



Tribunals Service

Information Tribunal

Information Tribunal Appeal Number: EA/2009/0046
Information Commissioner's Ref: FS50160381

Decided on the papers
7 October 2009

Decision Promulgated
27 October 2009

BEFORE

CHAIRMAN

ROBIN CALLENDER SMITH

and

LAY MEMBERS

GARETH JONES

MARION SAUNDERS

Between

MR NICK INNES

Appellant

and

INFORMATION COMMISSIONER

Respondent

Subject matter:

Validity of appeal

Standard of proof

Cases:

Bromley v The Information Commissioner (EA/2006/0072) and Malcolm v The Information Commissioner (EA/2008/0072).

Representation:

For the Appellant: Mr N Innes made his own representations

For the Respondent: Mr A Sowerbutts, Solicitor for the Information Commissioner

Decision

The Tribunal upholds the decision notice dated 18 May 2009 and dismisses the appeal.

Reasons for Decision

Introduction

1. On 5 January 2007 Mr Nick Innes (the "Appellant") and his wife (Vicky Innes) requested information about school 11+ tests taken in Buckinghamshire County Council schools during 2006. The request fell into two parts.
2. The first part sought information comprising "Raw Data", including a school-by-school-breakdown across Buckinghamshire County Council's education area, which showed the *name of the school*, the *type of school* (Independent or State), the *number of pupils taking the 11+ test*, the *distribution of marks obtained*, the *number of children opting out of the 11+ test* and the *Order of Suitability data*.
3. The second part of the request was for "*any studies, reports and statistical analyses concerning any aspect of the 11+ results, appeals etc*", which had either been prepared by the Council or made available to the Council from some other party. ***It is only this part of the request which is the subject of this appeal.***

The request for information

4. During the five months between January 2007 and May 2007 there was correspondence between the Appellant and the Council. As a result of that correspondence the Council released some of the requested information, explained certain difficulties and sought clarification from the Appellant about certain aspects of his request while the Appellant, for his part, sought to refine his request so as to clarify matters for the Council.
5. While the initial exchanges between the Appellant and the Council were constructive, by 30 April 2007 the Appellant was sufficiently dissatisfied to complain to the Information Commissioner (the "IC") about the Council's handling of the first part of his request and on 7 July 2007 he complained to the IC about the matters that form the subject of this appeal.

The complaint to the Information Commissioner

6. The IC investigated the complaints and issued a Decision Notice dated 18 May 2009. In respect of the request which is the subject of this appeal (the request for "any studies, reports and statistical analyses concerning any aspect of 11+ results, appeals etc") the issues considered by the IC were:
 - (i) the Council's failure to provide the Appellant with a piece of information that had actually been identified and requested -- a report containing correlation data mentioned in the Council's correspondence to the Appellant dated 10 April 2007;
 - (ii) the Council's failure to clarify the information about trends and patterns in the 11+ results that it said it had provided to the Appellant and which he was unable to trace; and
 - (iii) the Council's failure to confirm or deny the existence of any other relevant reports.
7. The IC asked the Council if it was prepared to release to the Appellant the report from which he understood certain correlation data had originated and asked what information it had provided to the Appellant about trends and patterns in the 11+ results and when that information was sent. The IC was seeking confirmation (or denial) about whether there were any further reports that would fall within the Appellant's information requests and the IC also asked to see the actual correlation data mentioned in the Council's e-mail to the Appellant on 2 May 2007.
8. On 8 December 2008 the Council stated that the IC had misinterpreted its comments with regards to the correlation data. The Council stated that the correlation data referred to was calculated on an ad hoc basis by data analysts in response to a specific request by the Head of Service. The data had not been compiled into a report made to any formal or official body and -- in addition -- there was no "unofficial" report based on that analysis. The Council stated that, in fact,

the data it held was not "reported" at all. It did not need to be because the correlated figures were self-explanatory to the Head of Service.

9. The IC was provided with a copy of the information the Council had sent to the Appellant on 13 March 2007 and 13 April 2007 which it believed illustrated trends and patterns concerning the 11+. The Council maintained that the report published in September was the Council's major analysis of the data and -- in the absence of a specific query or question from the Appellant -- it was not possible for it to confirm or deny whether it held an unspecified or unknown report (having tried on a number of occasions to clarify and crystallise the Appellant's request). Where the Council had received that clarification it had responded by either disclosing information or confirming that it did not hold it.
10. The Council told the IC that while information was held on its database for the purposes of the Freedom of Information Act 2000 ("FOIA"), the information that it did hold was not held in "report" format. It was only when the Council received specific questions or queries that it could confirm or deny whether it held the information requested by running an "ad-hoc" computer-generated search -- a "report" -- in response to that enquiry.
11. On 10 April 2007 the Council told the Appellant it did not have the resources available to scrutinise data or do annual checks on Head Teachers' recommendations or any other similar analysis despite what the Appellant believed to be the case. The Council could -- and did -- do ad hoc searches for particular information in response to specific questions from parents and others: that was why it could not respond to a general request concerning "studies, reports and analyses" but why it could respond to specific requests.
12. In the event the IC concluded that -- on the balance of probabilities -- the Council did not hold any further "studies, reports or analyses" of the type sought by the Appellant. It is that conclusion which is the only area which is the subject of this appeal.

The appeal to the Tribunal

13. The Appellant states:

"It would appear that the request made is not so broad in nature for the Commissioner to make an assessment on whether or not any such information is likely to exist."

14. The Appellant states that he does not believe that:

"the balance of probabilities test is an appropriate measure of whether or not a public authority is fulfilling its duty under the Act. It must be the case that an authority makes a reasonable attempt to determine that it is reasonably sure that it does or does not hold the information. Exactly what this level is I'm not sure, but 51% I would argue falls well short."

"It would appear that there is therefore still a significant chance that such information does exist, and I would like the Council to confirm or deny that this is the case and not for the Commissioner to make an informed guess regarding the balance of probability."

The questions for the Tribunal

15. Firstly, whether the matter set out at Paragraph 13 (above) -- "*...the request made is not so broad in nature for the Commissioner to make an assessment on whether or not any such information is likely to exist...*" -- creates any valid grounds of appeal against the IC's decision.

16. Secondly, whether the *balance of probabilities* test was the correct test for the IC to apply and also, if it was the correct test to apply, whether it was satisfied.

Evidence

17. In this appeal the Tribunal had been provided with a "closed" confidential annex of 101 pages from Buckinghamshire County Council in relation to the Appellant's requests.

18. It would appear that the same "closed" confidential annex was in fact also supplied to the Appellant (whether by design or accidentally this Tribunal does not know) in relation to another appeal where he is the Additional Party.

19. The evidence disclosed in that annexe has been considered carefully by the Tribunal. The effect of that is dealt with in our decision.

Legal submissions and analysis

20. The IC's position in relation to the matters covered by this appeal is fully expressed in the Decision Notice and does not need to be restated.

21. The Appellant takes the view that the 11+ selection process affects approaching 10,000 children each year in the Buckinghamshire area. Data has been recorded as part of that process for many years. He believes it performs a rich and complex resource from which an understanding of how the process is working and can be drawn.

22. He believes that the families of Buckinghamshire going through the education system have a right to know if their Council has analysed, studied, scrutinised (both quantitatively and qualitatively) in any way the rich set of data at its disposal and if so, what are the results of those analyses and studies.

23. He takes the view that the educational professionals at the Council will be fully aware of the types of report, studies and analyses that are being requested and that they know what the requests mean.

24. He states: "Clearly we do not know what studies have been performed, therefore we cannot ask for a specific piece of information. But we have seen that the Council appeared to believe it appropriate to vilify the information requested in a "confidential" response to the Information Commissioner. The Council are prepared to play a very distasteful, dishonest game to avoid even confirming or denying if this information exists. The public has a right to know and we ask that the Council be ordered to take a positive, cooperative stance to identifying and providing the requested information."

25. The Appellant takes the view that it would be an error to confuse the provision of numerous documents, web links and the like with cooperation and believes there has been "obscuration" in the Council's communications. He believes that "such unscrupulous practices by any Public Authority evading disclosure of information should be stamped out".

Conclusion and remedy

26. The disclosure to the Appellant of the "closed" confidential material annexed to the appeal papers creates an unusual situation. The Appellant may feel that this Tribunal - in *this* matter - has in some way been prejudiced against him by the attitudes revealed about his enquiries -- and the way in which Buckinghamshire County Council viewed many of his requests – by the use of language that is less than flattering about him.

27. In particular there are comments made on the first and second pages of that confidential annex (in our bundle, pages 170 and 171) and elsewhere that would appear to set a pejorative tone to the way in which the Appellant and his enquiries were being viewed.

28. The Tribunal has looked at this evidence and stripped away any adverse comment about the Appellant from its considerations. The conclusions of the Tribunal about the Appellant's requests have not in any way been affected by the commentary or subtext revealed in that confidential annex. The Tribunal has concentrated on the issues identified in the appeal.

29. It is quite usual for Tribunals (particularly the Information Tribunal) to see documentary evidence and hear oral evidence that is not available to Appellants. Where such material is gratuitously uncomplimentary -- as the Appellant in this appeal is likely to feel was the case – it is important that the Appellant understands that the Tribunal exercises its judicial experience and common sense and simply ignores adjectival material, concentrating only on the factual material before it.

30. For the avoidance of doubt the Tribunal has not concluded that the Appellant's requests were "vexatious" or "serial complaints". The Appellant was exercising his

right to make the requests that he did. The Appellant's requests should not have been classified so negatively by the Council.

31. The Tribunal however takes the view that the Appellant's dilemma is particularly highlighted in Paragraph 38 of his closing submissions. He asserts that the data stored forms a rich and complex resource from which an understanding of how the processes are working "can be" drawn. The Council is saying -- and the Tribunal accepts the Information Commissioner's decision in respect of this -- that where this data "has been" reduced to reports and analysis that has been disclosed to the Appellant it cannot then look forward and anticipate requests (for reports based on the data) that have yet to be made. The Appellant is asking for reports and analyses that simply have not come into existence at the time of the requests under appeal.
32. The IC noted that, on a number of occasions, the Appellant asked for the Council's advice as to precisely what information it held that would fall within the scope of his information request. The Council, for its part, on a number of occasions did ask the Appellant to clarify the precise nature of the information sought. It provided a number of web links and other information that it believed would be of assistance to the Appellant.
33. The Tribunal agrees with the IC's conclusion that -- at the heart of the disagreement between the Appellant and the Council concerning the second limb of the request -- lay a disagreement as to what was meant by "analysis".
34. The Council provided the Appellant with information that it believed fell within that definition. Much of that was statistical analysis rather than report-based analysis. The Appellant was seeking report-based analysis when it did not exist. An example of this manifest gulf between the Appellant and the Council was information provided by the Council and described as an "analysis of pupils taking the 11+ test in order to transfer to Bucks maintained secondary schools" which it regarded as illustrating trends and patterns at which the Appellant did not. The Appellant did not agree that the document did reveal the trends the Council suggested.
35. The IC was correct to be satisfied that the Council did have a database of "raw data" from which one-off reports could be drawn. That database was large enough and the "report" to which the Council referred were of a nature and kind of report

that is similar to what could be generated by a retail company's electronic till system at the end of the trading day showing a snapshot of data in response to a particular enquiry or set of search terms (for example the total profit for the day or the total number of cash sales).

36. If the Appellant had been able to frame his request in such a way as to allow the Council to "run a report" detailing the information he sought then it was prepared to do so.

37. The Council had in the past generated such reports in response to specific enquiries by other parents. The Tribunal is satisfied that, on the balance of probabilities, the Council had not had any occasion to retain those reports generated at the request of third parties.

38. In essence this disagreement turns on a judgement as to the bona fides or otherwise of the Council on this particular issue and the Tribunal has no evidence that the Council was acting in a way that was anything other than completely honest and straightforward on this point, particularly given the amount of time devoted to trying to accommodate the enquiries of the Appellant.

39. The Council may have felt the Appellant was asking too much but there is no evidence that the Council was seeking to conceal any information which it could properly have revealed. In short, it cannot reveal what it does not hold. The IC's decision in respect of this point is reasonable and discloses no grounds of appeal.

40. On the balance of probabilities test the Tribunal has no difficulty confirming that the IC used the correct test.

41. This Tribunal is not prepared to introduce any kind of sliding scale in terms of the standard of proof beyond the balance of probabilities. The House of Lords and other senior courts in recent decisions have confirmed the importance of maintaining the core principle -- in civil proceedings -- that the correct test is the balance of probabilities. It is only in relation to Asylum and childcare and child safety issues that there is any kind of variation.

42. There is no reason for the Information Tribunal to stray outside established law on this appeal and it affirms principles stated in *Bromley v The Information Commissioner (EA/2006/0072)* and *Malcolm v The Information Commissioner (EA/2008/0072)* on this point.
43. In particular the Tribunal is satisfied that the IC's decision -- that the Council had been able to use its raw data without the need for compiling studies, reports and statistical analyses because those Council officers required to use the data (for example the Head of Service) were sufficiently familiar with the subject matter so as not to require it being presented in a report format -- is completely reasonable.
44. It follows that the Tribunal accepts the assessment of the IC that the Council would have no reason to retain any "bespoke" reports requested by parents in the past.
45. In this appeal it has been quite clear that the Appellant's assumptions of what a Public Authority "should" do with such data is at variance to the realities of what actually happens. On the topic of enquiries by the Appellant it is also clear that the Council -- along with many others in the United Kingdom -- is data rich and information poor.
46. The Tribunal observes that the Council could have gripped and explained the situation with greater clarity to the Appellant at an earlier stage. The requests from the Appellant created at least 101 pages of the information and opinions set out in the closed Confidential Annex. The Tribunal questions whether all of that was necessary.
47. For the reasons stated above this appeal is dismissed.
48. Our decision is unanimous.
49. An order in respect of costs would be inappropriate in respect of this appeal.

Robin Callender Smith
Deputy Chairman
26 October 2009