14 November 2016, Ms McArthur wrote to the DfE repeating the FOIA request above and registering a complaint about the failure of the RSCWM to respond to her request.
4. There was then a response and some disclosure of documents. Following further complaints about the way the request had been mishandled, the DfE acknowledged failings and agreed to review the requests and stated

that it would provide in one place the information which could, in its view, be shared.

5. Some information was then provided on 15 May 2017 but with some of the requested information withheld under S36, S40 and S43. There was then further correspondence and further disclosure. An internal review took place on 6 October 2017 which provided further disclosure of requested information. Information was still withheld under FOIA provisions as set out above.
6. Ms McArthur first contacted the Information Commissioner (IC) on 2 February 2018 to complain about the way her request had been dealt with. By this stage the DfE's view was that it had now provided the previously withheld information. However, presumably because of the way in which the request was handled, the IC decided to agree to Ms McArthur's request that she investigate whether the exemptions applied at the date the request was dealt with (May 2017).
7. The IC's decision of 18 December 2018 upheld the decision to withhold the information in May 2017. However, the IC made recommendations to the DfE with a view to improving the handling of FOIA requests.
8. Ms McArthur appealed to this Tribunal on 11 January 2019.
9. In her grounds of appeal, Ms McArthur states that she does not accept that the closure of Woodlands Academy should have been viewed as a live and contentious issue in May 2017, justifying the withholding of information, because the decision to close the school had been made in May 2016 and it had closed its doors to pupils in July 2016. Staff were made redundant at the same time.

10. Ms McArthur is also unhappy with the investigation. She feels it should have been wider and looked more closely into the failures of both the RSCWM and the DfE in dealing with her requests. She cites one example when she was told in December 2016 that ministerial documents were not subject to FOIA. When she then asked to be provided with the Section of the Act which sets this out, it was acknowledged this was incorrect advice.
11. Ms McArthur has been advised by the Ombudsman that the IC and this Tribunal is the right place to bring her complaint. In her view the IC investigation has been narrow in focus and the quality of the information provided in some of the documents is poor and inaccurate.
12. It is the view of the IC that she is only able to consider the request for information and the disclosure of that information. She is not concerned with the content, consistency or quality of the information disclosed.

The Hearing

13. All the parties requested that this appeal be decided by way of a paper determination. The Tribunal considered that this was appropriate because of the wishes of the parties and the fact that Ms McArthur is not seeking further disclosure.
14. The appeal papers run to 343 pages.

Request, decision notice and appeal

15. Ms McArthur made a request for information as set out in paragraph 2 above. She wrote in March 2016. The first response (sent to the wrong email address and so not received) was not sent until December 2016. The response was from the DfE. The delay is of concern. In addition, the reply

was ineffective because it was sent to an incorrect email address in error. The response stated that 'ministerial documents' were exempt under FOIA. The DfE appeared to be both ignorant and dismissive of its legal responsibilities. It supports Ms McArthur's view that there is inadequate scrutiny and accountability of school governance.

16. In May 2017, over a year after the request, the DfE provided some of the information requested but stated that the rest was exempt under Section 36, Section 40 and Section 43. There was then an internal review which provided some further information.

17. By the time the IC had investigated and decided, the requested information had been disclosed. The IC decided that the DfE was correct, in May 2017, that the information withheld was exempt under Sections 36, 40, and 43. The IC found that the qualified person's opinion was provided on 15 May 2017 and sets out her reasoning for accepting that opinion at paragraphs 27-44. The exemption is a qualified exemption and the IC decided that there was a greater public interest in maintaining the exemption than in disclosure.

18. There is no dispute that personal data has been correctly withheld under Section 40.

19. Some of the information requested, relating to the costs involved in the closure of Woodlands school, is of a commercial nature. The DfE argued that, in May 2017, the financial situation of the school including the issue of redundancies was a live issue and that if this information was disclosed it would have been likely to affect the commercial interests of the DfE in that it would likely have had an adverse effect on the ability of DfE to negotiate on the future arrangements. The IC accepted this argument and that there

was a greater public interest in maintaining this exemption over disclosing the information.

20. The IC also accepted that a small amount of the information withheld contained advice about the closure of the school. This was a contentious decision and it was important that free and frank advice could be given to the HTB members who were making this decision.
21. Ms McArthur argues that by May 2017 the exemptions should not apply because the decision was taken a year earlier and the exempt information was not 'live' at May 2017.
22. Her other complaints are to do with the way her request was handled and the poor quality of the response from both the RSCWM and the DfE.

Reasons and Conclusions

23. The Tribunal understands why Ms McArthur has pursued this appeal. She is no longer seeking the information which has been disclosed to her. She believes the withheld information should not have been withheld in May 2017. Her complaint was accepted by the IC because of the way her request had been mishandled by the DfE and the RSCWM.
24. The Tribunal has to consider whether the exemptions applied at the time of the request was dealt with. Although the decision to close Woodlands was taken in 2016, it is clear that the consequences of that decision, the transfer of pupils, staff and the financial consequences continued to be sensitive and live issues until at least September 2017.
25. The Tribunal agrees with the IC's assessment that even if the advice given would not have changed it is likely that the way in which it was given

would have become more guarded and circumspect and, as a result, less clear and of value. The importance of having clear advice is significant because of the importance of the decision and the effect of the decisions on the lives of a significant number of pupils, parents and staff.

26. Negotiations were continuing from the date of the decision to close Woodlands up to at least September 2017, with various interim and transitional arrangements. These involved also the financial planning of the closure and transitional arrangements. The Tribunal accept that this information was exempt in May 2017 because of its commercially sensitive nature.

27. The Tribunal has considered the documents in the closed bundle and agrees with the reasoning of the IC that the information was covered by Section 36, Section 40 and Section 43.

28. The Tribunal also considered the public interest test. Ms McArthur is very critical of the consultation process which was undertaken prior to the decision. She argues that there was a lack of transparency and a lack of accountability in the decision making. It is clearly of public interest to understand and see the information used to reach the decision to close Woodlands. However, it is also of public interest that these decisions are properly taken, the consequences worked out and planned for and considered decisions are taken about future and transitional arrangements. The importance of a clear and accountable process of consultation is different from the issue of disclosure of the information which informs and is associated with the planning of such an event. In the Tribunal's view the IC is correct in saying that there is a greater public interest in these processes being carried out properly and carefully with free and frank advice.

29. In the circumstance, the Tribunal unanimously upholds the Commissioner's decision and dismisses the appeal.

Signed

R Good

Judge of the First-tier Tribunal

Date: 2 October 2019