



Case Reference: EA/2021/0316

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard by: CVP

Heard on: 12 May 2022
Decision given on: 10 June 2022

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER SUSAN WOLF
TRIBUNAL MEMBER PIETER DE WAAL

Between

JONATHAN BLOCH

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) DEPARTMENT FOR EDUCATION

Respondents

Representation:

For the Appellant: In person

For the First Respondent: Did not appear

For the Second Respondent: Cecilia Ivimy (Counsel)

Decision: The appeal is dismissed. The Department for Education (DfE) did not hold any information within the scope of the request.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice IC-94195-S5S7 of 29 September 2021 which held that, on the balance of probabilities the DfE held no

information within the scope of the request. The Commissioner found that the DfE had breached s 10 of the Freedom of Information Act 2000 (FOIA).

Factual background to the appeal

2. The appeal relates to the external consultation, if any, carried out by the DfE on two sections of the non-statutory Relationships Sex and Health Education (RSHE) Implementation Guidance published on 24 September 2020 titled 'Plan your Relationships, Sex and Health Education Curriculum' ('the Implementation Guidance'). The Implementation Guidance has no statutory basis. It is designed to provide teachers with further clarity and practical advice. There is no statutory obligation on governing bodies or head teachers to have regard to the Implementation Guidance and it does not set out legal duties with which schools must comply.
3. The two sections of the Implementation Guidance with which this appeal is concerned are headed 'Using external agencies' and 'Choosing resources'.
4. The Implementation Guidance was developed to complement the 'Relationships Education, Relationships and Sex Education (RSE) and Health Education' statutory guidance which was published on 25 June 2019 ('the Statutory Guidance'). The Statutory Guidance was issued under s 80A of the Education Act 2002 and s 403 of the Education Act 1996. Governing bodies and head teachers in maintained, academy trust and independent schools (for relationships and sex education) are required to have regard to the Statutory Guidance.
5. Each guidance had its own separate consultation process. The Statutory Guidance consultation process began in November 2017. As part of this process two versions of draft Statutory Guidance were published on July 2018 and February 2019.
6. In developing the Implementation Guidance the department engaged with a range of external bodies such as schools, unions, subject matter experts, parental communities and groups representing young people. All RSHE early adopter schools and these external bodies were sent a draft of the Implementation Guidance in September 2019 in the form of slides. The same slides were shared with early adopter schools in January 2020 in the form of a newsletter with an audio version attached.
7. The list of schools and a list of RSHE working group members engaged with were provided to Mr. Bloch and the tribunal at the hearing.
8. On 14 May 2020 a new version of the draught Implementation Guidance in the form of a Word document or sent to the external bodies. External consultees were asked the following questions:
 - What were your thoughts on the content?

- Were there any terms or phrases that were unclear?
- Do you have any comments to improve how the content is read/understood in schools?

9. In July ministers received the draft Implementation Guidance.

Requests, Decision Notice and appeal

The Request

10. This appeal concerns the following request made on 1 October 2020:

Which external organisations were consulted in the formulation of the sections “Using external agencies” and “Choosing Resources” in the Guidance published on 24 September 2020 titled “Plan your relationships, sex and health curriculum” and what was the nature of such consultation, when did it take place and how frequently with each external organisation.

The response

11. The DfE responded on 13 November 2020 with a general response, including the following, ‘We developed the guidance over a long period of time and consulted a broad range of organisations when drawing up the Implementation Guidance, both formally and informally.’

12. Mr. Bloch requested an internal review. By email dated 15 January 2021 the DfE stated:

...the sections titled ‘Using External Agencies’ and ‘Choosing Resources’ were added to the final version to further clarify some of the broader factors that schools need to take into account when selecting appropriate RSHE resources, so were not included in the earlier versions of the guidance. Consequently, no information within the scope of your request exists, and therefore the Department holds no information which it could release.

13. Mr. Bloch referred the matter to the Commissioner on 15 March 2021.

The Decision Notice

14. In a decision notice dated 29 September 2021 the Commissioner decided that the DfE held no information within the scope of the request on the balance of probabilities.

15. The complainant had put forward reasonable arguments to suggest that the DfE ought to hold the requested information, but the DfE has stated that it does not hold the requested information, and no persuasive argument had been put forward to undermine that assertion. The Commissioner accepted that the relevant policy team would have known whether the requested information existed and that carrying out further searches was likely to be a fruitless exercise.

16. The Commissioner found that the DfE was in breach of s 10.

Notice of Appeal

17. The Ground of Appeal is, in essence, that the Commissioner was wrong to conclude that the DfE did not hold the requested information.

18. Mr. Bloch makes the following points in particular:

- 18.1. The request was broad in scope. It covered any formal and informal discussions between the DfE and any external organisation about the proposed sections at any time during the preparation of the guidance.
- 18.2. A search of the formal consultation documents should have been carried out. The formal consultation could have involved part of the specified sections. Consultees might have raised some of the issues themselves and suggested that they should be addressed.
- 18.3. The passages in the relevant sections might have previously been included elsewhere in earlier drafts of the guidance.
- 18.4. If the passages were discussed with external organisations before the sections were added to the draft, those consultations would be in scope.
- 18.5. It is not clear why some of the material in the sections would only have been added to the final version. It seems unlikely that the need to quote the statutory requirements would not have been identified earlier.
- 18.6. The Commissioner could have verified that those sections had been added by asking for copies of earlier drafts.
- 18.7. If the sections were added as a result of ministers' instructions, any relevant communications between ministers and external organisations or between ministers' special advisers and external organisations would fall within the scope of the request.

The Commissioner's response

19. The request is clear on its face. The Commissioner does not agree that the request is as broad in scope as the appellant contends. Even if it were, there is no cogent reason to believe that any information within such wider scope is held.

20. The DfE told the Commissioner that:

- 20.1. the relevant sections of the guidance were developed within the DfE without the involvement of external partner organisations,
- 20.2. DfE staff dealing with this policy area had confirmed that this information was not held because these sections were developed internally without external involvement, and

- 20.3. the text of the two sections were not used in the earlier versions of the guidance consulted on.
21. In the light of this and with no cogent basis for disputing its veracity the Commissioner was entitled to reach the conclusions that she did. There was no need for any searches to be conducted, given the specific details provided about the origins of the relevant sections confirmed by those involved in the development of the guidance.
22. The tribunal conducts a full merits review. It can seek further submissions from the DfE. The contention that the Commissioner's investigation was insufficient does not provide a basis to disturb the Commissioner's findings.

The response of the DfE

23. The DfE has carried out further checks. Ministers' offices, special advisers' offices and previous members of the RSHE team have been questioned and asked to conduct key word searches. The results have been sifted and no information in scope of the request has been found.
24. The request is clear. It seeks a list of the external organisations 'consulted in the formulation' of the two sections. It then seeks further information about 'such consultation', namely its nature, date and frequency.
25. Mr. Bloch asserts that the request encompasses:
- 25.1. informal as well as formal consultation with external bodies on the two sections;
 - 25.2. communications with external organisations which informed the proposed content of the two sections, regardless of form (i.e. if it appeared under different headings); and
 - 25.3. consultation between Ministers and external organisations.
26. The DfE has interpreted the request to include each of the matters set out above. It has questioned relevant officials and carried out searches on this basis. These checks are sufficient to establish that no information is held within scope of the request.
27. Whilst the DfE accepts it may be the appellant's genuine belief that there would have been consultation with external organisations on the sections, having regard to what he sees as the significance of their content, that belief is not correct.

Mr. Bloch's reply

28. **Oates v IC and Architects Registration Board** EA/2011/0138 is not binding on the tribunal and in any event the circumstances of that case are not comparable.

29. The Commissioner did not apply the usual factors for determining if information is held. There was a complete absence of a search, instead the DfE relied solely on the recollection of DfE officials. The Commissioner had not tested that recollection by for example asking for drafts of the guidance circulated for consultation. The Commissioner wrongly attributed weight to the fact that the information from the DfE was confirmed by its staff. This is repetition not confirmation.
30. The appellant questions the reliability of the memory of staff, given the 'long period' of consultation, the possibility of changes of personnel and the inclusion of information exchanges.
31. In draft guidance issued for consultation by the DfE in July 2018 and February 2020, one of the sections has the title 'Working with external agencies' and it contains some passages of text that are similar to the final guidance. This undermines DfE's claim that the whole two sections of guidance were entirely new and only added to the final version at a late stage after all consultation had concluded. It also shows that officials' memory is not a reliable guide to the material held.
32. The result of questioning the staff of ministers' offices, special advisers and former members of the RSHE is subject to the same potential errors of memory. Special advisers are likely to have moved on, so may have private office staff.
33. Conclusions about the adequacy of the keyword searches are not possible without knowing the search terms used, which record systems were searched, whether any systems were not searched, whether relevant manual records are also held and whether and how the search process was adapted in response to the findings.

Legal framework

34. Section 1(1) FOIA provides:

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.

35. Information means information recorded in any form (s 84 FOIA).
36. The question of whether information was held at the time of the request is determined on the balance of probabilities.

The role of the tribunal

37. 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 she

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.

Issues

38. The issues for the tribunal to determine are:

- 38.1. What is the scope of the request?
- 38.2. On the balance of probabilities did DfE hold information within the scope of the request?

Evidence and findings of fact

39. The tribunal read and took account of an open bundle of documents. The DfE produced some additional documents for the hearing namely:

- 39.1. A list of schools referred to at para 16 of Matthew Hopkinson’s witness statement
- 39.2. A list of RSHE working group members

40. The tribunal heard evidence from Matthew Hopkinson, Deputy Director for Life Skills at the DfE. He took on the role in July 2021 having worked in various roles in the DfE since 1994.

41. On the basis of Mr. Hopkinson’s evidence and the documents in the bundle we make the following findings of fact on the balance of probabilities.

42. The slides that were shared in September 2019 and in January 2020 do not include the two sections named in the request. However, some of the content of the bullet points on the slide at p 359 of the open bundle headed ‘External organisations or speakers’ is reflected or included in the section headed ‘Using external agencies’.

Draft: Slide - ‘External organisations or speakers’	Final version: ‘Using external agencies’
These can be a powerful and useful way to bring expertise, resources, experience or an impactful personal story to pupils	External agencies (...) can provide speakers, tools and resources to enhance and supplement the curriculum.
Is this person or organisation credible? Review any case study material and look for feedback from others they have worked with	It is important that you review any case study material and look for feedback from others they have worked with.
Be clear what they are going to say or what line they will take - ask to see materials, slides, film clips, scripts etc in advance	You should be clear what they are going to say and what their position on the issues to be discussed are. You should ask to see any

	materials that external agencies may use in advance
Make sure you know the named individuals who will be there, check any need for DBS and that there is an agreed protocol should any safeguarding issue arise, for example a disclosure	Make sure you know the named individuals who will be there, any need for Disclosure and Barring Service (DBS) checks and that there is an agreed protocol should any safeguarding issue arise, for example from a disclosure.
Do a basic online search (as parents may do this) and if it throws up anything you or parents would be concerned about address this beforehand	You should also conduct a basic online search (as parents and carers may do this). It is important that anything you or parents and carers would be concerned about is addressed beforehand.
Check protocols for taking pictures or using any personal data the external speaker may get from the session	Before a session with an external speaker, it is important to check protocols for taking pictures or using any personal data the external speaker may get from the session
Don't be afraid to say no, or in extreme cases stop a session – these are your pupils and you are responsible for what is said to them	Remember teachers should not be afraid to say 'no', or in extreme cases stop a session. These are your pupils and you are responsible for what is said to them.
It's good practice for the teacher to be in the room, so they know what was discussed and can follow up with their pupils. They will also understand what has been discussed if a pupil makes a disclosure later	It is good practice for the teacher to be in the room, so they know what was discussed and can follow up with their pupils. They will also understand what has been discussed if a pupil makes a disclosure later

43. The two sections were added on 13th July 2020 by special advisers as a result of the process of clearing the Implementation Guidance with the Minister. The sections were drafted by the special adviser with responsibility for these areas with the approval of the Minister. The special adviser told Mr. Hopkinson that no external organisation had input into those two sections and they not been prompted by input from any external organisation. It was seen as an opportunity to address an issue which he felt was important. Although we have not heard evidence directly from the special adviser, there is nothing before us to suggest that this is untrue and we accept this evidence on the balance of probabilities.
44. It was not felt necessary to consult outside organisations or to go into further consultation, in part because this was not a formal consultation or statutory guidance.
45. In the course of this appeal officials have manually reviewed all the responses to the questions that consultees were asked about the May 2020 draft of the Implementation Guidance. Officials have also checked any feedback on the slides and the newsletters sent to the DfE by email or recoded in the notes of the

consultation meetings. None of those responses addressed the matters included in the two sections in the final draft, and none the responses contained feedback which informed the two sections as they were published.

46. Certain members of the team that led on the development of the Implementation Guidance, but have moved on from their roles, remain working within the department and were contacted for the purposes of the searches.
47. In December 2021 searches were carried out of emails in individual email accounts, documents saved to individuals' personal folders and documents saved to the DfE's SharePoint system. These systems were searched for information falling within the scope of the request. The date range for searches was July 2020 to 24 September 2020. Officials were asked to carry out searches to identify any formal or informal external consultation relating to either of the relevant sections or the subjects covered by those sections. The keywords suggested for the search were: using external agencies, choosing resources, political impartiality, extreme positions, political stances and capitalism.
48. Current RSHE team members, ministers' offices, special adviser's officers and previous members of the RSHE team were asked to carry out searches.
49. The results were shared with the official leading on the freedom of information response. That official opened each email and document. Nothing was found that fell within the scope of the request.

Mr. Bloch's oral submissions

50. Mr. Bloch submitted that the searches were not adequate. Officials could not have manually examined 23000 responses. There is very little clarity on the extensiveness of the search terms. Given that the DfE argues that these two sections were added on 13 July 2020 by the special adviser, there should have been a more focussed search of the special adviser's office over a much longer period. The subject matter could have come up in the consultation on the Statutory Guidance and then made its way into the Implementation Guidance.

The DfE's oral submissions and skeleton argument

51. The request is clear and the DfE has not tried to take an unduly narrow or technical approach to avoid answering it. It seeks a list of the external organisations 'consulted in the formulation' of the two sections. It then seeks further information about 'such consultation', namely its nature, date and frequency.
52. Some content that was ultimately included in the relevant sections was shared at an early stage in the consultation process in the form of bullet points on one of the slides. The DfE did not consider that that amounted to consultation on the

formulation of the two sections. If they are wrong on that, they have now shared the full list of organisations with whom the slides were shared and explained the process that was gone through.

53. The DfE have not searched through the consultation on the Statutory Guidance. That was an entirely separate process and out of scope of the request which was clearly targeted at the Implementation Guidance.
54. Although the DfE acknowledges that Mr. Bloch believes that the two sections must have been consulted upon and couldn't possibly have been added so late in the day, there is no evidence to support that belief. Mr. Hopkinson has given clear evidence as to how the sections were added. He has spoken to all the relevant people involved. He has spoken to the special adviser who added the sections who confirmed that it was not as a result of any consultation with external organisations or prompted by discussions with external organisations. Mr. Hopkinson has double checked this with the special adviser.
55. This was not a case where the DfE thought it would hold any information because the team understood what the engagement process had been and how the two sections had been added.
56. In addition the DfE has now carried out searches to double check the position. This involved looking at all the responses received. There were not 23,000 responses. The number of responses was relatively limited, and officials have read through all of them. This confirmed what they expected to find: that there was nothing in there which was a prompt for these sections to be included.
57. As a further check keyword searches were carried out over the period over which the sections were drafted. No information was returned that was in scope.

Discussion and conclusions

The scope of the request

58. The terms of the request are:

Which external organisations were consulted in the formulation of the sections "Using external agencies" and "Choosing Resources" in the Guidance published on 24 September 2020 titled "Plan your relationships, sex and health curriculum" and what was the nature of such consultation, when did it take place and how frequently with each external organisation.

59. We find that, objectively construed, this would include formal and informal consultation and consultation between Ministers/special advisers and external organisations.

60. The scope is explicitly limited to consultation in the formulation of the sections. This would not, in our view, cover any consultation which happened to touch on the content which appeared in those sections.
61. On this basis, we find that any consultation that took place on the Statutory Guidance would not amount to consultation in the formulation of those sections in the Implementation Guidance. Accordingly it was not necessary for the DfE to search through the consultation on the Statutory Guidance to see if there was any discussion of the topics that appeared in the two sections of the Implementation Guidance.
62. Further, we find that the fact that there is overlap between some of the content which was ultimately included in the two sections and the content included in slides that were shown to a number of external bodies, does not mean that those bodies were consulted 'in the formulation of' those sections. The notes of those meetings and the responses to those slides did not include any matters relevant to those sections. Further, the May 2020 draft, produced following the consultation on the slides, did not include those two sections. The two sections were only introduced at a late stage in July 2021, and at that stage there were no discussions with external organisations as to the formulation of those two sections.
63. In any event, the DfE has now provided Mr. Bloch with a list of those organisations who were engaged with at that time and explained the process that was undertaken. Mr. Bloch therefore now has the requested information if we are wrong to have concluded that this aspect falls outside the scope of the request.
64. In relation to any other information held in relation to consultation in the formulation of those sections, we accept that it is unlikely that the DfE would hold any information, because those sections were introduced at a late stage after external engagement had been completed.
65. In any event, the DfE has carried out searches and made checks in the course of the appeal. Mr. Hopkinson has spoken to the special adviser who has confirmed that the sections were not prompted by communications with external organisations, nor were external organisations consulted. We have accepted this evidence on the balance of probabilities. Manual checks have been made of all the responses and this would be likely to have produced results if any organisations had been consulted on the formulation of the sections either formally or informally. In addition, keyword searches have been carried out, albeit limited to a period around the time the sections were added.
66. We accept that memories are not perfect, but we find that the special adviser was likely to remember how the sections originated, and he could have said if he did not remember. He did not. Instead he gave positive evidence to Mr. Hopkinson that the sections were not prompted by external discussions. Further, manual searches have also been carried out.

67. We note that (i) it was unlikely that the DfE would have held any information within scope given the way in which these two sections were added, and (ii) that the scope of the request was limited to consultation in the formulation of those sections. If any information in scope had been held, we accept that the searches and checks carried out by the DfE would be likely to have revealed it.

68. On this basis we find on the balance of probabilities that the DfE does not hold any information within the scope of the request and the appeal is dismissed.

Signed Sophie Buckley

Date: 10 June 2022

Judge of the First-tier Tribunal