IN THE FIRST-TIER TRIBUNAL **Case No. EA/2011/0151**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FS50368610
Dated: 29 June 2011

Appellant:	**Geraldine Hackett**
Respondent:	**The Information Commissioner**
Heard at:	Royal Courts of Justice, Strand, London
Date of hearing:	9 December 2011
Date of decision:	5 March 2012

Before
CHRIS RYAN
(Judge)
and
Narendra Makanji
Rosalind Tatam

Attendances:
The Appellant in person
For the Respondent: Rachel Kamm

Subject matter:
Inhibition of free and frank provision of advice s.36(2)(b)(i)
Inhibition of free and frank exchange of views for purposes of deliberation s.36(2)(b)(ii)
Prejudice to effective conduct of public affairs s.36(2)(c)
Legal professional privilege s.42

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2011/0151**
GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is allowed in part and the Decision Notice dated 29 June 2011 is substituted by a notice in the same form save that at the end of paragraph 131 there shall be added the words "save in respect of those documents identified in confidential annexes I and II to the decision of the First-tier Tribunal dated 5th March 2012 which shall be disclosed within 35 days."

REASONS FOR DECISION

Summary of our conclusions.

1. We have decided that some parts of the Department for Education's materials relating to two schools projects in which the United Learning Trust was involved should be disclosed. The Department had relied on exemptions under sections 36 (prejudice to the conduct of public affairs) and 42 (legal professional privilege) of the Freedom of Information Act 2000 in respect of those materials and the Information Commissioner had concluded that it had been entitled to refuse to disclose the information requested by the Appellant under those exemptions. Having ourselves inspected the withheld information, we have concluded that section 36 was engaged and that, although the public interest in maintaining the exemption outweighed the public interest in disclosure in respect of most of the documents concerned, there were some (identified in a confidential annex) in respect of which it did not. As regards section 42 we have concluded that some of the documents did not fall within the scope of the exemption (they are also identified in a confidential annex) but that the rest did and, in respect of those documents, the public interest in maintaining the exemption did outweigh the public interest in disclosure.

The information request and complaint to the Information Commissioner.

2. The appeal arises out of an information request under the Freedom of Information Act 2000 ("FOIA"), which was submitted by the Appellant to the Department for Education (previously the Department for Children, Schools and Families), ("the Department") on 25 May 2010. It requested documents relating to the United Learning Trust ("ULT") and its associated companies, the United Church Schools Trust and United Church Schools Foundation, in the period October 1 2009 to December 24 2009 as well as minutes of meetings and correspondence with Oxford and Northamptonshire councils that related to ULT over the same period and "details of any finance provided to ULT or its associated companies in respect of two academies planned for Oxford and Northampton".

3. The broad effect of FOIA sections 1 and 2 is that a public authority has an obligation to disclose information that is requested from it unless the requested information is covered by one of the exemptions set out in Part II of FOIA. If it is covered by an exemption that is categorised as a qualified exemption then the information may still have to be disclosed unless (FOIA section 2(2)(b)) "*in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*"

4. The background to the request is that ULT is an organisation which runs a number of educational establishments, including academies that were set up under a programme introduced by the previous Labour administration and continued under the present coalition government. The programme enables non-governmental organisations to establish and manage schools and to receive financial support for that activity from the government. In December 2009 ULT announced that it was to withdraw from two such projects (Weston Favell Academy in Northamptonshire and Oxford School). The Appellant, who is a journalist specialising in educational matters, was concerned that, as ULT did not in her view have a good record in turning round failing

schools, there ought to be transparency as to how and why it was first selected as the potential sponsor for these two projects and then why it withdrew.

5. The Appellant was not happy that, although some information was disclosed in response to her information request, other information was withheld. She therefore complained to the Information Commissioner who carried out an investigation. The outcome of that investigation was recorded in a Decision Notice dated 29 June 2011 in which the Information Commissioner decided that, although some of the withheld information should be disclosed, the remainder should not because it was exempt from disclosure under FOIA sections 36 (prejudice to the effective conduct of public affairs), 40(2) (personal information of a third party) and 42 (legal professional privilege).

The Appeal

6. The Appellant appealed to this Tribunal challenging just the sections 36 and 42 conclusions. Each of those sections, when applied to the facts of this case, creates a qualified exemption.

7. The relevant part of section 36 reads:

"(1) This section applies to—

(a) information which is held by a government department or by the Welsh Assembly Government and is not exempt information by virtue of section 35, and

(b) …

(2)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—

(a) …

(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, or

> *(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."*

8. In the present case the Department relied on subsections (2)(b)(i) and (ii) and 2(c). The Appellant did not deny that, in the particular circumstances of this case (as it relates to papers of a previous administration), the Attorney General was the "qualified person" and therefore entitled to express the opinion on which the Department relied. Nor did the Appellant raise a specific challenge to the reasonableness of that opinion. She argued forcibly that the withheld information should have been disclosed, because of what she considered was an overwhelming public interest in decisions that had a serious impact on many people (including pupils and future pupils of the schools in question, as well as their parents) and involved heavy expenditure of public funds. However, we have not treated those arguments as challenging the reasonableness of the opinion, but have proceeded on the basis that, the exemption having been engaged, we should take them into account when addressing the public interest balance which we are required to consider under FOIA section 2(2)(b) (see paragraph 3 above).

9. The relevant part of section 42 reads:

> *"(1) Information in respect of which a claim to legal professional privilege … could be maintained in legal proceedings is exempt information."*

The Appellant asserted that relations between ULT and the Department would be governed by legal agreements and speculated that the Department would have had to take account of its obligations under those agreements before taking the actions which, she believed, led ULT to withdraw from the projects in question. She argued that it was in the public interest that the contracts themselves, as well as legal advice in relation to their effect, should be made available for public scrutiny. The essence of her case in this respect was, therefore, again

that the exemption was engaged but that the public interest in maintaining it did not outweigh the public interest in disclosure.

10. The withheld information was made available to us in a closed bundle. For obvious reasons the contents of that bundle could not be made available to the Appellant (as to do so would effectively pre-judge the appeal) and we were forced to hold part of the hearing in closed session, so that we could discuss the detail of the withheld information with those representing the Information Commissioner.

11. We will deal in turn with each of the exemptions relied on.

FOIA section 36

12. The closed bundle contained a copy of every document for which exemption was claimed, separated into different sections, depending on whether the exemption claimed was
    a. perceived inhibition of free and frank advice (subsection (2)(b)(i)) or free and frank exchange of views for the purposes of deliberation (subsection (2)(b)(ii)); or
    b. perceived prejudice of effective conduct of public affairs (subsection (2)(c)).

    (There was a separate section in the bundle containing materials to which, it was said, FOIA section 42 applies: we will come to those materials later in this decision.)

13. We reviewed each document by reference to the points made by the parties in open session, as supplemented in some cases by the Information Commissioner in closed session. We were satisfied in each case that the exemption had been correctly invoked and accordingly concentrated on assessing the public interest balance under FOIA section 2(2)(b).

14. The Appellant drew attention to the importance of the two projects and to the unsatisfactory manner in which they appear to have been

handled by the Department. She asserted (sometimes on the basis of sound evidence, but occasionally on the basis of second hand information, or even speculation) that ULT had first been imposed on the relevant local education authority by the Department, then maintained as sponsor despite publication of a report criticising its performance at another of its schools and finally forced, or at least encouraged, to withdraw. That background justified greater transparency in respect of the manner in which the Department dealt with the matter and the advice it received at the time. This was particularly so because of the vulnerability of the schools in question and the grave difficulties they may have faced when the two projects collapsed.

15. The Information Commissioner argued that the value to the public of disclosure was significantly less in the case of documents recording the implementation of policy than it would have been had the case concerned the formulation of such policy. The fact that the information request was not submitted until some months after ULT withdrew meant that the information requested did not concern a live project at the time. By that time one of the schools had acquired a new sponsor and, in the other case, the local education authority had abandoned plans to convert the school to an academy.

16. The Appellant challenged whether either advice or deliberation would, or should, be inhibited by disclosure, given the expectation that civil servants would not allow the possibility of a freedom of information disclosure to deter them from their duty to proffer candid advice and debate it in robust dialogue. In response to the suggestion that disclosure at the date of the information request would have been premature, she pointed out that the value of having information available to the public may also be diluted by the passage of time.

17. The Appellant challenged the suggestion that the conduct of public affairs would be damaged by disclosure, undermining the relationships between, on the one hand, the Department and, on the other local

education authorities or potential sponsors. She suggested that, in respect of those involved in the two projects under consideration, the harm had already been done by the time of her request and that future sponsors would be aware, in any event, of the public scrutiny that is bound to follow if they choose to enter into partnerships with central or local government.

18. The difficulty the Appellant faces in this case is that it became apparent to us when studying the closed bundle that it contained very little that threw light on the issues to which she drew our attention. This may have been the result of the period of time to which the information request applied (October to December 2009). It covered only a relatively short period leading up to ULT's withdrawal. However, the Appellant explained to us that she wished to press her case for disclosure of information relating to ULT's original appointment, because it was possible that material created during the later period referred to issues affecting the original appointment. Unfortunately, for the successful outcome of her appeal, it generally did not. Except as mentioned below, its focus was almost entirely on the events that were taking place at the time, or were anticipated for the future. It might nevertheless have disclosed matter that the public would have an interest to know, particularly in view of the concern expressed about ULT's withdrawal. We carefully reviewed it in that context and also considered the possibility that it might throw light on the events surrounding ULT's appointment.

19. When considering whether any document in the closed bundle might be relevant to the public interest factors identified by the Appellant we weighed in the balance the disadvantages that the Information Commissioner said would result from disclosure. These included:
    a. the inhibition on civil servants providing firm advice and support in the future;
    b. the need for decision-makers to be able to discuss all options; and

c. the potential harm disclosure could cause to relationships between the Department, on the one hand, and local education authorities or sponsors.

The Information Commissioner urged us to conclude that, while there was certainly a public interest in furthering understanding of what had happened with the two projects in question, and in increasing public confidence in the Department's decision-making, he had been correct to reach the conclusion he did in his Decision Notice.

20. Against that background we considered that the public interest in maintaining the exemption relied on outweighed the public interest in disclosing most of the withheld information, largely because these documents did not address the particular issues with which the Appellant was concerned. However, in the case of a few documents we considered that the application of the public interest test should lead to an order to disclose. This was because they had a direct bearing on the Department's decision-making processes during the last three months of 2009. In September of that year the Department complained to ULT about its record of success, yet in November it issued a public statement of support just a few weeks before ULT withdrew from the two projects, allegedly under pressure to do so from the Department.

21. We have set out in confidential annex 1 the identification of the documents in the closed bundle which we believe should, for these reasons, be disclosed. Where appropriate we have supplemented the reasons set out above in terms that would not be appropriate in this open part of our decision. Annex I should remain confidential until either the date for appealing this decision has expired and no appeal has been launched or, in the event that such an appeal is launched, the appeal has either been disposed of by the Upper Tribunal or withdrawn.

FOIA section 42

22. As mentioned above, the Appellant did not challenge the categorisation of information as falling within the scope of this exemption. However, it seemed to us, when reviewing the closed bundle, that some of the documents ought not to attract legal professional privilege. We have identified those documents in Confidential Annex II to this decision. That annex should remain confidential until either the date for appealing this decision has expired and no appeal has been launched or, in the event that such an appeal is launched, the appeal has either been disposed of by the Upper Tribunal or withdrawn.

23. As to the remainder of the documents for which section 42 exemption was claimed we accept that the exemption applies and accordingly turn to consider the public interest balance, as it applies to their detailed content.

24. The Appellant argued that there was no question of legal advice having been sought in respect of litigation and that this reduced the public interest in maintaining the exemption. She said that there was no question, either, of the disclosure of advice on one sponsor's contract having implications for other sponsor contracts, since each one would be tailored to the specific circumstances of the project being undertaken. Moreover, the information request was not submitted until some months after ULT withdrew from the two projects. On the other side of the balance, the Appellant said, lay the strong public interest in knowing what legal advice had been given in relation to the events that led to ULT's withdrawal from the two projects in question, particularly by reference to contracts which had been entered into with ULT previously. She pointed out that the relationship with any academy sponsor is governed by a binding contract and that, Government Ministers having expressed concern about ULT's record in September 2009, it was not until December of that year that ULT withdrew. In those circumstances, she argued, greater transparency was required in

respect of the whole process which led to the cancellation of the contract, including the legal advice the Department received as to its contractual rights and obligations.

25. The Information Commissioner argued that the public interest was clearly in favour of maintaining the exemption. He accepted that the academy programme affected a large number of people and that ULT had received substantial public funds for a feasibility plan in respect of its plans before it withdrew from the project. He also accepted that there would be some weight in favour of disclosure if it would create greater understanding of the legal issues than the public already had from public domain sources. Against that the Information Commissioner argued that the two projects were still live issues at the time of the information request, as was the academy programme as a whole.

26. The Information Commissioner also invited us to consider, on the basis of our inspection of the closed bundle, whether the material withheld under this exemption really would have the effect on public awareness and knowledge that the Appellant anticipated. We are clear that it would not. It is sufficient to say, in this open decision, that, whatever the position might have been had the Appellant requested information created during a different period of time (on which we have no knowledge), the material in the closed bundle falling within the section 42 exemption would not materially increase public knowledge on the issues she identified, or on any other issue of sufficient significance to set against the public interest in protecting legal professional privilege.

Conclusion

27. In the light of the findings we have recorded above we conclude that, apart from the documents identified in Annexes I and II, the Information Commissioner was right to reach the conclusion that he did. We direct

that the Department release to the Appellant the documents listed in those two annexes within 35 days of the date of this determination.

28. Our decision is unanimous.

[Signed on original]

Chris Ryan
Judge

5th March 2012

CONFIDENTIAL ANNEX I

That annex should remain confidential until either the date for appealing this decision has expired and no appeal has been launched or, in the event that such an appeal is launched, the appeal has either been disposed of by the Upper Tribunal or withdrawn.

In the table below we identify documents falling within the exemption provided by **FOIA section 36,** but in respect of which we consider that the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information. The documents should therefore be disclosed to the Appellant, except to the extent that any part of them may fall within another claimed exemption, which is either not challenged by the Appellant on this appeal, or in respect of which her challenge has not succeeded.

Tabs B and D, section 36(2)(b)(i) (free and frank advice), or (ii) (free and frank exchange of views)	
B3. Email string between 22 and 23 October 2009	The memo at B85-87 was attached to this email and the comments in respect of B85-87 (see below) therefore apply to this document also.
B85 –87. Memo dated 22 October 2009	The memo seeks ministerial approval from Vernon Coaker (the Minister of State for Schools and Learners at the time) to release feasibility funding to ULT for the establishment of an academy which would replace Oxford School and would be sponsored by ULT and co-sponsored by Oxfordshire County Council. The public interest in disclosure lies in the timing of the document and the light it throws on the decision-making process within the Department. The Appellant relies on the timing of: (a) a letter the Education Secretary, Ed Balls, wrote to ULT in September 2009 expressing concern at its performance; (b) a letter written by Vernon Coaker to the two LEAs concerned in November 2009 stating that the Department considered ULT to be a suitable sponsor; and (c) ULT's withdrawal in December 2009. The document falls within the same period of time and we consider that the resulting public interest in its disclosure is at least equal to the public interest in maintaining the exemption and that it should therefore be disclosed.
B19-20. Email from the office of Vernon Coaker to Andrew Smith MP dated 12 November 2009 (with the name and address of the MP's constituent in the final two lines redacted in compliance with FOIA section 40.)	It is questionable whether FOIA section 36(2)(b)(i) or (ii) should properly have been invoked in respect of a communication between a Minister and an MP in whose constituency the proposed new Oxford School would have been located. However, even without that consideration, we observe that it refers to the writer's belief that "an academy solution represents the only solution here" and his intention to "ensure that the Academy proposal put forward by ULT is educationally robust and that they have strong governance and leadership plans in place". It was written just a few weeks before ULT's withdrawal and accordingly merits disclosure on

	the basis that the negative impact on advice and deliberations within the Department seems likely to be low and does not outweigh the public interest in seeing how the Minister's decision-making process compared with information the Department was giving to outsiders at the time.
B57 – 71. A briefing paper for the Secretary State's meeting with ULT scheduled for 14 October 2009 (exemption being claimed under this heading only in relation to pages 12 and 13 of the document (B68 and 69 in the bundle))	Although the document contains some advice to a Minister, of a very general nature concerning topics that might be avoided during the proposed meeting, it is for the most part a series of factual statements and an appraisal of ULT's performance. It was written just a few weeks before ULT's withdrawal and accordingly merits disclosure on the basis that the negative impact on advice and deliberations within the Department seems likely to be low and does not outweigh the public interest in seeing how the Minister's decision-making process compared with information and assessments being shared within the Department at the time.
B82 and 83. Part of a memorandum headed "Sheffield Park Academy: Ofsted Monitoring Report" (the rest being said to be "out of scope"),	We think it questionable whether the document as a whole is "out of scope" given the terms of the original request, which refer to ULT generally at the outset, before narrowing the scope down to the two projects in Oxford and Northampton. However, we are satisfied that the rest of the document does contain significant advice on how to handle the relationship with ULP. The part under consideration contains no advice but simply records certain facts about negative press comments attracted by ULT and communications between ULT and the Department regarding the role it should play in the future. It also records that the minister wrote to the relevant LEAs on 5 November 2009 confirming that he still believed that ULT was a suitable sponsor and we believe that the public interest in seeing those statements, in the context of the Department's decision-making at the time, is at least equal to the public interest in maintaining the exemption.
D9 -10 and D25 - 29. Two email strings between a member of the Department's Delivery Unit for New Academies Division and an individual at church-schools.com (an affiliate of ULT) dated between late November and mid-December 2009.	These communications passed between the Department and ULT's affiliate just days before ULT withdrew. Apart from the last two emails in the string (recorded as having been transmitted at 26 November 2009 07:29 and 26 November 2009 10:34 respectively) we could see no significant advice or deliberation recorded in the documents. We believe that for this reason (and on the basis that the two emails we have identified are redacted) the public interest in maintaining the exemption does not outweigh the public interest the Appellant identified in the disclosure of information on certain aspects of the projects in question.
D43 – 51. A status report dated 4 December 2009 on "City of Oxford Academy Project" and a Feasibility Stage timeline.	The documents are simply factual reports on progress to date and a timeline for future steps. They do not record advice or deliberations. There is public interest in seeing this sort of material so close to the date when ULT withdrew, which is at least equal to the public interest in maintaining the exemption.
Tab E – section 36(2)(c) – prejudice the effective conduct of public affairs.	
E3 – E5. An email string	The emails show the Secretary of State's office seeking

on 6 October 2009	background information on a press report (suggesting that the governors of the Oxford School were in dispute with one another and with Oxfordshire County Council) and, after this has been provided, asking for background information on "the brokering of Academy status with ULT" and specifically "was it the LEA and ULT that approached DCSF with the proposal?" The response discloses that the Office for Schools Commissioner had approached ULT and that the LEA had then met ULT. It does go back to the facts of first appointment and is fact finding only. Exemption is claimed under the "effective conduct of public affairs" exemption but we believe that it should be disclosed on the basis that it was relevant to the public interest factors on which the Appellant relied and that this was at least equal to the negative impact on relationships with third parties (which was the basis of the prejudice relied on). We were told that the "advice to Ministers" referred to in paragraph 1 of the last email in the string had been disclosed earlier.
E21 – 24 Notes	This is a set of notes on a report (which we were told had previously been disclosed to the Appellant). It contains what the Information Commissioner referred to as "frank comment" (e.g. "ULT overstretched and not delivering") but we have decided that the public interest in retaining secrecy over this material by asserting an exemption based on prejudice to the effective conduct of public affairs did not outweigh the public interest in the assessment of ULT being disclosed.
E27. Note of ULT termly review meeting on 23 July 2009.	This is a purely factual document that records a meeting with ULT. We consider any damage to relations with ULT (the basis put forward in support of this exemption) would be quite limited and does not outweigh the public interest in disclosure relied on by the Appellant.
E29. Briefing for ULT termly review meeting on 23 July 2009	The same reasons for requiring disclosure apply to this document as to E27 above. Although it may be said to include a degree of advice no reliance was placed on the exemption under 36(2)(b).
E31. An email recording "feedback from operations board" dated 29 July 2009, forwarded on 20 November 2009.	The date of forwarding brings the document within scope. The original email of July 2009 includes comments on the ULT Expression of Interest and therefore reflects on the adequacy of the original proposals from ULT to become involved in the project. The public interest in that issue is at least equal to the public interest in maintaining the exemption.

CONFIDENTIAL ANNEX II

That annex should remain confidential until either the date for appealing this decision has expired and no appeal has been launched or, in the event that such an appeal is launched, the appeal has either been disposed of by the Upper Tribunal or withdrawn.

In the table below we identify documents for which **FOIA section 42** exemption is claimed, but which we do not consider fall within the scope of legal professional privilege. The documents should therefore be disclosed to the Appellant, except to the extent that any part of them may fall within another claimed exemption, which is either not challenged by the Appellant on this appeal or in respect of which her challenge has not succeeded.

Closed bundle tab A ("Extracts of documents released to the Appellant after the Department of Education internal review").	
A25 – Item 8 and the final, unnumbered item, of Risk Register on Weston Favell Academy dated 1 October 2009	The relevant part of the document identifies issues on which legal advice was said to be required or appropriate, but not the advice given or the detailed content of any instructions given to any lawyer. The Information Commissioner argued that it does record the issue on which lawyers were to be instructed to consider, but we consider that the connection to legal advice is too tenuous and the level of detail too low, for it to attract legal professional privilege.
A29 – Items 8 and 9 of Risk Register on Weston Favell Academy dated 2 November 2009	The relevant part of the document identifies issues on which legal advice was said to be required or appropriate, but not the advice given or the detailed content of any instructions given to any lawyer. The Information Commissioner argued that it does record the issue on which lawyers were to be instructed to consider, but we consider that the connection to legal advice is too tenuous and the level of detail too low, for it to attract legal professional privilege.
A31 – Items 8 and 9 of Risk Register on Weston Favell Academy dated 4 December 2009	The relevant part of the document identifies issues on which legal advice was said to be required or appropriate, but not the advice given or the detailed content of any instructions given to any lawyer. The Information Commissioner argued that it does record the issue on which lawyers were to be instructed to consider, but we consider that the connection to legal advice is too tenuous, and the level of detail too low, for it to attract legal professional privilege.
A35 – a copy of A25 above.	We reach the same conclusion as in respect of A25 above.
A37 – Part of the Minutes of a Project Board meeting about Weston Favell, held on 5 October 2009, which recorded that "the legals are progressing with the NCC team working on VAT and indemnity	The relevant part of the document identifies two legal issues and records that they were being dealt with by lawyers for the local education authority. We consider that the connection to legal advice is too tenuous, and the level of detail too low, for it to attract legal professional privilege.

figures".	
A47 – 50 Two entries in a Feasibility Stage timeline	The relevant parts of the document identify issues being pursued as part of the project, but not the advice given or the detailed content of any instructions given to any lawyer. The Information Commissioner argued that it does record the issue on which lawyers were to be instructed to consider, but we consider that the connection to legal advice is too tenuous, and the level of detail too low, for it to attract legal professional privilege.