



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

**Appeal Reference: EA/2017/0044**

**Decided without a hearing  
On 17/11/2017**

**Before**

**JUDGE  
MISS FIONA HENDERSON**

**TRIBUNAL MEMBERS  
DR MALCOLM CLARKE  
MR MICHAEL HAKE**

**Between**

**MR GERRY MURPHY  
(OBO IRISH NATIONAL TEACHERS ORGANISATION**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

## **DECISION AND REASONS**

### Introduction

1. This is an appeal against decision notice FS506205526 dated 16<sup>th</sup> February 2016 in which the Information Commissioner upheld the Department of Education Northern Ireland's (DENI) decision refusing to disclose the withheld information pursuant to s33 FOIA and s40(2) FOIA. The Appeal is allowed in part.

### Background

2. The Education and Training Inspectorate (ETI) is a unitary inspectorate and part of DENI, providing independent inspection services and policy advice for DENI<sup>1</sup>. As such it was responsible for the inspection of St John the Baptist primary school between 23<sup>rd</sup> and 25th March 2015. This was a school with 417 enrolled pupils all of whom come from the surrounding area. An acting principal and acting vice principal were in post.

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<sup>1</sup> Insofar as it is relevant to this appeal

3. The focus of the inspection as set out in the final report was:
  1. *the children’s achievements and standards in literacy and numeracy, in particular, how the school is addressing low attainment and underachievement where applicable;*
  2. *the quality of provision in the school and*
  3. *the quality of leadership and management.*
  
4. At the conclusion of the inspection the ETI inspectors informed the school management verbally that almost all of the teaching and learning in the school was good or very good with some outstanding. They were also told that the leadership and management since September (a time when the acting principal had taken over) was working well and addressing many issues. The verbal feedback was that the school was “good” for achievement and standards and provisions for learning and “satisfactory” for leadership and management and overall performance.
  
5. When the final written report was issued the outcome had been revised and the school’s overall performance levels was Inadequate:
 

• Achievements and standards	Good
• Provision	Good
• Leadership and Management	Inadequate
  
6. The school was placed in the formal intervention process. This is not a punitive process but provides a framework for external support to raised standards, in this case provided by the Council for Catholic Maintained Schools. A school in formal intervention is subject to further monitoring by ETI inspections. The Appellant’s concern is that the verbal outcome was revised by the Assistant Chief Inspector and the Chief Inspector who had not attended the school as part of the inspection.
  
7. The final report was published in May 2015. Its comments on leadership and management were set out in 11 paragraphs at section 7 of the report and whilst praising aspects of the efforts by senior leadership team and governors for their efforts addressing issues arising out of sensitive and complex matters within the school, there remained concerns that documentation was not complete, reforms were in an early stage and not yet embedded in school policy, half of the school building was not in use and that this was a health and safety concern. In arriving at the overall performance level of inadequate, the report took into account their concerns relating to leadership and management, accommodation and health and safety which they listed in 4 areas to address and an appendix of health and safety concerns.

Information Request

8. The appellant wrote to DENI on 12<sup>th</sup> October 2015 asking for the following information:
  1. *“Every iteration of the written inspection report from first draft through to final written report published on the ETI website in May of 2015.*
  2. *All notes, written and electronic, prepared by all inspectors involved directly or indirectly, before, during and after the inspection in St John the Baptist PS relating to the completion of the final written report.*

3. *All communications of a written and electronic nature between and amongst the Reporting Inspector and Deputy Reporting Inspector for this inspection and the Deputy Chief Inspector with responsibility for inspections in the primary sector and the Chief Inspector concerning this inspection and production of the final written report in May of 2015.*
  4. *All communications of a written and electronic nature between and amongst the Chief Inspector and the Deputy Chief Inspector with responsibility for inspections in the primary sector relating to this inspection and the Deputy Permanent Secretaries and Permanent Secretary in the Department of Education from the completion of the inspection in March 2015 up to and following the publication of the final written report in May of 2015.*
  5. *All communications of a written and electronic nature between and amongst the ETI and parents of children attending St John the Baptist PS, the Board of Governors of St John the Baptist PS, third parties such as the CCMS, community or political representatives, trade unions other than INTO and members of the public relating to the inspection in St John the Baptist PS completed in March 2015.*
  6. *Any other document held by the ETI pertinent to this inspection.”*
9. DENI refused to disclose the information requested in parts 1-4 relying upon s33(1)(b) FOIA by virtue of s33(2) FOIA. They also relied upon s 40(2) FOIA in relation to part 5<sup>2</sup> and some of part 6. However, they disclosed some information in relation to part 6. This refusal was upheld upon internal review on 20<sup>th</sup> January 2016<sup>3</sup>.

#### Complaint to the Commissioner

10. The Appellant complained to the Commissioner on 11.03.16 disputing that s33 FOIA was engaged and arguing that the public interest favoured disclosure. The Commissioner upheld the reliance upon s33 FOIA in relation to most of the information that had been withheld, she found that it did not apply to the final inspection report published on the ETI's website in May 2015<sup>4</sup>.

#### Appeal

11. The Appellant appealed on 16<sup>th</sup> March 2017. His grounds can be summarised as arguing that in relation to s33 FOIA:
  - i. The exemption was not engaged as:
    - a) disclosure would not be premature as the information was not requested until after the conclusion of the final report,
    - b) The Commissioner had misapplied the concept of “safe space” which was necessary whilst coming to a conclusion; however, once the conclusion was formed the process at which it was arrived should be disclosed.
  - ii. The Commissioner misjudged the balance of public interest and had given insufficient weight to:
    - a) The prejudice to teachers, pupils and parents of such a finding.

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<sup>2</sup> Before the Commissioner DENI and ICO were in agreement that in fact the material in part 5 fell within s33 FOIA as it formed part of the inspection materials.

<sup>3</sup> The reviewer also applied s41 FOIA to part 5. In light of her findings the Commissioner did not go on to consider s41 in the decision notice and it is not material to our findings upon appeal.

<sup>4</sup> Before the Commissioner DENI noted that it had erroneously included this report in the withheld information when it was in fact already available on the website, and the Appellant should have been directed there.

- b) the fact that the conclusion had been changed after the evidence gathering had taken place and by someone who had not themselves attended the school inspection.
  - c) The need for transparency in these circumstances.
  - d) The report is internally inconsistent and the evidence is necessary to evaluate the conclusions.
  - e) The report took into account matters relating to the previous principal which was outside the scope of the inspection and unfair to the school. The withheld material is necessary to understand the impact of this on the decision.
  - f) The Commissioner's decision was too general and had not looked at the detail and different categories of the withheld material.
12. In relation to information withheld under s40 FOIA disclosure would not be unfair or unwarranted:
- a) There was no expectation of confidentiality on the letters sent to those who provided information to the inspection.
  - b) If necessary parent/pupil/staff/governor identities could be redacted.
  - c) Those inspecting the school are public servants who should expect scrutiny and to stand by the work they have done.
13. All parties have consented to the case being determined upon the papers and the Tribunal is satisfied that it can properly determine the issues without a hearing pursuant to rule 32(1) (*Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (GRC Rules)*), being in receipt of an open bundle of documents comprising some 94 pages and a closed bundle containing the withheld material divided into 6 tabs corresponding to the limbs of the information request. In proceeding without an oral hearing the Tribunal has had regard to the overriding objective as set out in rule 2 GRC rules and has had regard to costs, proportionality and the narrow issues in this case. It has had regard to all the documentary evidence before it, even where not mentioned directly in this decision.
14. The Tribunal has set out its general reasoning with as much detail as it is able in the open decision; it has prepared a closed annex which sets out in more detail with specific reference to the information withheld its reasons for withholding the information. The Tribunal has concluded that some further information should be disclosed but with redactions, this is detailed within the closed annex. Upon confirmation that DENI have complied with the Tribunal's decision to disclose the documents as specified, a proportion of the closed annex can be made open and promulgated upon the order of the Tribunal.

Ground

15. S33 FOIA provides 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).*

S33 FOIA is a qualified exemption and is therefore subject to the public interest test as set out in s2(2)(b) FOIA.

#### Whether Exemption is engaged

16. The first issue for the Tribunal is whether DENI has the required audit functions provided for in s33 (1)(b). This is not disputed in the grounds of appeal and the Tribunal adopts the Commissioner's reasoning at paragraphs 19-21 of the decision Notice in concluding that DENI do have the required audit functions.
17. The next issue is whether disclosure would<sup>5</sup> have a prejudicial effect on the functions performed by the ETI. We are satisfied that "would" in this context means a strong likelihood prejudice which equates to more than a 50% chance. We accept the evidence as set out in DENI's representations to the Commissioner DENI that its functions include making evidence based judgments from an audit point of view as well as providing evidence based policy advice, evaluating the effectiveness and impact of key policies in practice and making evaluative comment on the quality of education being provided system -wide. It depends upon inspection evidence to fulfil these functions.
18. The Tribunal is satisfied that if disclosure were to undermine the quality of the evidence gathered or the decision making process followed or if it were to undermine the findings; then that would be prejudice such that the exemption would be engaged.
19. DENI argued before the Commissioner that Inspectors would be slower and more cautious over the recording of their notes, thus reducing the amount of information recorded and diminishing the inspection evidence base. This would also delay the timely production of inspection reports within agreed deadlines. This contention is not accepted by the Appellant and was rejected by the ICO. The Tribunal also rejects this argument. The subtext of this argument (were it to be accepted) is that in the absence of this level of scrutiny Inspectors rush their work which they do not complete with care. We take into account that Inspectors are bound by a statutory duty with an obligation of professionalism and that they can be expected to know that their records fall within the ambit of FOIA.
20. In her decision notice the Commissioner considered whether premature disclosure could affect the behaviour of the organisation being inspected. The Appellant argues that this is misconceived as by the time of his request the report was finalised and published. We understand the Commissioner to mean by "premature" the disclosure of information prior to its final state (ie when incomplete) however, we accept the Appellant's argument in relation to this inspection but take the impact of "premature" disclosure into account in relation to its impact on future inspections (in relation to this and other organisations).

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<sup>5</sup> DENI have relied upon this limb

21. The Commissioner also raised the issue of a general prejudice from disclosure revealing specific audit/inspection techniques that were not already known to the public. The Tribunal has had regard to the transparency surrounding the inspection process including the involvement of a representative, the information in letters to those involved, information online and from the final reports itself. We have also had regard to the material in the closed bundle and we are not satisfied that this is applicable on the facts of this case. Similarly, before the Commissioner, DENI argued that during inspection there is triangulation, new lines of enquiry emerge as evidence is shared between team members during meetings. It was not apparent to the Tribunal that “new lines of enquiry” emerged in these documents on the facts of this case, but we accept that it is likely that the focus of e.g. subsequent observations has been informed by the feedback of other members of the team.
22. The Commissioner argued that disclosure would:
- i. undermine the collection of information and evidence by creating a chilling effect whereby people would fear that their contributions would be made public, discouraging co-operation with the inspector in the future.
  - ii. undermine ETI’s assessment and analysis of the evidence, with inspectors fearing that their early thoughts, assumptions or conclusions will be held against them or their later findings. They are entitled to “space” to consider evidence and reach fully formed decisions taking into account all material available. Disclosure of the record of this would impair decision making and have a detrimental impact on the quality of the final report.
  - iii. Undermine the ETI’s function to make evidence-based evaluations if findings could be readily undermined or called into question by the disclosure of earlier reporting that does not accurately represent the ETI’s fully developed views.
23. The Appellant disagrees; he argues that there was no promise or expectation of confidentiality in relation to the consultees. He maintains that the function of the inspectors is to be free and frank, this is their role. He argues that disclosure would not undermine ability to make evidence based evaluations, but it would facilitate engagement and understanding of the final decision.
24. We have had regard to the process that is undertaken at achieving the final report. The inspectors observed teaching and learning, scrutinised documentation and the children’s written work and held formal and informal discussions with children, teachers and staff. They met representatives from the governors, met with groups of children and gave parents, teaching and support staff the opportunity to complete a questionnaire<sup>6</sup>. In recording this information the individual inspectors deploy their professional judgment. There is then a moderation process and a final moderation process. The report goes out in the name of the Chief Inspector who must therefore approve the report. Advice can be sought from within EDI. The report is drafted, with the opportunity to suggest corrections from specified consultees until a pre-publication copy of the report is issued followed by the final report.

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<sup>6</sup> Final inspection report p1 at p 29 OB

25. The process requires that the evidence collected provides sufficient information to create an audit trail to assess consistency with evidence for findings and final conclusions. We accept that for the inspection process to be effective it is necessary that honest and candid views are received, both from the school community and the inspectors undertaking the inspection process. We set out below in detail our findings relating to expectation, redaction and the identifiability of those involved and are satisfied that the school community would be less frank if they thought that their views would be made public. Similarly we are satisfied that inspectors would be less forthright if they believed information could be disclosed that showed their evolving thought processes. We accept the need to retain some degree of private thinking space while decisions are being made and whilst the totality of information is being gathered and analysed. Members of the inspection team and ETI's senior management should be expected to draw on the experience of each other, to discuss issues openly, frankly and robustly without the need to defend views that were not fully formed or that they no longer hold. This flow of information would be jeopardised by disclosure. We are also satisfied that it would undermine the authority of the final report which will have been arrived at following a process of development. We are therefore satisfied that the exemption is engaged.

Public interest.

26. We now go on to consider the public interest. In favour of disclosure:

- i. Society places a high value on education and effective oversight is therefore very important, disclosure would add transparency and enable scrutiny of that process.
- ii. Disclosure would enable the public to trust in the ability of the ETI to carry out fair and thorough inspections of schools
- iii. Disclosure would add to the public understanding of the apparent contradiction between the verbal outcome and the final outcome which if left unexplained could undermine public trust.
- iv. A better understanding of the reasons for the eventual outcome would be important in a community which we accept has been demoralised by the report's conclusions.

27. In favour of maintaining the exemption we take into account:

- i. The importance of the role of ETI to evaluate standards and identify where improvements are needed (as evidenced by statutory powers granted it) in support of the contention that anything which hinders or degrades functions will be contrary to the public interest.
- ii. Anything which undermines the quality of evidence received, the quality of the internal debate, assessment and scrutiny of evidence by the decision makers and the quality of the reasoning and decision making is not in the public interest.
- iii. Drafts undermine the considered concluded view by diluting the final position and highlighting areas of nuance and fine judgment.
- iv. Final conclusions can be undermined relying upon records of incomplete thinking.
- v. There was significant public concern of some duration around management and leadership. Disclosure in response to the request would seriously

risk undermining acceptance and the success of the report's proposals to address these issues.

28. When balancing these considerations we give significant weight to the need for free space away from external scrutiny to debate and reach conclusions. Similarly, those thinking of passing on information voluntarily will want to know it can be kept secure. We have given weight to the transparency already provided by the publication of the final report and the methodology of the inspection. We accept that ETI hold numerous events to explain to stakeholders how inspection works in practice, guidance for Principals is available on the ETI website, a senior member of staff is involved in all the inspection meetings and the moderation meeting where the acting principal heard the evidence used to reach a conclusion as well as the publication of all reports (including the report in this case) on the website<sup>7</sup>.
29. We are satisfied that the value of transparency is less strong where information is incomplete and does not represent a final position. Having had regard to the withheld information we are not satisfied that the majority of the information would further the stated public interests in disclosure as set out more specifically below and in the closed annex. However, where the withheld information adds transparency to the process of reviewing and ultimately changing the report's conclusion we are satisfied that the public interest favours disclosure.

### **Request 1**

*“Every iteration of the written inspection report from first draft through to final written report published on the ETI website in May of 2015.”*

30. DENI has described this aspect of the withheld material (tab 1) as being draft versions subject to editing and moderation as part of the robust quality assurance process<sup>8</sup>.
31. The Appellant seemed to suggest that he was not seeking the drafts<sup>9</sup> but as this is explicitly requested in part 1 of the request the Tribunal has nevertheless considered it in scope. Having reviewed the documents we take into consideration that by this stage what is in issue is version control and fine tuning, the decision already having been arrived at in substance. The process followed ensures that the reports are fair and accurate and balanced. It is an opportunity to correct perceived factual errors and emphasis. The drafts are distributed to a range of people with the opportunity to comment. The list of consultees is already public as part of the inspection framework. The drafts do not shed light on the reasons for the change from the verbal to the final conclusion identified by the Appellant. They drafts are not public at that time and as such we are satisfied that those commenting would expect their input to remain confidential.
32. From the comments it can be seen what each particular individual's concerns are and the extent to which their views have been adopted. Where a comment has not been adopted this can be expected to have professional implications in terms of other's perception of their priorities and authority. We are satisfied that disclosure

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<sup>7</sup> P90 OB letter from DENI to Commissioner July 2016

<sup>8</sup> P88 OB letter to ICO July 2016

<sup>9</sup> P21 OB



would inhibit future comment with consultees being more cautious in their engagement in this process. Were the comments to be disclosed the reasons for the agreement or failure to adopt the proposed changes would be in debate and would undermine the authority of the final report.

### **Request 2**

*All notes, written and electronic, prepared by all inspectors involved directly or indirectly, before, during and after the inspection in St John the Baptist PS relating to the completion of the final written report.*

33. From DENI's letter to the ICO July 2016<sup>10</sup> they argue that these notes inform the evaluation of an organisation's provision but also emerging and summary evaluations at any given point in time and could be subject to misrepresentation when taken in isolation. It is only through the moderation process and final moderation meeting that the final evaluations are arrived at.
  
34. The Record of Inspection Booklets contains the majority of the inspection evidence including contemporaneous inspectors' notes relating to the lessons observed for individual teachers. Notes are personal and identifiable as they relate to interviews, lesson observations, meetings with staff members in an organisation. Additionally, they argue that disclosure would be a breach of DPA.
  
35. Having viewed the information the Tribunal accepts that this includes the raw material from which the conclusions are drawn. They are the inspector's personal data indicating their own individual preliminary views which have not yet taken the entirety of the evidence and views of others fully into account. The conclusions have been evidenced and reasons given in the final decision of the report, the raw material is not inconsistent with the facts as set out in the final report however, disclosure of the raw material would undermine the final report as it would invite others to form their own view from notes which we are satisfied are not the complete evidence being by their nature a synopsis/aide memoire to assist in the process of reaching a collective view.
  
36. We take into consideration that transparency is already provided through the process of feedback given to participants during the inspection process. We are also satisfied that from the framework of the inspection and the publication of other reports; participants in the meetings and the subjects (both staff and pupils) of the lesson observations would not expect details of their individual performance to be made public. Even if the name of the teacher were to be removed the lesson would still be identifiable by the subject and curriculum followed which would designate the year group. The children would be able to identify the lesson and their own participation from the content. We take into consideration the small pool of individuals in a primary school in concluding that individual contribution would be identifiable and in our judgment exposure of this level of detail is not in the public interest.

### **Request 3**

*All communications of a written and electronic nature between and amongst the Reporting Inspector and Deputy Reporting Inspector for this inspection and the*

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<sup>10</sup> P88 onwards

*Deputy Chief Inspector with responsibility for inspections in the primary sector and the Chief Inspector concerning this inspection and production of the final written report in May of 2015.*

37. DENI argue that this information forms part of the moderation and quality assurance process and represents private thinking space.
38. In assessing the public interest, the Tribunal is satisfied that some of this information (as set out in the closed schedule) should be disclosed. The Tribunal takes into consideration that the staff and parents and local community have been given conflicting information by the inspection team; there having been a fundamental change between the verbal feedback and the written report. DENI argue that this was always only a provisional view and the quality assurance process prior to the publication of the final report meant that there was always the potential that this could change. However, we take into account that this is not a change in nuance but a different conclusion arrived at taking into account the same facts. As such the Tribunal is satisfied that for these pieces of information the “safe thinking space” carries less weight. Disclosure would not reveal a half-formed view that they would have to defend. The provisional view has already been disclosed and the ETI are being asked to justify why it has changed and to defend their final decision (in the context of information that they have made public).
39. The Tribunal takes into consideration the impact on morale and confidence that the final decision has had in the continuing operation of the school as set out in the Appellant’s submissions. Although reasons are given in the report for the current conclusion it does not explain why this conclusion is different from that of the inspection “team on the ground” and why the results in teaching and lesson provision were “outweighed” by the administrative ones. Whilst the report goes out in the name of the Chief Inspector who can be expected to be part of the decision making process; the purpose of having a “team on the ground” is likely to be viewed as the opportunity for the inspectors to form a view based on observation and first hand evidence. If that is rejected or overturned reasons for this ought to be transparent as should the process followed. The Tribunal is satisfied that the current position has not explained adequately the reasoning behind the change of view which from the material before us we accept is undermining acceptance of the report as stakeholders appear to have concluded that the final decision may have been made without due rigour, and suspect that outside influences have been at play or irrelevant material has been taken into account.
40. It is DENI policy that all personal details from below Grade 5 should be redacted when information is being disclosed, however the grades of those at the ETI identified in the material concerned, are not known to the Tribunal. Nevertheless, the Tribunal is satisfied from their job descriptions and role as evidenced within the closed material that they are of sufficient seniority and forward facing that disclosure of their involvement in this professional process would not be unfair or unwarranted neither would it breach the DPA for the reasons set out below.
41. The Tribunal is satisfied that correspondence within this section which does not shed light on the reasons for or process of changing the final decision or which

relates to the period after the decision had been changed should not be disclosed as it is not in the public interest. The Tribunal also relies upon the expectation of confidentiality from stakeholders, as set out in the closed schedule.

#### **Request 4**

*All communications of a written and electronic nature between and amongst the Chief Inspector and the Deputy Chief Inspector with responsibility for inspections in the primary sector relating to this inspection and the Deputy Permanent Secretaries and Permanent Secretary in the Department of Education from the completion of the inspection in March 2015 up to and following the publication of the final written report in May of 2015.*

42. DENI's case is that this material informs the moderation and quality assurance process<sup>11</sup>. The Tribunal has had regard to this information and is satisfied that it is not in the public interest to disclose it. The Tribunal has considered the date and content of any correspondence. We are satisfied that it does not inform the process followed or the reasons for the change in the final decision. To the extent that the content of correspondence refers to the input from stakeholders we repeat our findings relating to their expectation of confidentiality as set out elsewhere in this decision.

#### **Request 5**

*All communications of a written and electronic nature between and amongst the ETI and parents of children attending St John the Baptist PS, the Board of Governors of St John the Baptist PS, third parties such as the CCMS, community or political representatives, trade unions other than INTO and members of the public relating to the inspection in St John the Baptist PS completed in March 2015.*

43. This includes the detailed data breakdown and comments from the questionnaires. The general statistics are set out in the report which we are satisfied provided transparency. The Tribunal takes into account the very small numbers involved in assessing the identifiability of the respondents even if anonymised. We are satisfied that there was an explicit expectation of confidentiality as evidenced by the information provided to consultees.<sup>12</sup> The Appellant argues that the statistical groupings within the final report are misleading and inconsistent. His case is that the statement that a "significant minority (defined as 30-49%) of parents raised concerns" cannot be right as only 6% of parents responded. The report makes it plain<sup>13</sup> that it is referring to those who responded not the general population of parents at the school and from the sentence structure it is also apparent that this is an amalgamated figure for all the categories of respondees rather than an assertion as to the individual categories. We therefore do not accept that the synopsis provided is misleading or ambiguous and that the raw data should be disclosed to provide clarification. Additionally, where material is similar to that appearing in earlier categories it is withheld for the same reasons.

44. We are however satisfied that some additional disclosure from this part of the disputed information should be provided. To the extent that any person outside of ETI is identified for the reasons set out under personal data we consider that this can be redacted. This is information which gives further detail of ETI's reasoning

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<sup>11</sup> P88 OB et seq

<sup>12</sup> E.g p47 OB and p43 OB

<sup>13</sup> P32 OB

for the change of decision. Although not in the public domain we have taken into consideration the extent to which it has been made known to those outside of ETI in concluding that any “chilling effect” on ETI inspectors in future inspections is likely to be minimal.

### **Request 6**

*Any other document held by the ETI pertinent to this inspection.*

45. Much of this information is a duplication of information considered above. The Tribunal has had regard to the content and the date of the information, in determining that it is not in the public interest to disclose this information as it does not add to the transparency of the process and relates to correspondence from individuals who would not expect their correspondence to be public in these circumstances.

### **Personal Data**

46. There is an overlap between the public interest in disclosure and whether disclosure would breach the data protection principles as provided for by s40 FOIA which states:

*—(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.*

*(2) Any information to which a request for information relates is also exempt information if—*

*(a) it constitutes personal data which do not fall within subsection (1), and (b) either the first or the second condition below is satisfied....*

*(3) The first condition is—*

*(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—*

*(i) any of the data protection principles, ...*

*(7) In this section—*

*“the data protection principles” means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;*

*“data subject” has the same meaning as in section 1(1) of that Act;*

*“personal data” has the same meaning as in section 1(1) of that Act.*

47. The Appellant does not dispute that the data is personal data and we adopt the Commissioner’s reasons set out in the Commissioner’s decision at paragraph 47.

48. The first data protection principle provides that:

*Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—*

*(a) at least one of the conditions in Schedule 2 is met, ...*

49. Part II of Schedule I provides:

*1) In determining for the purposes of the first principle whether personal data are processed fairly, regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed.*

50. Information from those who completed questionnaires. In concluding that it would not be fair to disclose this information we take into account that in the final report<sup>14</sup> the questionnaires were stated to be confidential, this is consistent with the assertion of confidentiality to consultees which formed part of the instructions for participation<sup>15</sup>. We are satisfied that the participants had no expectation that their identity would become known to the inspection team let alone the general public:

*“Please note while all questionnaire submissions are confidential they are not anonymous... [name/teacher reference number] will not be passed on to the inspection team”<sup>16</sup>.* Whilst the raw data is therefore not named, disclosure is to the public and as set out below we are satisfied that this information would not be anonymous in the public domain.

51. We have taken into consideration the personal nature of the information gathered (e.g. satisfaction, complaint or praise for individuals, whether a child is safe or thriving etc.) in concluding that disclosure would be distressing, unwarranted and therefore unfair. We have considered whether this information could be redacted and are satisfied that it could not. We take into account the small pool of participants (a school roll of 471, only 6% parents responding) and the likelihood that even if anonymised identifying factors such as gender, age, subject and educational attainment would become evident. We are satisfied that the same considerations apply in relation to those who were interviewed and spoke directly to the inspectors.

52. Personal data from a review of work and lesson observations. We are satisfied that this encompasses both the personal data of the teacher and the pupils. The pupils would be at risk of unwarranted peer scrutiny as well as self-identification. The nature of the observation is to form a judgment which can be critical or positive and could include an assessment that a child is underachieving, or disruptive or writes messily etc. That would be damaging and distressing for them (or their family) to have vented publicly. In relation to teachers we are satisfied that in light of the historic appearance of ETI reports when published there would be no

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<sup>14</sup> P1 of the report at p 29 OB

<sup>15</sup> P43 and 47 OB

<sup>16</sup> Eg from Completing the online Teacher/support staff questionnaire

expectation that they or their competency would be identifiable in such an inspection report and that this would also be distressing with the potential for professional ramifications. We are satisfied that this information cannot be anonymised due to the small number of those involved and the distinguishing features of each lesson (by way of content, curriculum and teacher approach).

53. 3<sup>rd</sup> parties not directly involved in the inspection process or involved subsequently. We are satisfied that they would not have the expectation that their personal data or involvement would be made public and that disclosure would be unfair particularly in circumstances where they were not able to comment or where the consequences of their identification would have negative professional consequences for them.
54. Personal data of the school inspection team. We are satisfied that it is not customary for their notes to be disclosed but we are satisfied that they would know that they fall within FOIA and that as such they are capable of disclosure. However, we are satisfied that it would be unfair to disclose the work done prior to the verbal feedback as this would expose them to unwarranted scrutiny in relation to the record of their developing thought processes and evaluation of incomplete evidence.
55. In relation to the work post the verbal feedback; ordinarily this would continue to be a refinement of the conclusions reached and communicated verbally which could expect to be disclosed when fully formed in the final report. On the facts of this case we are satisfied that in light of the significant change in conclusion after the physical inspection phase had finished, there would be an expectation that this would need to be explained in greater detail. As set out above we are satisfied that to the extent that disclosure would confirm that the proper processes were being followed there would be no unwarranted distress in disclosure and that all of those whose input would be revealed would be of sufficient seniority in terms of their role in this inspection that they would expect to be professionally accountable to the public in concluding that disclosure in this regard would not be unfair.
56. In relation to the personal data disclosable in the documents identified by the Tribunal which we have determined would not be unfair we have gone on to consider the schedule 2 conditions. Schedule 2 condition 6 provides:  
*6(1)The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.*
57. We have applied the approach as set out in Goldsmith International Business School v the Information Commissioner and the Home Office 2014 UK UT 0563 (AAC). As such we are satisfied that the Appellant (and the wider public) do have a legitimate interest in the data identified. The ETI having given what appear to be 2 different conclusions based upon the same evidence, in circumstances where there is confusion and dismay on the part of the stakeholders with the outcome and insufficient clarity of the circumstances and considerations that have led to this outcome. We are satisfied that the data is necessary for the purposes of those

interests<sup>17</sup>. Although we accept that there is considerable contact with some of the stakeholders the wider community who are invested in the success of the school as parents, staff or pupils have not been given clarity, and this is all the more important in light of the publicity that this decision is likely to have had locally.

58. The Tribunal has considered redacting the information so that those whose actions and views are described in the withheld information would not be disclosed. In light of the hierarchy and structure of the organisation concerned we are satisfied that removing the name would not anonymise the information as it would be easily attributable.
59. We have then considered whether the processing is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject? We are satisfied that it is not. Those involved have public facing roles and responsibility within the organisation; this is a professional matter which does not impinge on their private life. All those involved can be expected to know that they are subject to FOIA and that they should be accountable for and able to justify their decisions especially in circumstances where the course of the inspection appears to have departed from the expected pattern. In our judgment disclosure of the information identified in the closed schedule does not fall within the s40 FOIA exemption.

#### Conclusion

60. For the reasons set out above we allow the appeal in part and have determined that the evidence identified as disclosable within the closed annex should be disclosed by DENI to the Appellant within 35 days.

Signed

Judge of the First-tier Tribunal  
Date: 9<sup>th</sup> February 2018

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<sup>17</sup> We define necessary as being more than desirable but less than indispensable