



NCN: [2023] UKFTT 00311 (GRC)
Case Reference: EA/2021/0368

First-tier Tribunal
General Regulatory Chamber
Information Rights

Determined on the papers

Decision given on: 23 March 2023

Before

**TRIBUNAL JUDGE CL GOODMAN
TRIBUNAL MEMBER MS J MURPHY
TRIBUNAL MEMBER MR P TAYLOR**

Between

MICHELLE CURRIE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

DEPARTMENT FOR EDUCATION

Second Respondent

Decision:

The appeal is allowed in part. Decision Notice IC-76510-R3L8 is not in accordance with the law. The following Decision Notice is substituted by the Tribunal.

Substituted Decision Notice:

The Tribunal finds that, in relation to the request for information made by the Appellant to the Department for Education on 20 July 2020 pursuant to the Freedom of Information Act 2000 (FOIA):

- a. **Section 36(2)(b)(i) and (ii) FOIA are engaged in respect of the information withheld in relation to part A1 and B1 of the Request and the balance of public interest lies in favour of withholding that information. No further steps are required for parts A1 or B1.**
- b. **Section 43(2) FOIA is engaged in respect of the information withheld in relation to parts B2 and D2 of the Request and the balance of public interest lies in favour of maintaining the exemption. No further steps are required for parts B2 or D2.**
- c. **All information requested in relation to parts B9 and E of the Request has now been disclosed in full other than redactions for personal data. No further steps are required for parts B9 and E.**
- d. **The following information must be disclosed to the Appellant in relation to Part D1 of the Request:**
 - **Heading “LA commentary” to the paragraph redacted on page D322**
 - **Heading “Other sponsors who submitted proposals” on page D325**
 - **The words: “Kingsbridge Educational Trust (KET) – Approved sponsor” and “Milton Keynes Education Trust (MKET) – Approved sponsor” in the table on page D325**
- e. **Either section 36(2)(b)(i) and (ii) or section 43(2) is engaged in respect of the remaining information withheld in relation to part D1 of the Request and the balance of public interest lies in favour of maintaining the exemption in each case. No further steps are required in relation to Part D1 other than as set out in paragraph (d) above.**

The Department for Education is ordered to make the information in (d) above available to the Appellant as soon as possible and no later than 20 working days after the date of promulgation of this Decision (ref. EA/2021/0368).

REASONS

Background

1. This appeal concerns a free school presumption competition run by Milton Keynes Council (“the Council”). The free school presumption process is the main route by which local authorities can establish new schools to meet demand for additional places.
2. The Council developed a specification for a new free school at Glebe Farm to open in September 2022 and ran a competition to identify a suitable trust to sponsor the school. The Department for Education (“DfE”) provided support and advice to the Council on the process and applications. Two trusts, Inspiring Futures through

Learning (“IFtL”) and Kingsbridge Educational Trust (“KET”), were selected for interview in January 2020. The Council then proposed its preferred applicant, IFtL, to the Regional Schools Commissioner’s Office for North West London and South Central (RSC), which is part of the DfE. IFtL was approved by the RSC on behalf of the Secretary of State at a Headteacher Board on 4 March 2020.

3. The Appellant is Chief Executive Officer of Milton Keynes Education Trust (MKET). MKET submitted an application for the competition, but was not selected for interview. On 20 July 2020, the Appellant made the following request for information from the DfE under the Freedom of Information Act 2000 (“FOIA”). This request for information is referred to in this Decision as the Request.

“Under the Freedom of Information Act, I should like to request information relating to the free school competition run by Milton Keynes Council for Glebe Farm School.

“In particular:

- A. All internal and external emails, and any other correspondence, related to the free school competition for Glebe Farm School, Milton Keynes, up until the present day
- B. Information sent by MKC to the RSC in support of its preferred Trust, including assessment criteria, weighting of criteria and performance of each application against scoring system
- C. Notes taken, or report made, by the DfE representative at the presentations/interviews for the shortlisted organisations
- D. All the information provided to the Headteacher Board for the meeting held on 4 March 2020 in support of Item 1.2 on the agenda (Whether or not to approve the Local Authority's preferred trust for the Glebe Farm, Milton Keynes, presumption project)
- E. The application form of the successful organisation together with any supporting documentation submitted by this organisation”

[Letters A-E added by the Tribunal for ease of reference.]

4. The Appellant made similar requests for information to the Council and to IFtL and KET.
5. The DfE responded on 11 November 2020. It confirmed that no information was held in relation to part C of the Request, but that information was held in relation to the other parts. It released some information in its entirety and other information with redactions. Some redactions were made for personal data under section 40(2) FOIA. The remaining information was withheld on the basis of the exemptions in section 36(2)(b) and (c) FOIA (prejudice to effective conduct of public affairs) and section 43(2) FOIA (commercial interests). In relation to section 36(2), Baroness Berridge, Parliamentary Under Secretary of State, gave an opinion as Minister of the Crown and “qualified person”.

6. The DfE's response to the Request was upheld on internal review on 8 December 2020. The Appellant complained to the Commissioner and some additional information was then disclosed by the DfE relating to IFtL's partner because it was found to be in the public domain.
7. On 15 November 2021, the Commissioner issued Decision Notice IC-76510-R3L8. The Commissioner did not support the response of the DfE in its entirety and found in particular that the qualified person's opinion was not "reasonable" in some respects. However, the Commissioner concluded that all the information withheld by the DfE was exempt either under section 36(2)(b)(i) and (ii), or section 43(2), and that in each case, the public interest favoured withholding the information.
8. The Appellant appealed on 12 December 2021 on a number of grounds, including that:
 - a. the Commissioner had taken a broad brush approach and failed to identify how each exemption applied to each of the five parts of the Request;
 - b. failed to give due weight to the Appellant's concerns about maladministration by the Council in the free school competition process;
 - c. failed to consider the public interest in open competition and the damage caused by decisions being made in secret, based on "prejudice, factual inaccuracies and personal likes and dislikes";
 - d. failed to take into account that participants in free school competitions were warned that any information they provided might be subject to disclosure under FOIA; and
 - e. some information included in the bids, such as the bidders' published accounts, would be in the public domain.
9. The Appellant outlined in detail her allegations of faults and maladministration in the Glebe Farm process, including alleged inconsistencies in scoring, delays in providing feedback and failure to follow DfE guidance.
10. The DfE was joined as second Respondent to the appeal on 3 February 2022. In its Response dated 19 April 2022, the DfE set out the basis of its reliance on sections 36(2)(b), 36(2)(c) and/or section 43(2) in relation to each item of information withheld and responded briefly to the Appellant's grounds of appeal. The DfE released further information with its Response, in particular IFtL's successful application, on the basis that the balance of public interest had shifted over time.
11. The DfE provided two witness statements from Paul Schofield, Deputy Director and a member of the RSC senior leadership team. Mr Schofield set out the background to the free school presumption process, its involvement in the Glebe Farm process and the DfE's response to the Request.
12. In its Response, the Commissioner relied on its Decision Notice and set out its observations on the grounds of appeal. At page A154, the Commissioner provided a table detailing where each part of the Request was addressed in the Decision Notice and the DfE Response.

13. In Reply, the Appellant emphasised her concerns that officials might have shared factually inaccurate information and personal opinions about MKET which affected its performance in the competition. She wanted to see the applications of other unsuccessful trusts in order to compare their bids with that of IFtL and MKET.
14. All parties consented to this matter being dealt with on the papers. The Tribunal was satisfied that it could properly determine the issues without a hearing and that it was fair and in the interests of justice to do so.
15. In reaching its decision, the Tribunal took into account all the evidence before it. The Tribunal had before it an open bundle of 447 pages and a closed bundle. Our findings were made on the balance of probabilities.

The Law

16. Section 1(1) FOIA provides that:

“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.”

17. Section 2(2) provides that:

“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.”

18. Section 36(2) provides:

“Information to which this section applies is exempt information, if in the reasonable opinion of a qualified person, disclosure of the information under this Act –

...

(b) would or would be likely to, inhibit –

- (i) the free and frank provision of advice, or
- (ii) the free and frank exchange of views for the purposes of deliberation”.

19. Any Minister of the Crown may act as the “qualified person” for section 36(2). The opinion of the “qualified person” must be “both reasonable in substance and reasonably arrived at” *Guardian Newspapers Ltd and Brooke v IC, IT*, 8 January 2007 (EA/2006/0011; 0013), at [64].

20. Section 43(2) provides that:

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”
21. The phrase “commercial interests” has been given a broad meaning, with a Tribunal holding in *Student Loans Company v IC* (IT 17 July 2009 EA/2008/0092) that it would not be appropriate to “tie its meaning directly or indirectly to competitive participation in buying and selling goods or services and to exclude all other possibilities” [42].
22. The exemptions in section 36(2) and 43(2) are not absolute and are therefore subject to the public interest test in section 2(2)(b). Where prejudice would only be “likely to” occur, the weight attached to that prejudice is lower.
23. The Commissioner drew the Tribunal’s attention to two recent First-tier Tribunal cases. Although neither are binding upon this Tribunal, we took these into account.
24. In a decision promulgated on 15 July 2021, *Church v ICO and Hertfordshire County Council* (EA/2020/0187V), a First-tier Tribunal concluded that a Council could not refuse to disclose certain information relating to a free school competition in reliance on section 43(2). The Tribunal found that while the exemption was engaged, it was “only weakly so” and the balance of public interest was “decisively” weighted in favour of disclosure of the applications of both the successful and unsuccessful trusts and the scores of the successful trust. The Tribunal found that the process for selecting a trust to run a school could not be compared to a procurement process to provide services to a public body, and observed that the requested information was “neither numerical nor managerially or financially sophisticated” [paragraph 12].
25. In the second decision promulgated on 9 September 2022 (EA/2020/0350P), a First-tier Tribunal allowed in part another appeal brought by the Appellant in respect of the Glebe Farm process, in relation to her FOIA request to the Council. Some of that information was the same as in this appeal. In contrast to the Tribunal in *Church*, the Tribunal found that section 43(2) did apply to much of the withheld information, including references to the unsuccessful trusts and their applications, and that the public interest balance was in favour of withholding this information.
26. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:
 - “(1) 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.

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

27. The Tribunal stands in the shoes of the Commissioner and takes a fresh decision on the evidence before us. The Tribunal does not undertake a review of the way in which the Commissioner’s decision was made.

Discussion

28. By the time the appeal came before the Tribunal, much of the requested information had been released to the Appellant and was no longer in issue.
29. The DfE maintained that no information was held in relation to part C of the Request. This was not disputed by the Appellant. The Appellant also did not dispute the DfE’s reliance on section 40(2) in respect of the redaction of personal data.
30. We will address the remaining redactions and withheld information in detail below, but first make some general comments with particular reference to the Appellant’s grounds of appeal.

Section 36(2)(b)

31. The Tribunal found that the exemptions in section 36(2)(b)(i) and (ii) were engaged in relation to (1) the DfE’s proposals for specific interview questions to be put to IFtL, (2) the Council’s scoring sheet of the applications, and (3) references to that scoring in papers submitted to the Headteacher Board. In reaching this decision, we noted that the weight attached is lower where disclosure is only “likely to” prejudice.
32. We found that Baroness Berridge was a qualified person for the purposes of section 36(2), and that her opinion that disclosure of this information would be likely to inhibit the free and frank provision of advice and exchange of views for the purposes of deliberation was reasonable. We accepted that if DfE and Council officials thought that their assessment of individual applications and advice about interviews with particular applicants might be made public, they would be less likely to express their “candid advice” and “forthright views” to each other about the strengths and weaknesses of each application (as described in Mr Schofield’s witness statement). Section 36(2)(b)(i) and (ii) were therefore engaged.
33. We found that the public interest in maintaining the exemptions in section 36(2)(b) in respect of this information outweighed the public interest in disclosure. In reaching this decision, we took into account the importance of transparency in the spending of public money generally, and in particular in the process of appointing a trust to run a new school – and noted in particular the observations of the Tribunal in *Church* in this regard. We took into account the specific concerns raised by the Appellant about possible maladministration in the running of the Glebe Farm process, her fears of secret briefings against MKET, and close relationships between officials at the Council and IFtL.

34. We balanced this against the substantial public interest in ensuring that competitions for the appointment of a sponsor for a new school are as thorough and robust as possible, with officials able to freely share views and opinions on applicants without fear of reprisal, so that the best possible candidate is appointed to run the school in the interests of the local community, parents and children. In particular, we accepted Mr Schofield's explanation of the importance of having a "safe space" where officials within the DfE and local authorities can share about applications to sponsor new schools to support effective decision making in order to ensure that "education provision is of the highest standard" [paragraph 22].
35. We noted that there were other routes available to the Appellant to raise her concerns about the process and that she had made complaints to the Council, the Local Government Ombudsman and the DfE, and that DfE officials had met the Appellant to discuss her concerns in January 2020. The Director of Children's Services at the Council had also investigated and concluded that he had "confidence in the fidelity of the approach undertaken and fairness in the Award made" (page A57).
36. Furthermore, both the Council and the DfE had made a substantial amount of information available which would facilitate public scrutiny and accountability of the process, including the application of the successful trust, IFtL, and had continued to review their position on withholding over time. We concluded that the public interest in the Council and the DfE running a thorough and robust process, including the full and frank exchange of views between their officials about the merits of different applications outweighed, in the circumstances of this case, the public interest in disclosure.

Section 43(2)

37. The Tribunal found that the exemption in section 43(2) was engaged in relation to (1) the identities of the unsuccessful trusts, (2) their applications, and (3) the remaining unredacted information about IFtL in their sponsor template. In reaching this decision, we noted that the weight attached is lower where disclosure is only "likely to" prejudice.
38. Disclosure of this information was likely to prejudice the commercial interests of the respective trusts. We noted that the phrase "commercial interests" has a broad meaning. We accepted the statement of Mr Schofield at paragraph 39 of his witness statement that:

"Whilst trusts are not for profit, there are still incentives, some of them financial, for them to grow, and therefore this information is clearly commercially sensitive".
39. In considering whether the commercial interests of the unsuccessful applicants were likely to be prejudiced by the release of their identities and applications, the Tribunal noted the lower weight to be accorded where prejudice is only "likely". We also took into account the comments of the Tribunal in *Church* about the lack of numerical or financial information in the applications before it. However, that Tribunal was

considering different applications from different trusts to a different competition run by a different local authority. The Tribunal in the first *Currie* appeal was considering the same documents as this Tribunal and it concluded that section 43(2) was engaged.

40. While not binding upon us, this Tribunal agreed with their reasoning. We noted that the Request was made and refused a matter of months after the process concluded, meaning that the information in the applications remained recent and current at the relevant time. The applications contained sensitive information about the activities and strategy of each applicant: as Mr Schofield pointed out, even the fact that a trust was applying for the competition was sensitive commercial information about its future plans which might impact those schools it was already operating. The structure and content of each application was unique to each applicant. While some information was publicly available, the way in which it was selected and presented in the bid was particular to each applicant and its bid to run the new school. Each application contained unique information about the applicant's vision and strategy for the new school and its proposals for staffing and financial structures in which each applicant endeavoured to differentiate itself from its competitors.
41. It is likely that many of the unsuccessful applicants will enter further competitions for new schools, most likely in competition against each other. Each applicant's chances of winning was likely to be prejudiced if its competitors knew that it had applied to run Glebe Farm and had access to its application. While one unsuccessful bidder, KET, had chosen to disclose its application to MKET, IFtL had refused and it was likely that others would also refuse. The Tribunal found that while applicants had been warned that their information might be subject to FOIA, they would have reasonably expected the Council to rely on exemptions such as section 43(2) to resist disclosure.
42. The Tribunal found that the public interest in maintaining the exemption in section 36(2)(b) outweighed the public interest in disclosure of this information.
43. In reaching this decision, the Tribunal noted again, as for section 36(2)(b) (see paragraphs 33-36), the importance of transparency in the spending of public money and the specific concerns raised by the Appellant about the Glebe Farm process. We balanced this again against the substantial public interest in ensuring that as many trusts as possible apply to run new schools to ensure healthy competition and high quality bids, in particular in an area of underperforming schools. If trusts know which of their competitors have submitted bids and have access to each other's bids, the process will become less competitive, and trusts may be reluctant to submit bids in future. We noted again the other avenues explored by the Appellant in relation to her concerns and that the Council and DfE had made a substantial amount of information available which would facilitate public scrutiny and accountability, including the application of the successful trust, IFtL. We concluded that the public interest in ensuring healthy competition to appoint the best possible trust to operate

the school outweighed, in the circumstances of this case, the public interest in disclosure.

44. We set out below the remaining withheld documents and information by reference to each part of the Request.

A. All internal and external emails, and any other correspondence, related to the free school competition for Glebe Farm School, Milton Keynes, up until the present day

A1. Commentary from DfE to the LA on the successful applicant, IFtL

45. It was not disputed by the Appellant that the only information relevant to part A of the Request was the commentary from DfE to the Council on the successful applicant, IFtL. There is only one paragraph now redacted from this document at page D236 of the open bundle. This paragraph contains “suggested interview questions for IFtL” which had been “geared specifically to IFtL”, “contained a candid appraisal on the part of DfE officials; and captured DfE’s frank views on how best to challenge IFtL at interview based on its own knowledge of the trust” (DfE Response, paragraph 33(1)).

46. For the reasons given in paragraphs 31-36 above, the Tribunal was satisfied that section 36(2)(b)(i) and (ii) were engaged in respect of these questions and that the balance of public interest was in favour of withholding this information.

47. We did not go on to consider section 43(2) because we were satisfied that section 36(2) applied.

B. Information sent by MKC to the RSC in support of its preferred Trust, including assessment criteria, weighting of criteria and performance of each application against scoring system

B1. Local Authority Scoring Sheet

48. The DfE explained that the sheet “involves an evaluation of competing considerations by the Council in order to assist with decision-making, and it was specifically shared with the DfE as part of the overall deliberation process” (DfE Response paragraph 35). Mr Schofield described the document in paragraph 24 of his witness statement as providing the DfE with “intelligence in the form of numerical scoring as evidence of the LA’s assessment of the applications and of a trust’s appropriateness, capacity and capability in key areas to take on a new school”.

49. For the reasons given in paragraphs 31-36 above, the Tribunal was satisfied that section 36(2)(b)(i) and (ii) were engaged in respect of the entire scoring sheet, and that the balance of public interest lay in maintaining the exemption.

B2. Applications from unsuccessful applicants

50. We have explained at paragraphs 37 to 43 above, why the Tribunal concluded that section 43(2) was engaged because the commercial interests of the unsuccessful applicants were likely to be prejudiced by the release of their applications, and why

we found that the public interest in maintaining the exemption outweighed the public interest in disclosure.

51. As the Tribunal was satisfied that section 43(2) applied, it did not go on to consider section 36(2)(c).

B9. Letter from Council lead member to DfE recommending IFTL

52. This letter had now been disclosed in full, other than redactions in relation to personal data which were not in issue.

D. All the information provided to the Headteacher Board for the meeting held on 4 March 2020 in support of Item 1.2 on the agenda (Whether or not to approve the Local Authority's preferred trust for the Glebe Farm, Milton Keynes, presumption project)

D1. Papers submitted to the Headteacher Board

53. Other than redactions for personal data, the only remaining redactions were one paragraph on page D322 of the open bundle and two paragraphs at the bottom of page D325.

54. The Tribunal notes that, although highlighted yellow on the closed bundle, a paragraph headed "Local Authority New Presumption Competition" on page D322 has been disclosed to the Appellant.

55. The Tribunal finds that the following information does not engage either section 36(2) nor section 43(2) and should be disclosed to the Appellant (and not redacted).

- Heading "LA commentary" to the paragraph redacted on page D322.
- Heading "Other sponsors who submitted proposals" on page D325
- The words: "Kingsbridge Educational Trust (KET) – Approved sponsor" and "Milton Keynes Education Trust (MKET) – Approved sponsor" in the table on page D325.

These headings do not contain prejudicial information and the fact that KET and MKET were unsuccessful applicants has already been made public.

56. In respect of the paragraph redacted on D322 below the heading "LA commentary", the Tribunal is satisfied that section 36(2)(b)(i) and (ii) are engaged and that the public interest lies in upholding the exemption for the reasons set out in paragraphs 31 to 36 above. This paragraph sets out the scoring of the two shortlisted trusts, as explained by the DfE in paragraph 32 of its Response. Mr Schofield says at paragraph 27 of his witness statement: "the details expressed in these documents are candid, containing detail about the capacity and performance of trusts intended for a specific internal audience to support and inform decision making".

57. In respect of the paragraph redacted on D325 below the heading "Other sponsors", the Tribunal is satisfied for the reasons given in paragraphs 37 to 43 above that section 43(2) is engaged and that the public interest lies in upholding the exemption.

This paragraph is a list of the other unsuccessful trusts and details of the distance between their head offices and the new school.

D2. Sponsor template for IFtL

58. IFtL's successful application has now been disclosed in full, other than redactions in relation to personal data which were not in issue and redactions on page D257 and D258 of the open bundle headed "Financial and Resource Management", "Future Plans" and "Risks/Issues".
59. The Tribunal was satisfied that section 43(2) was engaged in respect of the redactions on page D257 and D258 which contain commercially sensitive information of IFtL and that the public interest lay in upholding the exemption. The public interest in transparency and accountability around the process and future operation of the new school was satisfied by the disclosure of large parts of the IFtL application. We accepted Mr Schofield's explanation that there is already substantial transparency in relation to the financial affairs of IFtL as an academy trust (paragraph 52).

E. Application form of IFtL

60. This document had now been disclosed in full, other than redactions in relation to personal data which were not in issue.

Conclusion

61. In conclusion, the Tribunal decided that:
 - a. Section 36(2)(b)(i) and (ii) FOIA are engaged in respect of the remaining information withheld in relation to part A1 and B1 of the Request and the balance of public interest lies in favour of withholding this information.
 - b. Section 43(2) FOIA is engaged in respect of the information withheld in relation to parts B2 and D2 of the Request and the balance of public interest lies in maintaining the exemption.
 - c. All information requested in relation to parts B9 and E of the Request has now been disclosed in full other than redactions for personal data.
 - d. The following information must be disclosed to the Appellant in relation to Part D1 of the Request:
 - Heading "LA commentary" to the paragraph redacted on page D322.
 - Heading "Other sponsors who submitted proposals" on page D325
 - The words: "Kingsbridge Educational Trust (KET) - Approved sponsor" and "Milton Keynes Education Trust (MKET) - Approved sponsor" in the table on page D325.

- e. Either section 36(2)(b)(i) and (ii) or section 43(2) is engaged in respect of the remaining information withheld in relation to part D1 of the Request and the balance of public interest lies in maintaining the exemption in each case.
62. The Decision Notice was therefore not in accordance with the law in every respect. The appeal is allowed in part and a substitute Decision Notice is issued, as set out at the top of this Decision.

Other issues raised by Appellant

63. The Tribunal accepted, as outlined in Mr Schofield’s second witness statement, that correspondence between the DfE and MKET in relation to concerns raised by the Appellant about the Glebe Farm process were not within scope of the Request (and were in any event, already held by the Appellant).
64. The Tribunal also accepted on the balance of probabilities that the representations made by MKET to the RSC about the process were not addressed in any papers submitted to the Board and therefore no information pertaining to this was held by the DfE which fell within scope of the Request, and that no more detailed notes were held by the DfE of the meeting.

Signed Judge CL Goodman

Date: 27/02/2023