



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL  
(INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF  
INFORMATION ACT 2000**

EA/2012/0135

**B E T W E E N:-**

**DEPARTMENT FOR EDUCATION  
(NORTHERN IRELAND)**

**Appellant**

**-and-**

**THE INFORMATION COMMISSIONER**

**Respondent**

**Tribunal**

**Judge Kennedy QC  
Jacqueline Blake  
Marion Saunders**

**Subject matter:** Freedom of Information Act 2000, specifically section 41, and 40(2) and by consent an out of time request by the Appellant to argue Sections 33 and 36 are engaged.

**DECISION OF THE FIRST-TIER TRIBUNAL:**

The tribunal grants the appeal.

## **REASONS**

### **Introduction**

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (**“the FOIA”**), specifically in relation to sections 41, 40(2), 33 and 36.
2. The appeal is against the decision of the Information Commissioner (**“the Commissioner”**) contained in a Decision Notice (**“the Decision Notice”**) dated 30 May 2012 (reference FS50419885).
3. The Tribunal Judge and lay members sat on the 19<sup>th</sup> December 2012 and decided the case on the papers.

### **Request by complainant:**

4. The complainant, a school Governor, wrote to the Department of Education NI (**“the appellant”**) on 1 September 2011, requesting information relating to an inspection of Kirkinriola Primary School (**“the school”**) carried out in March 2011.
5. The request was as follows:

“I request copies of the parents questionnaires with the names redacted which were submitted to the Inspectorate at the time of the recent Inspection. I also request copy of the documentation which accompanied the questionnaires when they were forwarded to the parents for completion”
6. Relying on section 41 of the FOIA as grounds for withholding the information, the appellant did not send redacted copies of the questionnaires, but further to an internal review did disclose a statistical

summary and analysis of the questionnaire responses, showing the numbers of responses in relation to the set questions contained in the parental questionnaires. The statistical summary which the Appellant said constituted a redacted format, in that small responses (*i.e.* between 0 and 5) were withheld, they said was provided pursuant to section 40(2) of the FOIA.

7. The requested information (namely the questionnaires) contained the following information:
  - i. The answers to 20 set questions (phrased as statements) – with a tick box marking showing whether the respondent (parent) agreed, strongly agreed; neither agreed nor disagreed; disagreed; or strongly disagreed with the statement.*
  - ii. The year or key stage of the respondent's (parent's) child.*
  - iii. An 'Other Comments' section, allowing the respondent (parent) to enter any additional comments they wished to make (this can potentially include comments made on attached sheets.*
  - iv. Any other handwritten comments on the completed questionnaire forms".*

### **The Commissioners Decision**

8. The Decision Notice dated the 30<sup>th</sup> May 2012 held that, in accordance with FOIA:
  - i. The appellant/department correctly withheld some of this information under section 40.
  - ii. The following information requested is not exempt under either section 40 or section 41 and should be disclosed:-

The completed parental questionnaires provided to the appellant in relation to the inspection of the school in March 2011, with the following information redacted:-

- a) The 'other comments' section (including any comments provided for this section on attached sheets).
  - b) Any other handwritten comments on the form.
  - c) The name or signature of the respondent (parent) (where provided) – as this fell outside of the request.
9. With respect to the information referred to in the first part of the withheld information, namely the answers to the set questions, the respondent noted that this information had – to a certain extent – already been disclosed by the appellant/department, although it had only disclosed to the complainant as a statistical summary of the answers to the set questions from the information on the forms where the number of respondents (parents) was over 5.
10. Therefore the remaining information in the questionnaires requested which the respondent ordered to be disclosed is as follows:
  - a) The answers to the twenty set questions (phrased as statements)
    - with a tick box marking showing whether the respondent (parent) strongly agreed; agreed; neither agreed nor disagreed; disagreed or strongly disagreed with the statement.
  - b) The key stage of the child concerned.

**Grounds of appeal:**

11. The appellant relies on several grounds of appeal:

The appellant appeals the commissioner's decision on the following grounds:

- a) The commissioner erred in his determination of the extent to which the disputed information is exempt under section 40(2) of the FOIA;
- b) The commissioner erred in failing to decide that the disputed information is exempt under section 41 of the FOIA;

- c) The commissioner erred in failing to decide that the disputed information is exempt under section 33 of the FOIA;
  - d) The commissioner erred in failing to take adequate account of the fact that the complainant is the Governor of a small rural primary school with access to additional knowledge and information.
12. In addition Mr O'Dowd MLA, Education Minister invoked section 36 on or about the 21 August 2012 and this has been communicated to the commissioner.

**The relevant statutory framework:**

**Section 40(2)**

13. Section 40(2) of the FOIA exempts from disclosure third party personal data if, further to section 40(3)(a)(i) disclosure to any member of the public would breach any of the principles under the Data Protection Act 1998 ("the DPA"). This is an absolute exemption and is therefore not subject to the public interest test.

**Section 41**

14. Information is exempt information if it was obtained by the public authority from any other person (including another public authority) and the disclosure of the information to the public (otherwise than under the FOIA) by the public authority holding it would constitute a breach of confidence actionable by that or any other person. The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with that duty would (apart from the act) constitute an actionable breach of confidence.

**Section 33**

15. Section 33 of the FOIA states that:

“(1) This section applies to any public authority which has functions in relation to ...

(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)"

### **Section 36**

16. Section 36(2)(c) provides that "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 would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

### **Issues to be considered by this Tribunal:**

#### **Section 40(2)**

17. Could the disclosure of the withheld information lead to the identification of individuals who had completed questionnaires?
18. The appellant made submissions relating to the Data Protection Act 1998 ("DPA") and the European Council Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. This provides that:

"Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas to determine whether a person is identifiable account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person; whereas the principles of protection should not apply to data rendered anonymous in such a way that the data subject is no longer identifiable..."

19. The appellant made reference to Article 8 of the European Convention on Human Rights (“the ECHR”) which this Tribunal accepts is engaged.
20. In acknowledging the submissions of the appellant, it is agreed, for the purposes of the FOIA the definition of personal data is that in section 1(1) of the DPA: data which relates to a living individual who can be identified “(a) from those data, or (b) from those data, and other information which is in the possession of or is likely to come into possession of the data controller”. This Tribunal find that the information herein is “personal data”.
21. Both the appellant and the respondent made submissions in relation the case of OFSTED v Information Commissioner EA/2009/0121 (“Ofsted”). Ofsted concerned a request for lesson observation forms in connection with an inspection of a particular school. The tribunal in Ofsted found that the information should not be disclosed as there was a:

*“significant risk that the process of identification could well be narrowed to a significant extent, and certainly to the level where an informed guess might be made as to the identity of a particular teacher and the association of him or her with a particular set of scoring grades. This in turn would lead to a degree of informed speculation which could be damaging to the individual”*(Para 40)

*“in the context of a particular event (the inspection) taking place on a particular date within the restricted environment of a single school, we think that the publication of information about the grades recorded against just 12 lessons creates a real risk of identification by those having other information about, for example the order and timing of class visits. We think the risk is some way short of “remote” and that an individual facing that degree of risk of having his or her performance assessment identified (whether accurately or not) would be entitled to be concerned. We conclude therefore that the information has not been anonymised to a*

*sufficient degree to take it outside the definition of personal data”*  
(Para 42).

22. The appellant submits that the information stipulated to be provided to the complainant by the respondent in this case will create a real risk of identification. The appellant submits that the respondent has erred in his consideration of the size of the school, the number of children attending the school, the fact that the school is within a small rural community, the knowledge of the complainant as Governor of the school relating to complaints and other matters, and the context of the questions answered within the questionnaires. More specifically the appellant submits:
- i. The school in question is a very small one with only 93 pupils and the relationship between Principal, Governors and parents is therefore very close and intimate.
  - ii. The Principal and Governors will be well aware of the identities of the parents who have made any complaint to the school.
  - iii. Where a small number of parents have ticked a particular box, the Principal and Governors will be able to conclude that a person or persons who has complained about that particular subject is among those who have ticked that box.
  - iv. Since the disputed information includes the year or key stage of the pupil concerned, the Principal and Governors will be able to associate a particular questionnaire with a particular parent who has complained and who has a child in that year or key stage.
23. At the time of the inspection, the number of pupils who attended the school was 93, 60 questionnaires were issued to the parents; approximately 75% (i.e. 45) were returned and 30 contained additional comments.
24. The appellant submits that, specifically those forms which show a strong response to a particular question, will provide much more than an “extremely remote risk” of identification in the above circumstances. This Tribunal accepts this proposition and the above submissions. We find as a



fact that with the information on the form, a Governor of, or teacher in such a small school, who has knowledge or access to knowledge that would allow him or her to associate a parent with a comment such as “strongly disagree” to a certain question is likely to be in a position to identify at least some of the parents in question.

25. Even if there were any doubt about this assessment, this tribunal accept the evidence in the witness statement of Noelle Buick, Chief Inspector of Schools dated the 12<sup>th</sup> November 2012 at pages 114 to 121 of the Open Bundle before us, in its entirety and cite what we consider to be significant persuasive evidence in favour of and supporting the appellants submissions generally herein. Without prejudice to the generality of the contents of this helpful witness statement we refer inter-alia to the following extracts:

- a) *The requestor who had requested the disputed information, was a member of the Board of Governors at the school at the time of the inspection in March 2011 and is still on the Board of Governors. Where parents have stated in the comments box that they have complained to the Board of Governors, teachers or Principal, it is almost certain that the requestor or any of the Governors and the Principal, who is also on the governing body, could identify that parent and child.”*
  
- b) *“The audit function of the Education and Training Inspectorate ( the “ETI” ) relies in first-hand information of which the parental questionnaires are one vital piece. If parents were to think for one moment that their comments are not going to be treated in confidence (as stated on the questionnaire itself) it is highly likely that they would be less open and honest in their responses, while in many cases they may refuse to make a response at all. Were this to happen the whole point of the exercise in providing a valuable opportunity for parents to give*

*their views confidentially on the life and work of the school would irretrievably be lost”.*

- c) *“The questionnaire states: “Your name and your reply will be treated in confidence. The Principal and teachers will not be shown this questionnaire”.”*
  
- d) *“The school involved in this case is small and the relationship between the Principal of the school and its children, governors and parents is therefore very close and intimate. It is very likely, therefore, that the information from the tick boxes, along with information about the year or key stage of the child, along with information which the Principal/other governors would have from previous conversations (or written communication) with parents or children, could lead to the identification of an individual who had provided information in the tick boxes and about the year or key stage of the child.”* The Chief Inspector continues: *“This would be the case even if the written comments and name of the person had been redacted. Since each question relates to a particular issue relating to the management and provision of the school, negative comments in particular could be related to previous conversations and or communication with the Principal, teachers, governors. Indicating to a third party, the key stage of the child, would help significantly any third party’s attempt to identify the writer of the questionnaire. This is certainly the case in this school, where with only 93 children in total, an indication, for example that the child was in key stage 2, would narrow the field of possibilities down by anywhere close to over one-half. As outlined above, this then complemented with other information, could lead all the more readily to identification of an individual.*
  
- e) *“On the ground, this is a rural school where relationships between various stakeholders have been poor for many of the*

*recent years. This has extended principally, to two camps of both parents and governors being formed, with one camp in support of the school's present leadership and one opposed. Any further disclosure of information, other than that of a purely objective and numerical nature, including key stage of children information, would be very detrimental to the feelings and positions of stakeholders in this area."*

26. The respondent made submissions in relation to the case of *Department of Health v IC [2011] EWHC 1430*. This case was in relation to a request made to the Department of Health for abortion statistics. This tribunal agrees with the findings on the facts of that case in that it was extremely remote that the individuals concerned could be identified but consider this case to be distinguishable to the present case. The same proximity does not exist: these people are not in daily contact, as parents and pupils at a school would be; it is also unlikely that there would be such close proximity in terms of persons addresses.
27. The tribunal agrees with the submissions of the appellant in considering the above factors and accepts the respondent has erred in finding Section 40 (2) did not provide an exemption, even in part, to the disputed information.
28. The disputed information is personal Data within the definition at S1 (1) of the DPA (see Para 20 above), which is an accessible record in a relevant filing system as a manually processed: *"... set of information relating to individuals to the extent that ... the set is structured, either by reference to individuals, or by reference to criteria relating to individuals in such a way that specific information relating to a particular individual is readily accessible."* (See S 1 (1) of the DPA). While the Tribunal finds that the Appellant, as Data controller of this data did obtain the disputed information fairly and lawfully (as required by the first data protection principle), they are also required to ensure that the disputed information must only be: *".... obtained for one or more specified and lawful purposes and shall not be further processed in any manner incompatible with that purpose or*

*purposes.*”. The risk of identification of individuals following disclosure (referred to in our judgment herein) would, we find, be incompatible with the purpose or purposes of recording that data. The tribunal finds that the requirements under the data protection principles under Section 40 (3) of FOIA are met and in the circumstances the disputed information herein has absolute exemption.

#### **Section 41**

29. It is not disputed that the withheld information was obtained from third parties. The issue for this tribunal is whether disclosure would constitute an actual breach of confidence by virtue of being detrimental to the confider.
  
30. The appellant refers to the case of *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 as setting out the necessary constituents for an action for breach of confidence.

*“First, the information itself...must ‘have the necessary quality of confidence about it’. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must have been an unauthorized use of that information to the detriment of the person communicating it”.*

31. The appellant submits that:
  - a) The function of the schools inspectorate is vital in the maintenance and improvement of education in Northern Ireland.
  - b) There is reliance on the support and co-operation of parents who continue to have a relationship with that school during the time their child or children remain at that school.
  - c) Therefore the provision of fully confidential information to the inspectorate by parents is absolutely crucial to the effective provision of such a system and any release back

of information provided as being confidential is likely to have an adverse effect upon the inspection process.

d) The questionnaires were completed by parents in strict confidence and had the full expectation that their responses would not be provided to a third party insofar as they may be identified from information provided.

32. The respondent submits that section 41 is not engaged because disclosure of the disputed information is not likely, on the facts of this particular case, to lead to identification of the parents.

33. The appellant submits that the correct test is not whether *'it is not likely' that parents may be identified*", but rather, *'it would be extremely remote that parents may be identified'*. The respondent ultimately, in their submissions take no issue with this test but maintain that it is *"extremely remote"* that parents would be identified.

34. For the reasons expressed above, this Tribunal agrees with the appellant in respect of the above and finds that in the particular facts of this case section 41 is engaged as it is likely on the balance of probabilities that at least some parents could be identified. See the witness evidence of Noelle Buick, Chief Inspector at pages 114 to 121 of the Open bundle before us and referred to at Paragraph 25 above. We find, as a fact that the three conditions as set out at paragraph 29 above are met in the circumstances of this case and section 41 is engaged and the disputed information is exempt.

### **Section 33**

35. The respondent asserts that the appellant is merely speculating that such a disclosure could lead to reluctance by parents to co-operate with inspectors.

36. The appellant submits that in the absence of actual disclosure and the fallout thereafter it is not possible to bring directly observed evidence and

the submission made by the appellant is that experienced school inspectors indicate that the provision of the disputed information from the questionnaires provided by parents on a confidential basis would, or would be likely to prejudice the functions of the Inspectorate and accordingly that on balance this would be against the public interest

37. The tribunal finds that section 33 is engaged and the information is exempt. On the evidence before it (see above), this tribunal find there is a *'more than remote chance'* that the persons could be identified, and on the balance of probabilities, on the facts before us that it is likely that such identification would occur. If that happened, it is our view that disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions, and this tribunal do not believe that this is a risk which can or should be taken in the circumstances of this case. It would, we find be against the public interest. We refer to the witness statement of Noelle Buick, Chief Inspector at pages 114 – 121 of the Open Bundle before us and referred to at paragraph 25 above.

### **Section 36**

38. In relation to section 36, the appellant submits as follows:

“ Section 36 (2)(c) provides that '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 would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

The 'qualified person' within the meaning of the legislation is the Minister of Education. It is submitted that neither the Commissioner nor the Tribunal can substitute their own view for the decision of the qualified person that the exemption is engaged, i.e. that prejudice would or would be likely to occur if disclosure took place, merely on the basis that they disagree with that view. They may overrule that view only if they find that the qualified

person's view was not reasonable that is to say not within the bounds of reasonableness or range of reasonable opinions, or that the opinion was not reasonably arrived at – see Guardian Newspapers and Brooke v Information Commissioner and BBC, EA/2006/0011 paras 57-59.

37. The respondent however points out that while they accept that the Minister for Education would be a qualified person as required under Section 36, the Minister has not in fact provided a reasoned opinion for invoking Section 36. The Tribunal accepts this submission and refuses the appeal under Section 36.

**Conclusion:**

39. In light of the foregoing, the Tribunal allows this appeal. The requested information should not be disclosed.
40. The respondent has the right to apply to the Upper Tribunal for permission to appeal. Any such application must be made to the Tribunal in writing within 28 days of this decision.

Brian Kennedy QC

Tribunal Judge

DATE: 29th January 2013