Case Reference: EA/2022/0330

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard by: CVP
Heard on: 3 and 10 May 2023
Decision given on: 6 June 2023

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER DAVE SIVERS
TRIBUNAL MEMBER JO MURPHY

Between

CLARE PAGE

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) SCHOOL OF SEXUALITY EDUCATION

Respondent

Representation:
For the Appellant: Ms Gannon
For the First Respondent: Did not appear
For the Second Respondent: Miss Wright

Decision: The appeal is dismissed

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice IC-171936-C9H8 of 29 September 2022 which held that Haberdashers' Aske's Federation Trust ('the Trust') was entitled to rely on section 40(2) and section 41 of the Freedom of Information Act 2000 (FOIA) and that it did not hold some of the requested information.

2. The Commissioner did not require the public authority to take any steps.

Factual background to the appeal

3. On 20 September 2021 facilitators from the School of Sexuality Education (SoSE) taught a relationships and sex education lesson on consent to a class, including Ms Page's daughter, at Haberdasher's Hatcham College ('the School). The Trust is a Multi-Academy Trust of which the School is a member. 'The Trust' and 'the School' are used interchangeably in this decision.

4. This appeal has been brought because Ms Page has been unsuccessful in her attempts to obtain from the School (i) copies of the slides used in that lesson and (ii) the names of the individual facilitators who delivered the lesson. Ms Page also asserts that the School is incorrectly stating that certain other internal teaching materials do not exist.

Preliminary observation

5. It is not the tribunal's role to determine whether a school, or an external provider of relationships and sex education ('RSE') classes, should provide copies of teaching materials to parents. We do not have jurisdiction to determine if a school should have provided copies of teaching materials to a particular parent. We can only determine whether, if a school has refused to provide, say, a particular lesson plan in response to a FOIA request, an exemption applies under FOIA. In doing so, we are considering disclosure of one particular lesson plan to the world, not to a particular parent. This necessarily informs our approach to the public interest balance.

6. The same principle applies in relation to the question of whether parents should be told the names of those who teach their children. We are considering disclosure of those names to the world, not to a discrete set of parents.

7. For those reasons, our decision in this appeal should not be seen as a judgment on whether or not full teaching materials on RSE, or the names of those delivering RSE lessons, should be provided to parents as a matter of course.

Requests, decision notice and appeal

The request

8. This appeal concerns the following request made on 7 December 2021:

> [1] Please can I receive a copy of the lesson plan and accompanying slides and any other written or visual material used for the lesson on Consent that was presented to my daughter last term.
>
> [2] Please may I also receive a copy of any other lesson plans, guides, slides, written or visual resources produced by the SoSE that were used in any other classes at Hatcham College since the start of this academic year.
>
> [3] Please may I see all of the lesson plans and any other written or visual resources pertaining to Week 8 of the PSHE/RSE curriculum, which are detailed in this table below:
>
> [4] Please may I see the PSHE/RSE curriculum lesson plans for the current term, up to Christmas.
>
> [5] Please will the school inform me of which School of Sexuality Education staff members taught my daughter the lesson on Consent.
>
> [6] Please will the school inform me which staff members of the School of Sexuality Education have visited Hatcham College in preparation for delivering services for the current academic year.
>
> [7] Please will the school inform me which School of Sexuality Education staff members have visited the school to deliver lessons or presentations to any Hatcham College pupils so far this academic year.
>
> [8] Please will the Head Teacher confirm who is responsible for the public presentation given to the Friends Forum by herself, [name] and [name]; specifically which staff member was responsible for [name]'s claim that the school had answered all parental questions.

The response

9. The Trust replied on 21 January 2022.

10. The Trust withheld the SoSE materials requested in parts (1) and (2), relying on section 43 FOIA (commercial interests).

11. The Trust provided some of the information requested in parts (3) and (4) (week 8 materials and PHSE/RSE lesson plans for the current term).

12. The Trust withheld the information requested in parts (5), (6), and (7) on the basis that it was personal data.

13. The Trust provided the information requested in part (8).

14. Ms. Page requested an internal review on 28 January 2022. The Trust upheld its refusal in relation to parts (1) and (2) and raised section 41 in addition on 4 March 2022.

15. Ms Page referred the matter to the Commissioner on 19 May 2022.

The decision notice

16. In a decision notice dated 29 September 2022 the Commissioner decided that section 41(1) and section 40(2) were engaged and that the Trust did not hold any further information within part (3). He did not consider the other exemptions raised by the Trust.

Section 41(1) – information provided in confidence

17. The information in scope of parts (1) and (2) of the request was a set of powerpoint slides provided to the Trust by SoSE. The Commissioner was satisfied that the information was obtained from another person and that SoSE was a legal person capable of bringing a legal action. Having reviewed the withheld information, whilst the Commissioner recognised that the material drew from a variety of sources, he concluded that it was SoSE's intellectual property. The Commissioner concluded that the material was not trivial. The Commissioner was satisfied that it had the necessary quality of confidence.

18. The Commissioner concluded that the information had been provided to the Trust for a specific limited purpose and the Trust was only supposed to retain the information for a very short period of time. He accepted that the Trust was not permitted to further distribute it and was supposed to delete it immediately afterwards. The Commissioner was satisfied that when SoSE provided the information to the Trust, as opposed to when it presented the material in the course of a lesson, it set explicit conditions of confidence which it should reasonably have expected the Trust to maintain. The Commissioner determined that any reasonable person, standing in the shoes of the Trust, should have realised that an obligation of confidence had been invoked.

19. The Commissioner concluded that SoSE had the right to exploit its own intellectual property for commercial gain and that making the information available to the world would take away that right. The Commissioner concluded that fewer schools were likely to pay SoSE to deliver the same lesson where material was readily available for free. The Commissioner concluded that once the information was disclosed to the world, SoSE would find it difficult to enforce any remaining intellectual property rights. The Commissioner was satisfied that breaching the confidence would cause detriment to SoSE.

20. The Commissioner was not satisfied that the Trust would be able to mount a viable public interest defence. Having reviewed the withheld information, the Commissioner did not consider that there was anything within the material that clearly mis-represented the law or was so obviously inappropriate as to justify over-riding the Trust's duty of confidence.

21. The Commissioner recognised that, in this area, parents have rights to decide what is, or is not, taught to their child. He notes that those rights cannot be exercised in a meaningful way without parents being aware of the subject matter their children are likely to be taught. However he concluded that unrestricted disclosure was not a proportionate or necessary means of achieving any legitimate interest in keeping parents informed.

Information not held

22. Given that the Trust had provided a plausible explanation, supported by evidence, explaining why the material Ms Page asserted was missing never existed and therefore could not be held, the Commissioner was satisfied that, on the balance of probabilities, the Trust had provided all the information it held within the scope of part (3).

Personal data – parts (5), (6) and (7) of the request

23. The Commissioner was satisfied that the requested information fell within the definition of personal data. The Commissioner took a cautious approach to the dispute as to whether the names of the representatives were on the SoSE website at the time of the request, and assumed that they were not. Further the Commissioner noted that the request was for the actual representatives who attended the Trust's premises and nothing on the websites identified the particular individuals who had delivered the lesson.

24. The Commissioner recognised that there was a legitimate interest in understanding which individuals are being given access to schools and that parents have a legitimate interest in ensuring that their children are not going to come into contact with individuals who would pose a risk. He recognised that there was a broader legitimate interest in ensuring that public authorities were being transparent and accountable. The Commissioner was not satisfied that disclosure was necessary to meet the legitimate interest in disclosure and concluded that the processing was unlawful. The Commissioner concluded that the Trust was entitled to withhold the information under section 40(2).

Notice of Appeal

25. Ms. Page's grounds of appeal are as follows:

Ground 1

26. The Commissioner erred in holding that the information requested under part (1) could be withheld in reliance upon s.41 of the FOIA:
    26.1. There was no obligation of confidence;
    26.2. There is no detriment to SoSE;
    26.3. It is not actionable as the public interest falls in favour of disclosure.

Ground 2

27. The Commissioner erred in holding that information requested under (5), (6) and (7) was exempt as personal data:
    27.1. There is a strong legitimate interest in disclosing the information;
    27.2. The Commissioner was wrong to conclude that it was not reasonably necessary to know who was doing the teaching;
    27.3. The balance of interest falls in favour of disclosure.

Ground 3

28. The Commissioner erred in accepting that no further information was held in relation to part (3) of the request.

The Commissioner's response

Ground 1 - the Commissioner was wrong to conclude the PowerPoint slides within scope of part (1) could be withheld on the basis of FOIA section 41

29. The Commissioner submits that section 405 of the Education Act 1996 (EA 96) does not give rise to an implied obligation to disclose the slides:
    29.1. It is doubtful that Parliament intended all written materials and detailed lesson plans should be disclosable under section 405 EA 96 in circumstances where it has already provided for the provision of relevant information to parents through section 404 EA 96.
    29.2. Parliament is unlikely to have interfered with rights of confidence and other intellectual property rights – e.g. SoSE's rights over the slides – in the absence of clear words to the contrary.
    29.3. There is no suggestion in the statutory guidance that parents should have access to all written materials and lesson plans.

30. The Commissioner argues that even if there was such an obligation, the Trust would be able to rely on section 21 FOIA (information reasonably accessible by other means). Even if section 405 affords Ms Page a right of access to the slides, it does not follow that the general public has such a right.

31. The Commissioner submits that the absence of a statutory obligation (supported by statutory guidance) on the Trust to disclose all written materials and lesson plans suggests that Parliament does not consider disclosure of such information will generally be in the public interest. The public interest in parents knowing what sex education will or has been provided to their children is accounted for in the existing

statutory scheme which provides, according to the statutory guidance, for access to "details of content / scheme of work" (para 16), "examples of resources" that a school "plan[s] to use" (para 24) , and "clear information … on the subject content" (para 38).

32. The Commissioner acknowledges that there may be exceptional circumstances where FOIA requires that written materials and/or lesson plans for a specific sex education class should be disclosed. However, the Commissioner has detected nothing in the PowerPoint slides which would give rise an exceptional public interest in favour of disclosure.

33. Any residual public interest in disclosure specific to Ms Page's circumstances is further addressed by (a) the disclosure by the Trust, in response to Ms Page's information request, of a number of lesson plans and lesson materials produced by the School; (b) the fact that the Trust made arrangements for Ms Page to be shown the PowerPoint slides under restricted conditions; and (c) the fact Ms Page's complaint to the Trust was investigated and dismissed by an independent panel as part of the Trust's complaint procedures.

34. Insofar as the Trust has failed in its statutory obligations to properly consult and provide sufficient information to parents to make a meaningful decision about sex education, it is not proportionate to rectify any failings on the Trust's part by disclosure of the slides to the world at large under FOIA.

35. In relation to Ms Page's argument on the public interest in upholding the duty of confidence:

    35.1. The fact that the slides relate to one lesson only cuts both ways: if this reduces the public interest in preserving confidentiality it must also reduce the public interest in disclosure.
    35.2. The fact that original works are protected by copyright merits little weight.

36. The Commissioner submits that Ms Page is unable to demonstrate the Trust would be able to mount a successful public interest defence if the slides were disclosed in breach of confidence.

37. In relation to section 43 FOIA, the Commissioner relies on the decision notice and its submissions on section 41.

Ground 2 – the Commissioner erred in holding that information requested under parts (5)-(7) was exempt on the basis of section 40(2) FOIA

38. The Commissioner accepted in the decision notice that there was a legitimate interest in parents understanding which individuals are being given access to schools.

39. The Commissioner accepts that the Trust appears to have failed to include the names of the individuals from SoSE in its sex education policy, as required by the Statutory Guidance, and that this strengthens Ms Page's arguments that disclosure is reasonably necessary. However, in all the circumstances, the Commissioner maintains that disclosure would not be necessary:

    39.1. Disclosure of the names of individuals from SoSE would not improve Ms Page's understanding of what her daughter was taught, or better equip Ms Page to answer "any questions that her child might have on that individual's teaching …. [or] any other material that her child may find online associated with that individual".
    39.2. Ms Page has been provided with a significant amount of detail about sex education lessons and the SoSE, and has been shown the slides.
    39.3. Ms Page's "concerns as to the appropriateness of these individuals and the extent that they have been vetted by the school" is already addressed by (a) the Trust and School's statutory obligations to ensure the safety and wellbeing of pupils within its care; and (b) the ability of parents at the School to raise complaints about the provision of sex education, and have those complaints investigated and adjudicated on by an independent panel which will have access to the individuals' names; and (c) the fact that, when Ms Page did make a complaint, it was dismissed.
    39.4. The individuals in question will already have delivered the Consent Session and/or attended School at the time of the request, any concerns at the time of Ms Page's request cannot be said to concern any 'live' risk to her child.

40. If the Commissioner is wrong that disclosure was not reasonably necessary, then he submits that the balancing exercise still firmly favours non-disclosure.

41. The Commissioner submits that the legitimate interests of parents at the School to know which individuals have taught their children sex education and a broader legitimate interest in ensuring that public authorities are being transparent and accountable do not attract significant weight for the reasons given in the above section on whether disclosure is reasonably necessary.

42. The Commissioner submits that Ms Page is wrong to argue that the individuals' right to privacy should be given very limited weight:

    42.1. There is no hard and fast rule that "professional" activities do not engage a right to privacy.
    42.2. It does not follow from (a) the fact that the individuals from SoSE have chosen to go into schools to teach, and (b) that their names would be known to the pupils and teachers they have come into contact with, that (c) the individuals from SoSE would not be harmed by disclosure of their names to the world at large. As a matter of legal principle, information known by a limited section of the public may still be confidential or private.

42.3. The individuals' right to privacy is heightened by the fact that disclosure of their names would place them at risk of harassment and abuse by individuals who take issue with SoSE and its teaching methods

42.4. Although the Statutory Guidance indicates that the individuals' names should have been listed in the School's sex education policy, pursuant to section 404(1)(b) EA 96, this policy is only available to parents rather than the world at large and the Statutory Guidance does not have the force of statute and can be departed from, especially if this is required to avoid a risk to an individual's safety or wellbeing.

42.5. The suggestion that "some of the individuals in question have an active online presence" is vague and should be treated with caution given uncertainty as to what information was placed on SoSE's website at the time of the request. Even if information has been placed into the public domain indicating that certain individuals are connected with SoSE, there is nothing in the public domain indicating which individuals from SoSE delivered the Consent Session and/or have attended the School.

Ground 3 – the Commissioner erred in accepting that no further information was held in relation to part (3) of the request

43. There is no convincing basis to re-open this issue. The explanation given by the Trust was plausible and supported by evidence, and the Commissioner was right to accept that explanation on the balance of probabilities.

Legal framework

Information provided in confidence

44. Section 41 provides, so far as relevant:

Section 41 – Information provided in confidence

(1) Information is exempt information if –
(a) it was obtained by the public authority from any other person (including another public authority), and
(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

45. The starting point for assessing whether there is an actionable breach of confidence is the three-fold test in **Coco v AN Clark (Engineers) Ltd** [1969] RPC 41, read in the light of the developing case law on privacy:

(i) Does the information have the necessary quality of confidence?
(ii) Was it imparted in circumstances importing an obligation of confidence?

(iii) Is there an unauthorised use to the detriment of the party communicating it?

46. The common law of confidence has developed in the light of Articles 8 and 10 of the European Convention on Human Rights to provide, in effect, that the misuse of 'private' information can also give rise to an actionable breach of confidence. If an individual objectively has a reasonable expectation of privacy in relation to the information, it may amount to an actionable breach of confidence if the balancing exercise between article 8 and article 10 rights comes down in favour of article 8.

47. Section 41 is an absolute exemption, but a public interest defence is available to a breach of confidence claim. Accordingly there is an inbuilt balancing of the public interest in determining whether or not there is an actionable breach of confidence. The burden is on the person seeking disclosure to show that the public interest justifies interference with the right to confidence.

Section 21 (information reasonably accessible by other means)

48. Section 21 provides, insofar as relevant:

> (1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
>
> (2) For the purposes of subsection (1)—
>
> (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
>
> (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

Personal data

49. The relevant parts of section 40 of FOIA provide:

> (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
> (2) Any information to which a request for information relates is also exempt information if –
> (a) It constitutes personal data which does not fall within subsection (1), and
> (b) either the first, second or the third condition below is satisfied.

(3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act -

(a) would contravene any of the data protection principles, or..

…

(5A) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

50. Personal data is defined in section 3 of the Data Protection Act 2018 (DPA):

> (2) 'Personal data' means any information relating to an identified or identifiable living individual (subject to subsection (14)(c)).
>
> (3) 'Identifiable living individual' means a living individual who can be identified, directly or indirectly, in particular by reference to—
>
> (a) an identifier such as a name, an identification number, location data or an online identifier, or
>
> (b) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

51. This is in line with the definitions in the UK General Data Protection Regulation (UK GDPR). The tribunal takes the view that the recitals to the GDPR 2016/679 are a useful guide to the interpretation of the UK GDPR. Recital 26 to the GDPR is relevant, because it refers to identifiability and to the means to be taken into account:

> (26) The principles of data protection should apply to any information concerning an identified or identifiable natural person. Personal data which have undergone pseudonymisation, which could be attributed to a natural person by the use of additional information should be considered to be information on an identifiable natural person. To determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly. To ascertain whether means are reasonably likely to be used to identify the natural person, account should be taken of all objective factors, such as the costs of and the amount of time required for identification, taking into consideration the available technology at the time of the processing and technological developments. The principles of data protection should therefore not apply to anonymous information, namely information which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is not or

> no longer identifiable. This Regulation does not therefore concern the processing of such anonymous information, including for statistical or research purposes.

52. The definition of "personal data" consists of two limbs:

i) Whether the data in question "relate to" a living individual and
ii) Whether the individual is identified or identifiable, directly or indirectly, from those data.

53. The tribunal is assisted in identifying 'personal data' by the cases of **Ittadieh v Cheyne Gardens Ltd** [2017] EWCA Civ 121*; Durant v FSA* [2003] EWCA Civ 1746 and **Edem v Information Commissioner** [2014] EWCA Civ 92. Although these relate to the previous iteration of the DPA, we conclude the following principles are still of assistance.

54. In **Durant,** Auld LJ, giving the leading judgment said at [28]:

> Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject's involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person's or body's conduct that he may have instigated.

55. In **Edem** Moses LJ held that it was not necessary to apply the notions of biographical significance where the information was plainly concerned with or obviously about the individual, approving the following statement in the Information Commissioner's Guidance:

> It is important to remember that it is not always necessary to consider 'biographical significance' to determine whether data is personal data. In many cases data may be personal data simply because its content is such that it is 'obviously about' an individual. Alternatively, data may be personal data because it is clearly 'linked to' an individual because it is about his activities and is processed for the purpose of determining or influencing the way in which that person is treated. You need to consider

'biographical significance' only where information is not 'obviously about' an individual or clearly 'linked to' him.

56. The High Court in **R (Kelway) v The Upper Tribunal (Administrative Appeals Chamber) & Northumbria Police** [2013] EWHC 2575 held, whilst acknowledging the Durant test, that a Court should also consider:

> (2) Does the data "relate" to an individual in the sense that it is "about" that individual because of its:
>
> (i) "Content" in referring to the identity, characteristics or behaviour of the individual?
> (ii) "Purpose" in being used to determine or influence the way in which the individual is treated or evaluated?
> (iii) "Result" in being likely to have an impact on the individual's rights and interests, taking into account all the circumstances surrounding the precise case (the WPO test)?
> (3) Are any of the 8 questions provided by the TGN are applicable?
>
> These questions are as follows:
> (i) Can a living individual be identified from the data or from the data and other information in the possession of, or likely to come into the possession of, the data controller?
> (ii) Does the data 'relate to' the identifiable living individual, whether in personal or family life, or business or profession?
> (iii) Is the data 'obviously about' a particular individual?
> (iv) Is the data 'linked to' an individual so that it provides particular information about that individual?
> (v) Is the data used, or is it to be used, to inform or influence actions or decisions affecting an identifiable individual?
> (vi) Does the data have any biographical significance in relation to the individual?
> (vii) Does the data focus or concentrate on the individual as its central theme rather than on some other person, or some object, transaction or event?
> (viii) Does the date impact or have potential impact on an individual, whether in a personal or family or business or professional capacity (the TGN test)?
> (4) Does the data "relate" to the individual including whether it includes an expression of opinion about the individual and/or an indication of the intention of the data controller or any other person in respect of that individual. (the DPA section 1(1) test)?

57. Personal data of which the applicant is the data subject is always exempt by virtue of section 40(1) FOIA. In relation to other personal data, the data protection principles are set out Article 5(1) of the UK GDPR. Article 5(1)(a) UK GDPR

provides: that personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject. Article 6(1) UK GDPR provides that processing shall be lawful only if and to the extent that at least one of the lawful bases for processing listed in the Article applies.

58. The only potentially relevant basis here is article 6(1)(f):

> Processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which requires protection of personal data, in particular where the data subject is a child.

59. The case law on article 6(1)(f)'s predecessor established that it required three questions to be answered, which we consider are still appropriate if reworded as follows:

    1. Is the data controller or a third party pursuing a legitimate interest or interests?
    2. Is the processing involved necessary for the purposes of those interests?
    3. Are the above interests overridden by the interests or fundamental rights and freedoms of the data subject?

60. Lady Hale said the following in *South Lanarkshire Council v Scottish Information Commissioner* [2013] 1 WLR 2421 about article 6(1)(f)'s slightly differently worded predecessor:

> 27. ... It is well established in community law that, at least in the context of justification rather than derogation, 'necessary' means 'reasonably' rather than absolutely or strictly necessary .... The proposition advanced by Advocate General Poiares Maduro in *Huber* is uncontroversial: necessity is well established in community law as part of the proportionality test. A measure which interferes with a right protected by community law must be the least restrictive for the achievement of a legitimate aim. Indeed, in ordinary language we would understand that a measure would not be necessary if the legitimate aim could be achieved by something less. ...

61. Section 40(2) is an absolute exemption and therefore the separate public interest balancing test under FOIA does not apply.

Section 43 – commercial interests

62. Section 43(2) provides:

> "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)"

63. ‘Commercial interests’ should be interpreted broadly. The ICO Guidance states that a commercial interest relates to a person’s ability to participate competitively in a commercial activity.

64. The exemption is prejudice based. ‘Would or would be likely to’ means that the prejudice is more probable than not or that there is a real and significant risk of prejudice. The public authority must show that there is some causative link between the potential disclosure and the prejudice and that the prejudice is real, actual or of substance. The harm must relate to the interests protected by the exemption.

65. Section 43 is a qualified exemption, so that the public interest test has to be applied.

66. In considering the factors that militate against disclosure the primary focus should be on the particular interest which the exemption is designed to protect.

67. In **APPGER v ICO** [2013] UKUT 0560 (AAC) the Upper Tribunal gives guidance on how the balancing exercise required by section 2(2)(b) of FOIA should be carried out (paragraph 75):

> “… when assessing competing public interests under FOIA the correct approach is to identify the actual harm or prejudice that the proposed disclosure would (or would be likely to or may) cause and the actual benefits its disclosure would (or would be likely to or may) confer or promote. This … requires an appropriately detailed identification of, proof, explanation and examination of both (a) the harm or prejudice, and (b) benefits that the proposed disclosure of the relevant material in respect of which the exemption would (or would be likely to or may) cause or promote.”

The statutory backdrop in education law

68. Under section 9 of the Education Act 1996 the Secretary of State and Local Authorities are required to “have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure.”

69. Under section 80A of the Education Act 2002 (as amended) the Secretary of State must give guidance about the provision of education under section 80, including section 80(d) “provision for relationships and sex education for all registered pupils at the school who are provided with secondary education”.

70. Under section 80B(1) the Governing Body of a maintained school must:

"(a) make, and keep up to date, a separate written statement of their policy with regard to the provision of education under each of paragraphs (1)(c) and (d) of section 80, and (b) publish a copy of the statement on a website and provide a copy free of charge to anyone who asks for one."

71. Under section 80B(3) "The governing body must consult parents of registered pupils at the school before making or revising a statement under subsection (1)."

72. Sections 403-405 of the EA 1996 concern sex education provided by schools and require inter alia the school to have in place a "statement of policy" with regard to "sex education" (this is in addition to the requirement to have a policy for "sex and relationship" education):

 404 Sex education: statements of policy.

 (1)The governing body of a maintained school shall—

 (a) make, and keep up to date, a separate written statement of their policy with regard to the provision of sex education, and

 (b) make copies of the statement available for inspection (at all reasonable times) by parents of registered pupils at the school and provide a copy of the statement free of charge to any such parent who asks for one.

73. Under section 405 a parent can withdraw a child from sex education either "wholly or partly":

 405. Exemption from sex education in England:

 (1) If the parent of any pupil in attendance at a maintained school in England requests that he may be wholly or partly excused from receiving sex education at the school, the pupil shall, except so far as such education is comprised in the National Curriculum, be so excused accordingly until the request is withdrawn.

 (2) In subsection (1) the reference to sex education does not include sex education provided at a maintained school in England as part of statutory relationships and sex education.

 (3) If the parent of any pupil in attendance at a maintained school in England requests that the pupil may be wholly or partly excused from sex education provided as part of statutory relationships and sex education, the pupil must be so excused until the request is withdrawn, unless or to the extent that the head teacher considers that the pupil should not be so excused.

74. Schools must have regard to the relevant statutory guidance and where they depart from the guidance, they must have good reason for doing so. The relevant statutory guidance is "Relationships Education, Relationships and Sex Education (RSE) and Health Education, Statutory guidance for governing bodies, proprietors, head teachers, principals, senior leadership teams, teachers" (September 2020) ("The Statutory Guidance").

75. The Statutory Guidance is issued, in part, under section 403 which provides in (1A) that:

> (1A) The Secretary of State must issue guidance designed to secure that when sex education is given to registered pupils at maintained schools [in England] 6 –
>
> (a) they learn the nature of marriage and its importance for family life and the bringing up of children, and
>
> (b) they are protected from teaching and materials which are inappropriate having regard to the age and the religious and cultural background of the pupils concerned.

76. The Statutory Guidance provides that all schools must have in place a written policy for Relationships Education and RSE:

> "15. All schools must have an up-to-date policy, which is made available to parents and others. Schools must provide a copy of the policy free of charge to anyone who asks for one and should publish the policy on the school website."

77. Under paragraph 16 the policy should 'Set out the subject content, how it is taught and who is responsible for teaching it.'

78. Paragraph 16 sets out that typical policies are likely to include sections covering:

> • details of content/scheme of work and when each topic is taught, taking account of the age of pupils
> • who delivers either Relationships Education or RSE…

79. Paragraph 23 provides that:

> There are a lot of excellent resources available, free-of-charge, which schools can draw on when delivering these subjects. Schools should assess each resource that they propose to use to ensure that it is appropriate for the age and maturity of pupils, and sensitive to their needs.

80. Paragraph 24 provides that:

Schools should also ensure that, when they consult with parents, they provide examples of the resources that they plan to use as this can be reassuring for parents and enables them to continue the conversations started in class at home.

81. Under the heading "Working with parents/carers and the wider community" the Statutory Guidance states:

> 40. The role of parents in the development of their children's understanding about relationships is vital. Parents are the first teachers of their children. They have the most significant influence in enabling their children to grow and mature and to form healthy relationships.
>
> 41. All schools should work closely with parents when planning and delivering these subjects. Schools should ensure that parents know what will be taught and when, and clearly communicate the fact that parents have the right to request that their child be withdrawn from some or all of sex education delivered as part of statutory RSE.
>
> 42. Parents should be given every opportunity to understand the purpose and content of Relationships Education and RSE. Good communication and opportunities for parents to understand and ask questions about the school's approach help increase confidence in the curriculum.
>
> 43. Many schools build a good relationship with parents on these subjects over time for example by inviting parents into school to discuss what will be taught, address any concerns and help support parents in managing conversations with their children on these issues. This can be an important opportunity to talk about how these subjects contribute to wider support in terms of pupil wellbeing and keeping children safe. It is important through such processes to reach out to all parents, recognising that a range of approaches may be needed for doing so.
>
> 44. Many schools will have existing mechanisms in place to engage parents and should continue to draw on these as they respond to the new legal framework.

82. Paragraph 52, under the heading 'Working with external agencies' provides:

> 52. As with any visitor, schools are responsible for ensuring that they check the visitor or visiting organisation's credentials. Schools should also ensure that the teaching delivered by the visitor fits with their planned programme and their published policy. It is important that schools discuss the detail of how the visitor will deliver their sessions and ensure that the content is age-appropriate and accessible for the pupils. Schools should ask to see the

materials visitors will use as well as a lesson plan in advance, so that they can ensure it meets the full range of pupils' needs (e.g. special educational needs). It is important to agree how confidentiality will work in any lesson and that the visitor understands how safeguarding reports should be dealt with in line with school policy. Further information for teachers in handling potential safeguarding or child protection reports is on page 35.

The role of the tribunal

83. 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

84. The issues for the tribunal to determine under s 41 are:

    84.1. Would disclosure of the information to the public by the School constitute an actionable breach of confidence:
        84.1.1. Does the information have the necessary quality of confidence?
        84.1.2. Is an obligation of confidence owed?
        84.1.3. Is there detriment to SoSE?
        84.1.4. Would disclosure be in the public interest such that it would not amount to an actionable breach of confidence?

85. The issues for the tribunal to determine under s 40(2) are:
    85.1. Is Ms Page pursuing a legitimate interest?
    85.2. Is disclosure reasonably necessary for the purposes of that legitimate interest?
    85.3. Is the legitimate interest overridden by the interests or fundamental rights and freedoms of the data subject?

86. The question of whether information is held is determined on the balance of probabilities.

87. As it was not necessary for us to consider the other sections of FOIA, we have not set out the issues arising from those sections.

Evidence

88. We took account of a closed an open bundle of documents. We admitted and took account of further evidence from both parties on the second day of the hearing in the form of archived screenshots of the second respondent's website.

89. We heard evidence and read witness statements from Ms Page and Ms Padalia (the chief executive of the second respondent). Any necessary findings of fact are incorporated into our discussion and conclusions below.

90. The following gist of the closed part of the hearing was provided to the appellant:

> Following the open hearing on 3 May 2023, there was a closed hearing at which only the Judge, the two lay members, Dolly Padalia, and counsel for the second respondent were present.
>
> Ms Padalia was taken to B52 of the closed bundle where the names of the two individuals who provided the consent talk were listed. In answer to Judge Buckley's questions, Ms Padalia stated the following:
>
> (i) Staff member A, at the relevant time in late 2021 and early 2022, was listed on SSE's website, had a social media presence and had an online presence. Reference was made to A's affiliation with SSE on A's website and LinkedIn profile.
>
> (ii) Staff member B, at the relevant time in late 2021 and early 2022, was not listed on SSE's website, had no online presence that Ms Padalia was aware of, and had only a private social media account. Ms Padalia was not aware of any online or social media reference to B's affiliation with SSE. Ms Padalia was not sure whether in the period following early 2022, and **before** the point at which all staff names were removed from the SSE website, there was a point at which B was listed on SSE's website.
>
> A panel member asked if the session deviated from the content of the slides in the closed bundle. The answer given by Ms Padalia was that she had talked about the session with the people who had delivered it, who had said that the session had only lasted half an hour and that apart from answering any student questions the content did not deviate from the slides.

Submissions

91. The representatives of the appellant and the second respondent made oral submissions at the hearing. The appellant also filed a skeleton argument.

Appellant's submissions

Education law backdrop

92. Ms Gannon submitted that understanding the backdrop of education law is important when considering the public interest balance.

93. Ms Gannon highlighted that, based on the legislative framework, there is a foundational principle that parents can educate their children as they see fit.

This is reflected in article 2 of Protocol No.1 of the European Convention on Human Rights, which provides that:

> In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

94. Ms Gannon noted that there is an obligation on schools, under sections 406 and 407 of the Education Act 1996 ('the 1996 Act'), to provide non-partisan teaching on political issues.

95. Ms Gannon took the tribunal through the statutory framework and the Statutory Guidance relating to sex education. She submitted that the requirement, in paragraph 16 of the Statutory Guidance, that the written policy for Relationships Education and RSE should set out 'who is responsible for teaching it' meant that the individual's name should be included in the policy. She submitted that it was not enough to name the organisation responsible for teaching RSE.

96. Ms Gannon submitted that paragraph 24 of the Statutory Guidance cannot be interpreted as referring to a sample of the teaching materials, because the purpose is to enable conversations to be continued at home. It must therefore mean all the material. Paragraph 24 provides:

> Schools should also ensure that, when they consult with parents, they provide examples of the resources that they plan to use as this can be reassuring for parents and enables them to continue the conversations started in class at home.

97. Ms Gannon noted that RSE was in scope for Ofsted inspection, and asks if the school does not retain teaching materials, how it can be subject to accountability via Ofsted inspection.

Ground 1

<u>An implied right to materials under section 405</u>

98. Ms Gannon submitted that if section 41 did not apply, then an argument based on section 43 would also fail.

99. Ms Gannon argued that it is a necessary implication of section 405 of the 1996 Act and the right to withdraw *in part* that parents know what they are withdrawing from. Unless they receive the material in advance in full, the power to withdraw 'in part' is meaningless. A minor effect on common law rights that cut across that purpose does not prevent this being a correct interpretation.

100. She submits that if that is right, the School is not acting within its powers to agree with SoSE that the material could be subject to conditions of confidence restricting the access of parents. Even if section 405 does not give rise to a right to access materials, it still weighs heavily in the public interest balance.

Detriment

101. Ms Gannon submitted that the tribunal cannot conclude that there would be a loss of commercial advantage where all providers are required to disclose this information. It is clear from the Statutory Guidance, and if not, from the letter of the Secretary of State for Education that schools are not expected to work with external providers who will not allow schools to share this type of material. Therefore all providers are in the same position and there is no detriment to one provider in particular.

102. SoSE normally run through the session in advance with the schools, so schools already have the opportunity to cancel the session and deliver it themselves using SoSE's materials.

Public interest

103. Ms Gannon submitted that the Statutory Guidance makes clear that there is a general public interest in disclosure of what is taught to children in publicly funded schools.

104. It was submitted that there is strong public interest in Ms Page and other parents knowing what sex education has or will be provided to their children. This is in line with the government position. The Statutory Guidance provides that parents should be informed of the content, which enables parents to meaningfully decide whether to exercise their statutory right to withdraw. It enables them to consider whether the teaching is in conformity with their views, and to continue conversations at home. It makes effective their right to complain if they consider that the content is partisan, not age appropriate, unsafe or not best practice. This is illustrated by the fact that Ms Page was not able to complain effectively without access to the materials.

105. Ms Gannon submitted that this general public interest is strengthened for the following reasons.

    105.1. Ms Page had ongoing concerns about safeguarding and inappropriate teaching materials at the School. The outcome of a previous complaint had held that not all material had been sufficiently vetted.

    105.2. Although Ms Padalia gave evidence that there was normally a 'run-through' the School's position was that they did not know in advance what was in the material.

105.3. Ms Page has well-founded and legitimate concerns about the appropriateness of SoSE as a provider of RSE. The CEO describes herself as an activist, engaged in teaching which experiments in sex education. SoSE engages individuals which some parents might consider not to be appropriate, who write erotica or have their own websites containing adult material. The examples of resources on the SoSE website available to teachers and parents are not age appropriate and advocate children engaging in unsafe practices. At the relevant time the SoSE website contained a number of links which led to material inappropriate for children including erotica and a sex toy shop. The safeguarding policy is not on the SoSE website.

105.4. SoSE have failed to appreciate that RSE can be partisan and have therefore failed to guard against that. In order for parents to judge whether the teaching is partisan, teaching materials need to be accessible.

105.5. The brief synopsis of the lesson provided by SoSE amounted to four bullet points and does not show what was taught. The other information provided by the School does not show Ms Page what her daughter was taught.

105.6. The meeting of 4 November between Ms Page and the Trust CEO, Ms Shadick, where Ms Page was offered Ms Shadick's laptop to view the slides was an inappropriate way of sharing the material. It would not allow Ms Page to discuss the class with her daughter or husband, she could not use the material in a complaint or share it with Ofsted. Ms Page had legitimate concerns that if she viewed the material she might be entering into some sort of confidentiality agreement. P 174 confirms the School's understanding that the slides were shared with Ms Page on the express understanding that the materials would be kept confidential and not disclosed publicly. No 'careful engagement' with parents took place. There was no session with SoSE where they shared the slides with Ms Page and SoSE sought to discourage the School from sharing the material ('we would really prefer that you do not share our slides with the parent' p 187).

106. Ms Gannon submits that it is overstating the matter to say that disclosing one set of slides would be 'fatal'. All providers are expected to disclose this information. If others seek to use it, it can be protected by copyright. There is no threshold of 'exceptionality'. The usual public interest balance should apply.

107. It is not necessary to set out Ms Gannon's submissions on section 21.

Ground 2

108. Ms Gannon submits that the government recognises that there is a legitimate interest in knowing who is teaching RSE. The Statutory Guidance provides that the name of those teaching it should be available on the School's website. Knowing the name will enable Ms Page to prepare herself to respond to questions that her daughter might have and to complain effectively.

109. Ms Gannon argues that knowing the names is reasonably necessary because it will allow Ms Page to discuss the information with her daughter, it may allow her to better understand what had been taught, and will better equip her to answer any questions about what that individual may have said or may have said online separately.

110. Ms Gannon submits that there is no evidence of any steps the School took to vet the individuals. The SoSE vetting process allowed individuals who work in the adult sex toy industry to work as facilitators. Parents who might feel uncomfortable with those individuals teaching their child are left in a bizarre space where they are allowed to complain but do not know who to complain about.

111. Ms Gannon argues that knowing that an individual is qualified and has had a DBS check is insufficient. Knowing the identity allows a parent to look up that individual's website, LinkedIn profile, the public statements they have made and articles they might have written. Parents are able to see the materials their child might have found if they had googled that person.

112. The Commissioner argues that the consent session has already been delivered so there is no live risk. Ms Gannon submits that there was an intention at the relevant time to invite SoSE back to the School to deliver more sessions, and there remained a live risk that a child, having been taught by someone potentially inappropriate, would find material about them online and a parent would be unable to provide answers.

113. Ms Gannon submits that the balance falls in favour of disclosure. Information relating to an individuals' professional role has less weight than their private life. It is a public facing role. In the light of the Statutory Guidance there cannot be a legitimate expectation of privacy. The closed evidence was that one individual had a social media presence online and that reference was made to A's affiliation with SoSE on their website and LinkedIn profile. This weighs heavily against the right to privacy outweighing the right to know who is teaching a child.

114. Ms Gannon notes that there is no confidentiality agreement entered into between SoSE and the School in advance setting out that identities cannot be disclosed. Parents are not told in advance that they would not be told who was

teaching their child. The reality is that SoSE adopts an inconsistent approach. Sometimes they are willing to disclose and sometimes not.

115. Ms Gannon argues that the Commissioner and the second respondent rely on vague assertions of harassment. It is concerned with name calling, aggressive statements on Twitter and hate mail. No examples were given and no examples of hate mail included in evidence. It was not serious enough to report to the police and nobody has had their social media account suspended as a result. It is not sufficient to outweigh the significant interest in Ms Page knowing who taught her child.

Ground 3

116. Ms Page is concerned that documents are missing. This is heightened by the fact that the documents that are said to be missing are those that the School may have considered most controversial. All that the Trust did to search for the documents was liaise with the PHSE lead who explained that the materials had not been created.

117. Ms Gannon submits that the PHSE lead might have said that for any number of reasons. She might not have understood the question, another member of staff might have prepared it, or she might have wanted to avoid scrutiny. Other electronic searches could have been done, and other members of staff could have been asked. The appellant asks that the School be required to conduct a reasonable search for the requested information.

Second respondent's submissions

118. SoSE do not accept that there is an implied obligation under section 405 and adopt the Commissioner's arguments on this point.

119. It is not disputed that RSE is treated differently from other subjects and that a great deal is done to ensure that parents have the information available to make decisions on whether to withdraw their children from class in part or as a whole. This is not limitless and FOIA is not the only or the appropriate means for a parent to obtain the information sought.

120. SoSE's approach is to engage with parents. In this case SoSE responded quickly to the request from the School for information, explained what could be shared and how, and continued to suggest ways to meet Ms Page's request.

121. In advance of the lesson on consent, Ms Page had been content to make her decision not to withdraw her child based only on the title of the session, without asking for further information or who was delivering the session.

122. Miss Wright submits that if Ms Page felt that the circumstances in which she was shown the slides were not adequate or appropriate she has had every opportunity to ask to view the slides under different circumstances. In the email dated 8 November 2021 SoSE state: 'We're also very happy to explore some alternative solutions, e.g. one of our team could attend a meeting with the parent where we show them the slide on one of our devices and talk them through the content?' (p D188)

123. Miss Wright submits that the letter from the Secretary of State dated 31 March 2023 does not set out a hard and fast rule and is addressing circumstances where the information has not been shared with parents at all.

124. Miss Wright argues that no viable public interest defence would be available to the School. There is a strong interest in preserving confidences, therefore there must be an even stronger public interest in disclosure to override the duty of confidence. In circumstances where only one talk was provided by SoSE at this School, unrestricted disclosure is neither a proportionate nor a necessary means of achieving the legitimate interest of keeping parents informed.

125. She submits that there is a clearly a great risk of infringement of intellectual property rights if the slides are released to the world at large. SoSE has a long established reputation and has been delivering curriculum for some time, so there would be an obvious appeal to their material. The slides may be used by a large number of competitors. RSE is compulsory in schools and the risk may be worth running given how lengthy the process of enforcing copyright would be.

126. In relation to the personal data, it is accepted by SoSE that there is a legitimate interest in understanding who is being given access to schools and a broader legitimate interest in transparency and accountability. There is a legitimate interest in ensuring that individuals in schools do not pose a safeguarding risk. Disclosure of the names to the world is not necessary to meet those legitimate interests.

127. SoSE argue that the individuals had already delivered the session and both the School and SoSE already had an obligation to ensure the safety of the pupils. The interest is served by safeguarding policies, recruitment checks and letters of assurance. Disclosure has the potential to cause distress. There is evidence of hate mail and harassment on social media. The information already in the public domain highlights an individual's links with SoSE but does not identify which particular individuals delivered the talk.

Discussion and conclusions

Does section 405 of the 1996 Act contain an implied statutory duty?

128. Section 405 of the 1996 Act gives parents a right to withdraw their child from receiving sex education:

> (1) If the parent of any pupil in attendance at a maintained school in England requests that he may be wholly or partly excused from receiving sex education at the school, the pupil shall, except so far as such education is comprised in the National Curriculum, be so excused accordingly until the request is withdrawn.
>
> (2) In subsection (1) the reference to sex education does not include sex education provided at a maintained school in England as part of statutory relationships and sex education.
>
> (3) If the parent of any pupil in attendance at a maintained school in England requests that the pupil may be wholly or partly excused from sex education provided as part of statutory relationships and sex education, the pupil must be so excused until the request is withdrawn, unless or to the extent that the head teacher considers that the pupil should not be so excused.

129. Ms Gannon argues that this section gives rise to an implied statutory duty. The implied statutory duty is said in the grounds of appeal to be '…an implied statutory duty to provide parents with sufficient information so as to enable them to make a meaningful decision as to whether to action their right under s.405 of the EA 1996 to "wholly or partly" withdraw their child from sex education classes' (paragraph 46(a) of the grounds of appeal).

130. It is argued in the grounds of appeal that the implied statutory duty is to provide such information to parents as is 'necessary to make that decision' and that 'this includes all written materials used during any sex education lessons and detailed lesson plans for the same: i.e. the information requested.'

131. The implied statutory duty is referred to in the grounds of appeal and in the appellant's skeleton argument as 'an implied statutory duty to disclose the information requested to Ms Page, and any other parent who requested it.'

132. The skeleton argument states that it is a necessary implication of the language of the right under section 405 that 'parents are entitled to curriculum materials in advance of any lessons taking place'.

133. First, we do not accept that a statutory duty 'to provide parents with such information so as to enable them to make a meaningful decision as to whether to action their right under s.405 of the EA 1996 to "wholly or partly" withdraw their child from sex education classes' would mean that there was a duty to provide parents with copies of curriculum materials, or, for example, all written materials used during any sex education lessons and detailed lesson plans.

134. There are other ways for parents to be provided with sufficient information to enable them to make a meaningful decision as to whether to withdraw their child. For example, parents could be provided with a detailed written summary of the content of the sessions. They could be invited to a meeting where the school explained the content of the sessions. They could be asked to attend a dry run of the session. There are no doubt many other ways in which sufficient information could be provided to enable an informed choice.

135. On that basis, even if it were necessary to imply a statutory duty along the lines suggested, it would not mean that the School was under a duty to disclose the information requested to Ms Page and any other parent who requested it.

136. Further, even if there were an implied statutory duty to provide all written materials, the provision of copies without any confidentiality restriction is not the only way to provide parents with access to those materials. For example, parents could be provided with password protected access to the written material on the condition that they do not circulate the material any further than their immediate family. Accordingly we do not accept that such an implied duty would necessarily be inconsistent with an obligation of confidence as required under section 41.

137. In any event, we find that it is not necessary or proper to imply a statutory duty to provide parents with sufficient information so as to enable them to make a meaningful decision as to whether to action their right under s.405 of the EA 1996 to "wholly or partly" withdraw their child from sex education classes. In the light of the words used, their context and the purpose of the legislation, we do not accept that Parliament must have meant there to be a *statutory duty* to provide sufficient information. The purpose of the legislation can as well be achieved by schools acting properly to provide sufficient information to parents in accordance with the Statutory Guidance.

138. The right to withdraw is not meaningless without a statutory duty, because under the Statutory Guidance, to which the Schools must have regard and from which they must have good reason for departing, 'Schools must ensure that parents know what will be taught and when', parents should be given 'every opportunity' to understand the 'content' of sex education, and schools should provide 'examples of the resources they plan to use'.

Section 41

Confidentiality and detriment

139. The slides were provided to the School after the lesson had taken place. The email to which they were attached states:

'I've attached the slides, however could I request that these are not shared further, and that they are deleted once you've used them to clarify anything with the parent?' (page D185)

140. We accept on the basis of this email that the slides were provided to the School in circumstances importing an obligation of confidence. The wording is akin to an express statement that the information is being provided in confidence. Any reasonable person would have realised on the basis of that email that the slides were being given to the School in confidence. We find that the information has the necessary quality of confidence. They are a unique product that has been created by SoSE. The slides were not public knowledge or publicly available.

141. We accept that there would be detriment to SoSE. The appellant argues that there can be no detriment because this information should be disclosed as a matter of course by all such providers. It is argued that this is now abundantly clear from the statements of Ministers. Ms Gannon submits that where schools are now advised expressly not to work with organisations that restrict the disclosure of materials, disclosure will not result in disadvantage to SoSE as it must be understood to be an expected industry norm.

142. The Statutory Guidance provides that parents should be given 'every opportunity to understand the purpose and content of Relationships Education and RSE'. It also provides that schools should provide 'examples' of resources. We do not accept that it can be inferred from the Statutory Guidance that, as a matter of fact, providers were not restricting the disclosure of materials.

143. We are considering the position in January 2022. Had it already been the norm for providers to freely disclose their materials in January 2022, it is unlikely that there would have been a need for the Secretary of State to write a letter to Schools in March 2023 highlighting the difficulties arising, inter alia, from the fact that 'some schools have already entered into contracts with providers that prevent them from sharing materials with parents'. The fact that the letter needed to be written in those terms, strongly suggests that providers were not freely disclosing their materials at the relevant time.

144. No doubt there are many free resources available to schools or to SoSE's competitors that wish to write and deliver their own lessons on consent. However we accept that a ready-made set of slides created by an experienced organisation would be attractive to competitors and to schools. We accept that this would be likely to significantly decrease the appeal of engaging SoSE to deliver this particular lesson on consent. Delivering RSE lessons in schools is a major part of SoSE's business. Enforcing copyright is slow, expensive and uncertain. In our view this amounts to a detriment.

145. We accept that there is already a risk, in theory, that some schools who use SoSE could withdraw after they have seen the slides and deliver the sessions

themselves. We do not accept that this is likely, and we do not accept that it significantly decreases the impact of the detriment set out above.

Public interest defence

146. Although section 41 is an absolute exemption there is nonetheless a public interest balance for the tribunal to undertake. Breach of confidence will not be actionable if the breach is in the public interest.

147. We are considering the public interest in disclosure to Ms Page as a member of the public i.e. we must consider the public interest in disclosure to the world. We are not considering the public interest in disclosure to the parents of children who were present in that consent class, or to one particular parent.

148. We note that SoSE indicated in an email dated 8 November 2021 to the School that they were willing to attend 'a meeting with the parent where we show them the slides on one of our devices and talk them through the content'. It appears that the School did not pass this offer on to Ms Page. It is also evident that by this stage the relationship between Ms Page and the School had broken down to the extent that Ms Page had moved on to making a formal complaint and, shortly after, a freedom of information request.

149. Whatever the state of Ms Page's personal relationship with the School, it is clear that SoSE were willing to attend a meeting with Ms Page or any other parent and show them the slides. If Ms Page had asked for another opportunity to view the slides we find, in the light of that email, that the answer from SoSE would have been positive.

150. We accept that it may have been reasonable in Ms Page's particular circumstances, given the particular background of her dispute with the School, for Ms Page not to have asked for another opportunity to go through the slides in a meeting. However, when considering the public interest in disclosure to the world, we do this in the knowledge that SoSE were willing to attend a meeting with a parent whose child had attended the session to show them the slides and to talk through the content. We accept Ms Padalia's evidence that this offer accords with SoSE's general practice of offering to run through the sessions with parents.

151. These factors significantly reduce the public interest in ordering disclosure of these slides to the public in general.

152. We accept that there is a very strong public interest in parents being properly aware of the materials that are being used to teach sex education to their children.

153. We accept that there is a very strong public interest in curriculum materials and lesson materials on sex education being shared with parents in advance of the lessons so that they can make an informed decision as to whether or not to withdraw their child from those lessons in part or in full. In this case, the request and refusal took place after the lesson had been delivered, and therefore disclosure cannot serve the public interest in material being shared *in advance* so that parents can make an informed decision on whether or not to withdraw their child in full or in part.

154. We accept that there is a particularly strong public interest in parents having access to teaching materials where a parent has raised concerns about safeguarding and inappropriate teaching materials at that School and where the outcome of a previous complaint had held that not all material had been sufficiently vetted.

155. We accept that there is a public interest in parents being able to make an effective complaint about a lesson.

156. We accept that there is a particularly strong public interest in parents having access to teaching materials where the organisation that delivered the teaching:

156.1. Had, at the relevant time, a website which provided links to websites of facilitators/consultants which contained material that was not suitable for children;
156.2. Had, at the relevant time, a CEO who had formed 'an intra-activist research and pedagogical assemblage to experiment with relationship and sexuality education (RSE) practices in England's secondary schools' (page F432);
156.3. Has a website that contains teaching resources for use during lockdown which recommended that 16 year olds watched a 18+ programme on Netflix.

157. However, we find that those public interests are served by the availability of a 'run through' where parents can see the slides and are talked through the content. It does not, in our view, make a difference to the public interest balance that such a 'run-through' did not take place. It was available, both before and after the lesson, if a parent had requested it.

158. We accept, as the Secretary of State points out in her letter of 31 March 2023, that it will not be convenient for all parents to attend a viewing of the slides at school. Further we acknowledge that having copies of the materials to take home enables more detailed discussion with the child of the matters covered. Finally although we find that it would be possible to make a complaint about the content of a lesson after such a viewing, we accept that it is easier to take advice and to draft and pursue a complaint if you retain a copy of those slides. On that basis we accept that there is some residual public interest in disclosure of the

slides which would not be served by the parents attending a meeting and being talked through the slides.

159. We accept that there is some value in the public in general knowing the content of sex education classes taught in schools, particularly in schools funded by public money. This is limited where the information consists of one set of slides on one particular topic.

160. We do not accept that this general public interest in disclosure is increased to a significant extent by the other factors relied on by Ms Gannon. The matters of concern in relation to the website and its links were publicly available at the time and therefore already open to public scrutiny, as were the 'lesson plans' criticised by the appellant.

161. We accept that there is some increased public interest in transparency of lesson materials of organisations such as SoSE because of the public debate and sensitivity in relation to questions of political impartiality and/or the risks of partisan teaching in relation to sex education. This is limited because the request relates to one lesson and because, having viewed the slides, the contribution to public understanding and illumination of that debate through publication of these slides would be limited.

162. Weighed against this public interest is the importance of upholding duties of confidence, which is an important factor in the balance. Looked at as a whole, and taking into account the factors set out above, we find that the public interest in maintaining confidences is not outweighed by the public interest in disclosure of this set of slides to the world.

163. For those reasons we find that the School was entitled to withhold the information under section 41 FOIA.

Section 40

164. It is not disputed that the names of the individuals who taught the particular lesson are personal information.

165. On the basis of the screenshots of the SoSE website provided by both parties, it appears to us more likely than not that the names of both facilitators appeared on the SoSE website at the relevant time (22 January 2023). The matter is not entirely clear. Ms Padalia's oral evidence in response to questions from the Judge was that the name of one of the facilitators was not on the website in 'early 2022' and that she was not sure if it had been put on the website later. Given that Ms Padalia's evidence was not specific in relation to dates and was given 'on the hoof' approximately 16 months after an event that she would have no reason to recall, we place little weight on it in relation to whether or not the name was on the website on 22 January 2022.

166. It appears from the website screenshots that it was usual practice to place the details of current facilitators on the website, and that these particular facilitators' details were on the website by March 2022. In those circumstances, we have concluded the matter on the balance of probabilities and find that the details of both facilitators were on the SoSE website at the relevant time.

167. It emerged during the course of the hearing that the School only held the names of the two individuals who had delivered the lesson to Ms Page's daughter. There had been no other visits and no other lessons or presentations delivered in 2021-2022. It is not material to the outcome of the appeal, but Ms Gannon correctly pointed out that the response to part (6) should therefore have been 'Not held'.

168. We do not accept that it is appropriate to identify the legitimate interest as simply 'knowing who is teaching at the school' or 'knowing who is teaching her child at the school' or 'knowing who is teaching her child sex education'. That simply identifies the information that Ms Page is seeking. It does not identify why that information is sought. The question posed by the statute is not, 'Is your interest in this information legitimate?' It is not helpful or sufficient to simply state that a requestor has a legitimate interest in knowing the information sought. Otherwise the second stage becomes redundant: if the legitimate interest is 'knowing the requested information', then disclosure will always be reasonably necessary.

169. We must identify the legitimate interests pursued by Ms Page, for the purposes of which it might be necessary for the requested information to be disclosed.

170. We accept that there is a general legitimate interest in appropriate, properly qualified and safe individuals teaching sex education. Similarly, we accept that Ms Page has a legitimate interest in her daughter being taught sex education by appropriate, properly qualified and safe individuals.

171. We accept that Ms Page has a legitimate interest in being able to complain effectively if she has concerns about those teaching her children.

172. We accept that there is a legitimate interest in the public being aware of who is responsible for delivering sex education in publicly funded schools. This is supported by the Statutory Guidance which requires schools to publish a policy on the delivery of sex education to be made available on its website which includes expressly "who is responsible" for teaching sex education.

173. In relation to the general public interest in relation to transparency in relation to who is responsible for teaching sex education, we find that this was served by (a) public knowledge that SoSE were responsible for delivering the session in question and (b) the fact that the SoSE website at the relevant time contained

details, including names and biographies, of SoSE facilitators. Nothing is added to the general public interest in transparency by knowing which particular facilitator taught this particular lesson. We do not accept that it is reasonably necessary to release the names of the individual facilitators who taught this particular lesson for the purposes of this general public interest.

174. In relation to Ms Page's particular legitimate interests, we have to consider whether they could be served by less intrusive means than releasing the names of those individuals to the world. In relation to the legitimate aim of ensuring that appropriate, properly qualified and safe individuals are teaching sex education, we find that the statutory framework that has been established to regulate who works in schools meets that interest. The fact that SoSE's safeguarding policy does not appear on its website does not, in itself, suggest to us that the usual policies will not have been followed.

175. In addition, the details of facilitators and their biographies appeared on SoSE's website at the relevant time. The concerns that Ms Page had about the suitability of the facilitators arose from the information she found about those facilitators on the SoSE website. Parents and members of the public have access to those details on the website and can complain if they wish about their suitability as facilitators.

176. We do not accept that Ms Page is unable to make a complaint if she does not know the names of the individual facilitators. If she has concerns about the way in which the session was taught, she can raise these concerns and the name of the facilitator will be available to those determining the complaint. If she has concerns arising out of the appropriateness of the facilitators listed on the website she can raise those concerns.

177. For all those reasons, we do not accept that disclosure of the names of the facilitators who taught this individual session to the world is reasonably necessary for the purposes of the legitimate interests. Having reached those conclusions we do not need to consider any other issues and we conclude that the School was entitled to withhold the information under section 40 FOIA.

Information 'not held'

178. Based on the fact that the PHSE lead stated that the materials in question had not been produced, we are satisfied on the balance of probabilities that the information was not held. We do not accept that there was any need to carry out a search for materials that the School had been told by the responsible individual did not exist.

Summary

179. In the light of our conclusions above, we do not need to consider section 43 or section 21. The appeal is dismissed.

Signed Sophie Buckley Date: 6 June 2023

Judge of the First-tier Tribunal