ON APPEAL FROM:

The Information Commissioner's Decision Notice No:
FS50569987

Dated: 18th. June, 2015

Appeal No. EA/2015/0137

Appellant: **Janet Downs ("JD")**

Respondent: The Information Commissioner (**"**the ICO**"**)

Before

David Farrer Q.C.

Judge

and

Suzanne Cosgrave

and

Narendra Makanji

Tribunal Members

Date of Decision: 31st. December, 2015

The appeal was determined on written submissions

Subject matter:

FOIA S. 36(2)(c) and s.43(2)

(i) Whether the opinion of the qualified person that the disclosure of the requested information would be likely to prejudice the effective conduct of public affairs was reasonable and, if it was, whether the public interest in maintaining that exemption outweighed the public interest in disclosing the requested information.

(ii) Whether the disclosure of the requested information would be likely to prejudice the commercial interests of the Department for Education ("the DfE") or any other body and, if it would, whether the public interest in maintaining that exemption outweighed the public interest in disclosing the requested information.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal finds that neither exemption is engaged and that, if either were, the public interest in withholding the requested information would not outweigh the public interest in disclosure. The appeal is therefore allowed. The Department for Education must communicate the undisclosed requested information within 30 days of receipt of this Decision.

Dated this 31st. day of December, 2015
David Farrer Q.C.
Judge [Signed on original]

Abbreviations

In addition to those indicated above, the following abbreviation is used in this ruling -

The DfE **The Department for Education**

The DN **The Decision Notice of the ICO**

REASONS FOR DECISION

The Background

1. Academy schools are not subject to control by a local authority but are answerable directly to the DfE. The concept originated in legislation enacted under the last Labour government and has been continued and developed by the coalition and now the current Conservative administration.

2. Academy schools are now broadly of two kinds; some are successful schools which apply for academy status in order to enjoy a greater degree of autonomy than when subject to the control of a local authority. Others are failing schools or schools with particular problems, as judged by OFSTED perhaps subject to special measures, which are thought to require external help and leadership independent of the local authority, from one of a range of bodies, known as "sponsors".

3. Sponsors may be Converter schools (i.e., those that sought Academy status to develop existing success),trusts, chains of existing academies, local businesses or other bodies capable of assisting the transformation of failing schools into good or outstanding schools. Sponsors accept the role on a non – profitmaking basis following negotiations with the DfE. Depending on the demands involved in assisting the particular failing school, the sponsor may need DfE funds in order to perform its task, though that is by no means invariable. The possible need for and quantum of such funding is a matter for the initial negotiations.

4. Sponsorship is a quite recent development. It is apparent that, for various reasons, a particular sponsorship may not work satisfactorily so that transfer to a fresh sponsor may be necessary. At the date of the request described below, 2nd. December, 2014, twenty three sponsorships had been transferred from one provider to another. As with the initial sponsorship, it might be appropriate, with some transfers, to provide funds to the new sponsor to meet the cost of "rebrokering" the sponsorship.

The Request

5. In a letter to the DfE dated 2nd. December, 2014, JD made the following requests –

   "I should be grateful if you could send me the names of academies/ free schools which have changed sponsors or moved from one academy chain to another from 1 September 2013 to 31 October, 2014. The list should include the names of previous sponsors/ chains and new sponsors/ chains .

   I should also be grateful if you could let me know how much money was given to the sponsors/ academy chains to help with transition e.g., start – up grants, money for legalities etc.."

6. The DfE provided the information requested in the first paragraph but, by its response of 24th. December, 2014, refused to disclose the financial information requested in the second, relying on the exemption enacted in FOIA s.43, namely that the requested information was commercially sensitive and that the public interest favoured non – disclosure.

7. Following an internal review, it further invoked FOIA s.36(2)(c), quoting what it asserted to be the reasonable opinion of a qualified person, namely the minister, Sam Gyimah, that disclosure would be likely to prejudice the effective conduct of public affairs, otherwise than as provided for in s. 36(2)(a) or (b). Like s.43, s.36, if engaged, requires a balancing of public interests for and against disclosure.

8. JD complained to the ICO by Email dated 3rd. February, 2015

The DN

9. The ICO, in his DN dated 18th. June, 2015 concentrated on the exemption provided by s,36(2)(c). Having decided that the DfE was entitled to rely on it, he did not go on to consider s.43. The factors governing the engagement of the two exemptions are very similar in this case and the competing public interests virtually indistinguishable.

10. In reaching his decision the ICO found that the minister was "a qualified person" by virtue of s.36(5). He accepted the DfE submissions that publication of funds provided in particular cases could mislead potential new sponsors, create unrealistic expectations as to the financial support available and undermine recruitment of new sponsors.

11. He concluded that the prejudice likely to result from disclosure was sufficiently significant and frequent to outweigh the arguments in favour of disclosure.

12. JD appealed to the Tribunal on 26th. June, 2015. Her grounds reflect the submissions considered below.

The Appellant's case

13. JD submitted that the DfE "oversold" the value of switching failing academies to stronger sponsors.

14. She examined the list of schools subject to sponsorship transfers ("rebrokering") and performed an analysis of the circumstances of most of the twenty – three transfers involved in the request, designed to show that, in a substantial number of cases, the new sponsor was not confronted by challenging problems and that sponsors and chains were not reluctant to take over academies which needed a new sponsor. It was therefore not true that disclosure of the requested information was likely to discourage rebrokering and weaken the DfE's bargaining position when seeking replacement sponsors.

15. The DfE's case that the withheld information was commercially sensitive or that its disclosure was likely to prejudice its financial or other interests was therefore not made out.

16. She asserted that the relevant costs were not readily accessible to the public through the online publication of the accounts of the academies concerned.

17. As to the public interest, she submitted that academy schools, their governance and their funding, outside the control of the local authority, were all matters of vigorous public debate.

18. The number of cases of rebrokering was increasing rapidly and it was essential that the public know in detail the costs of a controversial procedure which were likely to continue to rise for the foreseeable future.

19. JD relied on passages from the National Audit Office report of October, 2014 " Academies and maintained schools: Oversight and intervention" ("the NAO report") and the House of Commons Education Committee report "Academies and free schools", published in January, 2015 ("the HOCEC report") in support of her submissions that the public should be able to judge the value for money of different forms of intervention in the running of failing schools and that the DfE must be more open about the implementation of the academies programme. We refer briefly to particular passages in those reports below.

The ICO's case

20. The ICO's submissions reflected the reasoning of the DN and were, unsurprisingly, based on the case advanced by the DfE in a letter to the ICO dated 23rd. March, 2015 and supplemented by further Email correspondence. That letter, enclosing a spreadsheet containing details of the twenty – three cases of rebrokering which omitted the withheld funding information, was exhibited in the open bundle with redactions. The Tribunal received in a closed bundle the unredacted letter, the spreadsheet including the withheld funding information and the submission made to the minister for the purpose of s.36.

21. Moving a school to a stronger sponsor is one of the DfE's "most robust intervention tools for tackling underperformance in academies". Therefore, getting the right new sponsor is critical to the success of the academies programme.

22. Payments for rebrokerage depend on the facts of the particular case; there are no set payments to a school or sponsor where it takes place.

23.The DfE argued that disclosure of this information would be likely to prejudice the effective conduct of public affairs in the following ways -

(i) By raising unrealistic expectations in potential sponsors as to the sums they were likely to receive, because early rebrokerings involved very specific factors. Such sponsors, met with an apparently less generous attitude from the DfE would be unwilling to take on a failing school because they felt they were being treated unfairly. The pool of suitable sponsors ready to take part in rebrokering would be reduced.

(ii) Sponsors would regard publication of this information as setting a precedent for the future disclosure of similar information, which could release sensitive data, for example, figures that indicated the size of severance packages.

(iii) Unexplained variations in grants made to different sponsors could encourage sponsors to drive hard bargains rather than concentrate on the philanthropic objectives of the scheme.

These were the arguments presented to the minister for the purposes of his qualified opinion under s.36. and substantially adopted by the ICO.

24.It further submitted that the immaturity of the academies system and its very rapid implementation aggravated these problems because sponsors and others involved could be unduly influenced by particular statistics or cases which proved to be unrepresentative of the general development of the policy.

25.Its case on the s.43 (commercial interests) exemption was, understandably, very similar, Prejudice to commercial interests involves a weakening of the power to get value for money, in this case, the best sponsor at the best price.

26. Paragraph 31 of the letter seems to raise the likelihood of prejudice to the commercial interests of the school,, rather than the DfE, arguing a weakening of its negotiating position when dealing with suppliers, since the supplier would know how much in total had been provided and would inflate its quote to match that total. It is, in principle, open to the Tribunal to have regard to the commercial interests of any number of affected parties.

27. As to the balance of public interests, it acknowledged the substantial interest in academy funding, given the importance of the academy programme to the future of public education and the speed with which it is being implemented. It argued, however, that such interest was outweighed by the need to maintain confidentiality as to this financial information so that the academy system could be developed as economically as was reasonably possible, in the interests of the taxpayer and of pupils in all sectors of the state education system.

Our reasons

28. So far as material, the relevant FOIA provisions read as follows -

" 36 (1) This section applies to –

(a) Information which is held by a government department . . . .

(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

. . . . . .

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

The possible objects of prejudice in (a) and (b), to which "otherwise" refers, are irrelevant to this appeal.

. . . .

(4) In relation to statistical information, subsection(s) 2 . . .shall have effect with the omission of the words "in the reasonable opinion of a qualified person".

(5) In subsections (2) and (3) "qualified person"

(a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown

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(2) Information is exempt information if its disclosure under this Act would or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).,

29. Both exemptions are qualified exemptions; if either is engaged, then the information must be disclosed, unless the public interest in withholding it outweighs the public interest in its disclosure.

30. We shall deal first with the question whether s.36(2)(c) is engaged in respect of the withheld information.

31. The first question for consideration is whether the withheld figures are "statistical information." If they are, no question of the reasonable opinion of a qualified person arises. The test on appeal would be simply whether, in the Tribunal's opinion, disclosure would be likely to prejudice the relevant interest (see s.36(4)).

32. It seems that neither the parties nor the DfE .have considered the point so the Tribunal has received no argument upon it. FOIA contains no definition of the term in s.36 or s.84. The same term appears in s.35(2) but the context gives no assistance as to its interpretation in s.36, though it can be assumed that it is used in the same sense in both subsections. The Oxford Dictionary of Statistical Terms describes statistics as "the study of the collection, analysis, interpretation, presentation, and organization of data". Applying that definition to the statutory term and the facts of this appeal, it is at least arguable that the inclusion of the figures for payments to sponsors involves at least one of those activities.

33. However, given our conclusion as to the qualified person's opinion and the lack of argument on the matter, we shall proceed on the footing that s.36(4) does not apply. Should this matter ever need to be revisited, this is an issue which the parties should address, however.

34. The minister was undoubtedly "a qualified person". His opinion was that disclosure would be likely to prejudice the effective conduct of public affairs, the less demanding of the alternative tests

35. As to the meaning of "likely to prejudice", we adopt the test enunciated by Munby J. in *R(Lord) v Secretary of State for the Home Department [2003] EWHC (Admin.)* and adopted for the purposes of FOIA in *John Connor Press Associates v IC IT 25th. January, 2006* and a series of subsequent decisions of this Tribunal: is there "*a significant and weighty chance of prejudice to the identified public interest"* so that there *"may very well"* be prejudice to those interests, even if the risk falls short of being more probable than not ?

36. The test of what is reasonable is not whether the Tribunal shares the minister's opinion but whether it is a rational conclusion, reached by a proper and fair process, which takes account of material evidence and arguments and disregards irrelevance and speculation. It is closely akin to the "Wednesbury" test as applied to decisions of ministers and public authorities.

37. We have summarized the relevant content of the submission to the minister in this case and treat it as the sole basis for the opinion which he formed. There is no reason to doubt that he considered it with care and absorbed and approved its recommendations before signing it off.

38. However, in the Tribunal's opinion, the evidence supporting that opinion was tenuous, to say the least and the qualified opinion took no account of the possible weaknesses in the arguments submitted, because they were never drawn to the minister's attention. Moreover, there appears to have been no serious consideration of the possible benefits to the sponsorship scheme of a positive strategy of disclosing the relevant funding statistics.

39. The primary argument – that publication would raise unrealistic expectations which, when unfulfilled, would discourage the disillusioned prospective sponsor from

participating in rebrokerage (or initial sponsorship) - has no apparent evidential basis and seems to ignore a number of points to which the DfE makes no reference.

40. This is a new system, as the DfE rightly emphasizes. In claiming that sponsors would behave in the manner described, it has no experience to draw on or none which was put in evidence. It is possible that experience of disclosing the funding of other rebrokerings might produce the predicted reaction. If so, the DfE would be on much firmer ground in ceasing publication. The unalterable precedent argument advanced by the DfE makes no sense; it is perfectly reasonable for a public body to say that it will cease to provide details of grants that it makes because experience shows that such disclosure is damaging its commercial and other interests.

41. The primary argument assumes that the potential sponsor -

(i) would, absent disclosure under FOIA, remain ignorant of the amounts paid in other rebrokerings and,

(ii) though strongly influenced in its decision whether or not to sponsor by disclosure of the sums paid to other sponsors for accepting transfers, would not have insisted on such information before deciding to participate, had no such disclosure taken place

42. A brief study of the sponsors on either side of the first twenty – three rebrokerings listed in the disclosed information shows that chains, multi – academy trusts were involved from an early stage. The Tribunal understands from all the evidence that such involvement had quite rapidly increased by the date of JD's request.[1] Such chains must be well aware from previous experience of the levels of funding provided in different cases and the factors which produce differing provision.

[1] See NAO report Summary para. 3 - 460 sponsors for 1900+ academies and HOCEC Conclusions and recommendations 23 - 33

43. Moreover, if a potential sponsor is so strongly influenced in its decision whether or not to act by information as to what funding another sponsor secured for another initial sponsorship or rebrokering, it seems highly likely that it would seek such information when negotiating with the DfE anyway and would be similarly discouraged by a blank refusal to provide it.

44. The DfE submitted no evidence nor information in its letter to the ICO of any problems in obtaining sponsors nor of questioning as to what payments other sponsors were getting, when negotiating the first twenty – three transfers. JD's claims that many of the rebrokerings probably took place without delicate negotiations or marked reluctance from the new sponsor appear to have some force.

45. The NAO report, at paragraph 15 of the section "Key findings" stated that the DfE had supplied information on grants provided to every sponsored academy and that the average grant had been reduced significantly by the adoption of a formula – based approach. A similar point was made at paragraph 18. The fact that grants were being reduced was therefore in the public domain before the request giving rise to this appeal. That makes the DfE argument about unrealistic expectations and disillusioned sponsors all the harder to accept

46. Points (i) and (iii), as recited at paragraph 23 above are really the same point with the refinement that (i) envisages the complete withdrawal of the Trust from the pool of potential sponsors whereas (iii) contemplates its conversion to a mercenary determination to drive a hard bargain, quite contrary to the philanthropic principles underlying sponsorship. Both appear to assume, not just a strong financial self – interest in the potential sponsor, which may or may not be the case, but, more strikingly, a surprising conviction in the DfE that the sponsor is so commercially naïve as to suppose at the outset that all will receive similar payments, irrespective of the varying problems,

financial, educational and social, that different sponsorships will confront. Only a sponsor afflicted with such naivety could feel that varying payments created unfairness, as the DfE postulates.

47. Furthermore, these arguments seem to ignore the possibility of explaining to the sponsor, if it questions unequal provision, the starkly obvious point that different cases demand different levels of funding.

48. Given that the whole scheme is founded, to the knowledge of all concerned, on the principle of non – profitmaking philanthropy, the DFE might conclude that a sponsor which was too obtuse to understand the need for differential funding and too self - interested to accept the principle when it was explained or to negotiate accordingly was not a suitable replacement for an inadequate sponsor nor indeed fitted for sponsorship at all.

49. The suggestion mooted at 23(ii) that disclosure of the rebrokerage costs of each transfer could reveal sensitive information such as the quantum of a severance package is hard to follow since no breakdown of those costs was requested. No explanation of this alleged risk was provided.

50. The rapid implementation of the academies system does not appear to the Tribunal to heighten the risks to the DfE's interests involved in disclosure of the funding amounts. Again, the DfE argument attributes to potential sponsors a remarkable lack of statistical grasp, so that they assume that isolated examples of funding in the early stages of implementation are a safe guide to the general level of support to be expected in the future. This is a particularly unrealistic argument.

51.With respect, the same goes for the argument as to prejudice to the school from publication of the rebrokering payment.[2], which was advanced on the issue of prejudice to commercial interests. No sensible supplier would suppose that a quotation designed to match the entire payment, designed for a wide range of expenditure, would be taken seriously by the school.

52.In summary, the DfE arguments attribute to potential sponsors a bewildering blend of naivety and financial opportunism, which appears to make them unlikely participants in a philanthropic project for which high quality leadership, managerial and financial skills appear to be indispensable, the more so where rebrokerage is involved. The Tribunal finds the implied characterization unconvincing.

53.At paragraph 35 of this decision, we refer to the possible benefits of disclosure to the development of the academy programme. First, publication would enable sponsors and the general public to see that, in a substantial number of cases, no payment at all was made to the new sponsor, a point which might increase public confidence in the scheme and make plain to the potential sponsor that funding was not inevitable. Secondly, it is quite possible that sponsors would regard such transparency as a mark of confidence in those who might be recruited as sponsors and a good omen for a successful partnership with the DfE.

54.For these reasons we conclude that the opinion of the qualified person was not reasonable because the evidence and arguments submitted to him were unconvincing, in some cases unrealistic and speculative and, viewed as a whole, incapable of establishing a significant and weighty chance that prejudice would be caused to the effective conduct of public affairs. Equally importantly, they failed to refer to a number of significant considerations which were material to the formation of his opinion.

55.Exactly the same matters determine the question whether s.43(2) is engaged. For the reasons set out above, we conclude that the ICO, assisted by the DfE, has failed to show

[2] See paragraph 26 referring to para. 31 of the DfE letter to the ICO.

that any prejudice to the DfE's commercial interests is likely to be caused by disclosure of these figures. "Commercial interests" probably cover all the interests relating to the academies system which the DfE seeks to protect, whether immediate costs involved in rebrokerage or the longer – term issue of the size and quality of the pool of potential sponsors which, according to the DFE, are likely to be reduced by disclosure. Getting the best possible service for your money is plainly a major commercial interest.

56. Despite rejecting the submissions that these exemptions are engaged, the Tribunal thinks it right to indicate its findings on the question of the public interest, should it be in error as to either or both of its primary findings. The relevant public interests are identical in the case of the two exemptions relied on.

57. The public interest arguments recited by the ICO and the DfE in favour of withholding this information are, inevitably, a reformulation of the ICO's submissions and the DfE's arguments in the letter to the ICO. For the purposes of this part of our decision, we assume that, contrary to our primary findings, disclosure would be likely to cause prejudice to the effective conduct of the academies system and the commercial interests of the DfE. We are entitled to bear in mind that, even on that footing, the occurrence of prejudice can be treated as far from certain. Moreover, the degree of prejudice may be relatively modest, whilst satisfying the s.35(2)(c) test.

58. Assuming the likelihood of the degree of prejudice set out in paragraph 57, we have no doubt that it is easily outweighed by the public interest in disclosure.

59. Education is an issue of very great public concern in all sections of society.

60. The development of the academy system under governments of different political complexions has roused substantial public interest and concern and seems to Polarise opinion to a marked degree.

61. Every aspect of the financing of the system by the use of public funds is a matter of importance to both supporters and opponents of the system. Informed comparisons with the costs of maintained schools which remain under local authority control are essential to the proper conduct of the debate and such comparisons require more than the periodic provision of a global figure.

62. Rebrokering occurs frequently where the first sponsor has failed, for whatever reason, to produce the looked – for improvement in the academy's performance. Opponents of the system may argue - whether correctly or not is immaterial - that the need to find a replacement sponsor reveals a flaw in the project and the associated costs are an argument against the system as a whole. On the other hand, supporters should be able to demonstrate, if it is the case, that such costs are modest and do not frequently arise.

63. A reasoned argument requires the availability of such information.

64. More generally, we note the conclusions of the HOCEC report and the final paragraph of the summary

"The DfE needs to be far more open about the implementation of the academies programme: it has much to gain from transparency and clarity over its processes."

65. The same summary insists that –

"The DfE should be more open and transparent about the accountability and monitoring

That involves openness as to the funding for which they must account.

66. The Tribunal has no hesitation in quoting the HOCEC report which is not a "proceeding in Parliament" within Article 9 of the Bill of Rights, 1689 and was published by the authority of the House of Commons. Moreover, so far from questioning its findings, this decision reflects.them.

Conclusion

67. For these reasons we find that neither of the exemptions relied on is engaged and that , if either were engaged, the public interest in disclosure of the requested and withheld information would clearly outweigh the interest in maintaining the exemption.

68. This appeal is therefore allowed.

69. This is a unanimous decision.

David Farrer Q.C.

Tribunal Judge

31st. December, 2015