



Neutral Citation Number: [2023] UKFTT 00836 (GRC)

Case Reference: EA-2023-0094

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

**Heard: By CVP
Heard on: 3 October 2023
Decision given on: 13 October 2023**

Before

**TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER PAUL TAYLOR
TRIBUNAL MEMBER PHEBE MANN**

Between

JEREMY YALLOP

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

CORRECTED UNDER RULE 40

Representation:

For the Appellant: In person

For the Respondent: Did not appear.

Decision: The appeal is Allowed

Substituted Decision Notice for IC-193481-Q0J2

Organisation: The Office for Standards in Education, Children's Services and Skills ('Ofsted')

Complainant: Jeremy Yallop

The Substitute Decision

- (1) The Tribunal is not satisfied that the public authority carried out adequate searches in order to locate the request information.

- (2) The Tribunal requires the public authority to take the following steps to ensure compliance with the legislation:
 - a. The public authority shall undertake a further search for the requested information having regard to the tribunal's reasons below, which should include making enquiries of Her Majesty's Chief Inspector, Amanda Spielman, and her private office or support staff.
 - b. The public authority shall make a fresh response to the Appellant's request for information which will be subject to the rights given under section 50 of the Freedom of Information Act 2000 to make a new complaint to the Information Commissioner.
- (3) The public authority must take these steps within 35 calendar days of the date on which the Commissioner sends them notification of this decision in accordance with the Direction below.
- (4) Failure to comply with this decision may result in the Tribunal making written certification of this fact pursuant to section 61 of the Act and may be dealt with as a contempt of court.

Directions

1. The Information Commissioner is directed to send a copy of this decision to Ofsted within 28 days of its promulgation or an unsuccessful outcome to any appeal that is made.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice IC-193481-Q0J2 of 24 January 2023 which held, on the balance of probabilities, that the Office for Standards in Education, Children's Services and Skills (Ofsted) held no information within the scope of the request.

Requests, Decision Notice and appeal

The Request

2. This appeal concerns the following request for information made on 28 July 2022:

"In October 2018 Amanda Spielman wrote to the Chair of the Public Accounts Committee. Her letter said:

The concept of home education is being warped. We have a lot of anecdotal evidence that suggest that parents are home educating their children under duress, to prevent exclusion.

Often, these parents do not have the capacity to provide a good standard of education. In other cases, parents use home education as a guise to allow them to use illegal schools or to evade the scrutiny of public services.

I am interested in the evidence referred to in this letter. Could you please disclose the records that Ofsted holds of

(a) the “evidence that suggests that parents are home educating their children under duress, to prevent exclusion”?

(b) the evidence that “these parents [often] do not have the capacity to provide a good standard of education”?

(c) the evidence that "parents use home education as a guise to allow them to use illegal schools or to evade the scrutiny of public services”?

I would be grateful if you could include in your disclosure the evidence that Amanda Spielman was referring to.”

The response

3. On 9 August 2022, Ofsted responded. Ofsted stated that it had carried out reasonable searches but had been unable to locate a record setting out what quantifiable evidence HMCI was referring to in her letter. Ofsted explained that, as the evidence was referred to as ‘anecdotal’, it was unlikely to have been systematically recorded. Ofsted referred Mr. Yallop to some information on an activity referred to as ‘off-rolling’.
4. Mr. Yallop requested an internal review. He made the following points:
 - 4.1. The response neither confirmed nor denied that the information was held.
 - 4.2. The request was for the evidence itself, not for a record setting out what evidence HMCI was referring to, which Ofsted should be able to locate by asking Amanda Spielman what she was referring to.
 - 4.3. The request should have set out whether Ofsted had searched for the information in evidence from section 97 inspections of unregistered schools or in evidence held by each Ofsted region outside of inspection evidence.
 - 4.4. The response was for anecdotal evidence not quantifiable evidence.
 - 4.5. The information about off-rolling was not relevant to his request.
5. In its internal review response on 7 September 2022 Ofsted confirmed its initial response. Ofsted stated:

“1. Confirming what is (or isn’t held)

...In Ofsted’s response, it confirmed that it had conducted appropriate searches and had not been able to locate a record which set-out what anecdotal information HMCI’s comments were based on. Whilst it remains possible that Ofsted may independently hold evidence that was referred to in the letter, unsurprisingly the key information required to identify and locate such ‘anecdotal’ evidence is not itself recorded.

In my view this means, for the purposes of the FOI Act, Ofsted provided you with an accurate explanation, setting out why the information could not be identified. This is

an entirely valid response to a request that is consciously targeted towards obtaining ‘anecdotal’ information.

2. Locating the information

The FOI Act does not require a public authority to seek any individual’s recollections and to substitute these for recorded information, especially where this relates to events four years previously.

I think your comments here are helpful in confirming that you now recognise that you now recognise that Ofsted is unable to answer your question by reference to recorded information alone. The FOI Act is only concerned, however, with recorded information and Ofsted has not been able to locate a written record of what evidence HMCI was referring to in her letter.

3. Searching in previously mentioned locations

...

Carrying out a search within those locations takes us no further forward as it has no prospect itself of identifying the information that was being referred to in the letter of October 2018.

4. Anecdotal information

I can confirm that Ofsted correctly understood your request. As Ofsted has previously explained to you, by the very nature of it being ‘anecdotal’, the evidence is unlikely to have been systematically recorded.

A dictionary definition for ‘anecdotal’ is *“not necessarily true or reliable, because based on personal accounts rather than facts or research”*.

In the letter to the Select Committee, which forms the core of this request, I have taken the phrase *“we have a lot of anecdotal evidence”* to be naturally understood as meaning *“we have seen or heard a lot of anecdotal evidence”*.

The term anecdotal in this sense can be taken to have been used in the letter to indicate to the Select Committee that there is not recorded information to accompany the statement that followed. In my view inclusion of this word assisted the Select Committee in understanding that Ofsted had not systematically recorded the information it had seen and heard.

The wording used in Ofsted’s response to you attempts to draw the distinction between what you have requested, and the likelihood of Ofsted actually having recorded it.

I think this point capture the fundamental problem, and I think futility, with the request you have made, in that you are asking for information you are aware is unlikely to be captured in terms relevant to the FOI Act.

...”

The Decision Notice

6. In a decision notice dated 24 January 2023 the Commissioner decided that Ofsted had complied with its obligations under section 1(1)(a) FOIA as it had confirmed no information is held.
7. The Commissioner noted that Ofsted had attempted to conduct searches, and the Commissioner appreciated the difficulty of trying to conduct searches for evidence described as ‘anecdotal’. In relation to the suggestion that Ofsted approach HMCI to ask them on what evidence their comments were based the Commissioner acknowledged that there were circumstances where it might be necessary to ask an individual for information. However:

“...in this case, the Commissioner does not consider this would have been likely to elicit any information – the letter was written four years ago and HMCI clearly informed the Select Committee this was anecdotal. If evidence existed of these practices, it would be well known within Ofsted and east to locate.’

8. The Commissioner concluded, on the balance of probabilities, that recorded information in scope of the request was not held given the letter referred to “anecdotal evidence” which the Commissioner accepted was usually seen or heard, based on the dictionary definition that anecdotal evidence is “evidence in the form of stories that people tell about what has happened...”.

Notice of Appeal

9. The Grounds of Appeal are, in essence:
 - 9.1. The Commissioner was wrong to conclude that Ofsted has complied with its obligations under section 1 FOIA. It is likely that asking Amanda Spielman how to locate the evidence that she said Ofsted had was the only reasonable way to locate that information. It was manifestly unreasonable for Ofsted to instead conduct a search that it considered futile.
 - 9.2. The Commissioner was wrong to conclude that Ofsted has searched for the requested information. Ofsted had searched for a secondary record that set out what the evidence was. Ofsted’s search for the secondary record was based on a misunderstanding of its obligations under the Freedom of Information Act: it wrongly considered that it was only obliged to disclose information that it could locate “by reference to recorded information alone”.
 - 9.3. The Commissioner was wrong to accept Ofsted’s interpretation of the phrase “we have a lot of anecdotal evidence” to mean “we have seen or heard a lot of anecdotal evidence.” Anecdotes can be written.
 - 9.4. The Commissioner was wrong to conclude that, since Amanda Spielman’s letter was written almost 4 years ago, it is unlikely that she would be able to recall what she wrote about.

The Commissioner’s response

10. The Commissioner accepts that before a public authority can be satisfied on the balance of probabilities that it doesn't hold information falling within the scope of a request, it must conduct adequate and properly directed searches.
11. The Commissioner's decision notice acknowledged that, "there are circumstances where it may be necessary to ask an individual for assistance in locating information".
12. However, in this case, the letter was written by Amanda Spielman four years prior to the request being made. The Commissioner therefore remains of the view, given the time that had elapsed, asking an individual to recall whether any recorded information was being referred to and if so to identify this would be unlikely to successfully locate information. The Commissioner therefore submits that not consulting Amanda Spielman under these circumstances does not render the searches that have been conducted inadequate.
13. Although the Appellant did not request a record of the evidence, if it had been held it would have assisted Ofsted in directing its searches.
14. The Commissioner's understanding is that anecdotal evidence is likely to be evidence based only on personal observation, collected in a casual or non-systematic manner. Ofsted has been clear that it is likely referring to evidence seen or heard rather than recorded. The Commissioner submits that he was entitled to accept the word of the public authority in this regard.
15. The Commissioner remains of the view, based upon the searches conducted and the explanations provided by Ofsted, on the balance of probabilities, the information requested in this case is not held.
16. The Commissioner applied for the appeal to be struck out but this was refused by Judge Findlay in a decision dated 7 August 2023.

The reply of Mr. Yallop

17. Mr Yallop submits:
 - 17.1. Ofsted has not confirmed that it did not hold the requested information.
 - 17.2. Anecdotal does not mean unrecorded.
 - 17.3. The search was not adequate. Ofsted falsely believed that it was not obliged to ask an individual and that it was only obliged to disclose information that could be located via recorded information alone.
 - 17.4. The Commissioner is not entitled to accept the word of a public authority that has not carried out adequate searches.
 - 17.5. The Commissioner cannot judge on the balance of probabilities in the absence of adequate searches.

Legal framework

18. Section 1(1) FOIA provides:

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case to have that information communicated to him.”

19. The question of whether information was held at the time of the request is determined on the balance of probabilities.

The role of the tribunal

20. The tribunal’s remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner’s decision involved exercising discretion, whether he should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Issues

21. The issue for the tribunal to determine is whether, on the balance of probabilities Ofsted held information within the scope of the request.

Oral submissions

22. Mr. Yallop made helpful submissions reiterating the points in his reply, which the Tribunal has taken into account.

Discussion and conclusions

23. When a public authority claims the information is not held, the Commissioner decides whether this is the case on the balance of probabilities and will reach a decision based on the adequacy of the public authority’s search for the information and any other reasons explaining why the information is not held.

24. In the tribunal’s view it is right, as a general principle, that the Commissioner is entitled to accept the word of the public authority and not to investigate further in circumstances where there is no evidence of an inadequate search, any reluctance to carry out a proper search or any motive to withhold information in the public authority’s possession. It is simply not practical or proportionate for the Commissioner to carry out a full-scale investigation in every case in which a public authority is not believed by a requester.

25. This accords with the approach that was taken by the First-tier Tribunal in **Bromley v Information Commissioner & the Environment Agency** (EA/2006/0072) in **Oates v Information Commissioner** (EA/2011/0138) and that has been taken in numerous subsequent tribunal decisions. We are not bound by the decisions in **Bromley** or **Oates** or by any other First-tier Tribunal decisions, but we are satisfied that this is the correct approach for the tribunal to take.

26. The Commissioner wrote to Ofsted on 4 October 2022 informing them that the complaint had been accepted as eligible for formal consideration. The Commissioner informed Ofsted that:

“The ICO will allow you a maximum of one opportunity to justify your position. Once a case officer is assigned, if we require further input from you, you will be given up to 20 working days to provide the information requested.

You must use the intervening time to thoroughly review your handling of the request.

You need to be fully prepared and ready to provide your submissions to the ICO, which we would expect to be more detailed than the responses you have already provided to the complainant.

We welcome your submissions in advance of the case being allocated as this will offer us the potential to resolve the complaint earlier.”

27. Ofsted did not provide any submissions in response to that letter, and the Commissioner did not ask Ofsted for any further input. Accordingly in reaching his decision the Commissioner relied solely on the response to the request and the internal review outcome. There will be many complaints which can be dealt with purely on the basis of the response to the request and the internal review outcome, and the Commissioner is not under any obligation to ask the public authority for further information in every case.
28. Looking at Ofsted’s response and its internal review outcome, we find that it is possible that Ofsted misunderstood its obligations to search for information. It is possible that Ofsted thought that it only had to conduct a search using recorded information, and that it was not required to ask individuals for their recollections in order to assist it in locating the information. In other words, Mr. Yallop may be right that Ofsted took the position that it had no obligation to use the expertise and knowledge of its staff to locate recorded information, and that it was only obliged to disclose information that it could locate ‘by reference to recorded information alone’. That is certainly one interpretation of the response and internal review outcome.
29. For example, at p C68 of the bundle, Ofsted explains that ‘the key information required to identify and locate such ‘anecdotal’ evidence is not itself recorded. In my view this means, for the purposes of the FOI Act, Ofsted provided you with an accurate explanation, setting out why the information could not be identified.’
30. That is a misunderstanding of FOIA. Whilst the information itself must be recorded, a reasonable search is likely to involve using the knowledge and expertise of staff to locate the recorded information. The ‘information’ that is needed to identify or locate the requested information does not, in itself, need to be recorded.
31. The tribunal accepts that Ofsted may not have misunderstood its obligations and may simply have expressed itself unclearly in its communications to Mr. Yallop.
32. Whether or not Ofsted misunderstood its obligations in relation to searching for information, we find that if the requested information did exist in recorded form, the obvious place to begin the search was by asking HMCI, Amanda Spielman, and her private office/support staff.

33. A public authority should conduct an appropriate and reasonable search for information. This should include, as a minimum, searching in the places where it is reasonable to expect that the public authority would find the information, if it existed.

34. The requested information in this case was the evidence referred to by HMCI Amanda Spielman in a letter to the Public Accounts Committee on 30 October 2018. In that letter HMCI stated (pA22 of the open bundle):

“I would like to reiterate what I said to the committee during the oral evidence session. As Chief Inspector, I believe that it is important that I comment only on areas where we have evidence, rooted in inspection findings. To do otherwise, and to offer opinions on a wider range of policy matters, would only undermine Ofsted’s credibility.

However, in those areas where our inspections are highlighting system-wide concerns, we have not hesitated to speak out. Since taking up the position of Her Majesty’s Chief Inspector (HMCI), I have spoken out, for instance, on off-rolling, the narrowing of the curriculum, illegal unregistered schools, the importance of supporting headteachers from outside pressures, domestic abuse and neglect of children.

This is the approach that I will continue to take throughout my term in office: speaking from the evidence to make sure that Ofsted remains a force for improvement in the education and care sectors.”

35. HMCI made clear in the above passages that she believed that it was important that she commented ‘only on areas where we have evidence, rooted in inspection findings’ and that it would ‘undermine Ofsted’s credibility’ to do otherwise.

36. Given this emphasis on supporting evidence, we find that it is likely that in October 2018 when HMCI said ‘we have a lot of anecdotal evidence’, HMCI, or at least her private office/support staff, would have been aware of the source of that anecdotal evidence. If it was recorded evidence, then they are likely to have known where it could be found.

37. Further, in the light of this emphasis on evidence and the stated risk of undermining Ofsted’s credibility where no such evidence existed, the tribunal takes the view that where HMCI was expressly relying on ‘anecdotal evidence’, it is likely that some record would have been made of the source of that evidence.

38. HMCI has made similar statements about home education in November 2018, October 2019 and November 2020. In June 2021, in an oral evidence session of the Education Committee she stated:

“[T]here are some families who make an excellent job of home education and always have done, but there are many pockets of concern, and I would single out particularly young people who have essentially fallen out of school or been off rolled, perhaps because they have special needs or the school has not been able to cope with their behaviour, who end up nominally home educated but where it is very clear that parents do not have the capacity or expertise to do a decent job of it.”

39. Even though the initial letter to the Chair of the Public Accounts Committee was nearly 4 years before the request, taking into account HMCI's emphasis on commenting only on areas where there is evidence, and given her more recent comments on this issue, the tribunal disagrees with the Commissioner's conclusion that asking HMCI would not have been likely to elicit any information.
40. In our view, even though a significant period of time had passed, it is likely that HMCI herself or her private office would, at the time of the request, recall the source of the anecdotal evidence. Further, given our finding that there are likely to have been contemporaneous records of the source of such evidence, those records might still have been available at the relevant time.
41. These findings are unaffected by the description of the evidence as 'anecdotal'. There are many sources of anecdotal evidence. We accept that anecdotal evidence could have been verbal and unrecorded. It could have been verbal but reported to or recorded by Ofsted in writing. It could have been written, in the form of letters from teachers or parents for example. In all these scenarios, for the reasons set out above, we find that HMCI or her private office would be likely to recall the source of the evidence relied on in the letter to the Chair of the Public Accounts Committee.
42. In those circumstances we find that the failure to ask HMCI and her private office/support staff was evidence of an inadequate search. This was the obvious starting point for the search for the requested information.
43. We conclude that there was evidence of an inadequate search by the public authority which the Commissioner should have considered before deciding not to make further investigation. In the circumstances of this case, we have decided that he was not entitled to accept the word of the public authority without further inquiry.
44. Thus, adopting the same test as the tribunal did in **Bromley**, the Commissioner fell into error in accepting the assertion of the public authority, on the basis of which he decided on the balance of probabilities that it was more likely than not that Ofsted did not hold the information requested.
45. We make it clear that we are not deciding that Ofsted does hold the information requested but that in this case there was insufficient evidence to support the conclusion that it was more likely than not that Ofsted did not hold the information requested.
46. For all these reasons we have decided that the Information Commissioner's Decision Notice was not in accordance with the law and the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised differently. Accordingly, this appeal is allowed and the tribunal's decision above is substituted for that of the Commissioner.

Signed Sophie Buckley

Date: 9 October 2023

Corrected: 30 October 2023

Judge of the First-tier Tribunal