Neutral citation no: [2025] UKUT 308 (AAC)
Appeal No. UA-2023-001104-GIA
UA-2023-001104-GIA

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Clare Page

Appellant

-v-

The Information Commissioner

1st Respondent

&

School of Sexuality Education

2nd Respondent

Before: Upper Tribunal Judge Mitchell

Hearing: 16 & 17 September 2024, Rolls Building, Fetter Lane, London

Representation:

Appellant: Jonathan Moss, of counsel, instructed by Sinclairs Law solicitors.

1st Respondent: Will Perry, of counsel, instructed by solicitor to The Information Commissioner.

2nd Respondent: Susan Wright, of counsel, instructed on a direct access basis.

On appeal from:

Tribunal: First-tier Tribunal (General Regulatory Chamber)

Tribunal ref: EA 2022/0330

Date of decision: 6 June 2023

SUMMARY OF DECISION

93. Information Rights.
93.4. Freedom of information – absolute exemptions.

Judicial summary

The First-tier Tribunal did not err in law in holding that a parent was not entitled, under section 405 of the Education Act 1996 (the parental right to request a pupil's excusal from relevant sex education), to be provided with sex education teaching materials relating to a sex education lesson after it had taken place. Section 405 is to be construed as imposing an implied obligation to provide parents with information about proposed relevant sex education although this is not necessarily a right to be provided with all teaching materials. In the Appellant's case, information was sought in relation to sex education that had already been provided so that the information could not have been sought for the purposes of deciding whether to exercise parental rights under section 405.

The First-tier Tribunal did not err in law in deciding, for the purposes of section 41 of the Freedom of Information Act 2000, that disclosure of sex education teaching materials, prepared by an organisation commissioned to provide sex education at a maintained school, would constitute an actionable breach of confidence. The Tribunal dealt properly with the case before it, which bore little resemblance to the highly developed case on the law of confidence that was argued before the Upper Tribunal. Had that case been put to the First-tier Tribunal, the outcome might have been different but an appeal to the Upper Tribunal limited to points of law cannot be used to remedy perceived shortcomings in a party's case before the First-tier Tribunal.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge and members follow.

DECISIONS OF THE UPPER TRIBUNAL

The Appellant is granted permission to appeal against the First-tier Tribunal's decision (ref. EA 2022/230) to the extent described below in paragraph 243.

The decision of the First-tier Tribunal (ref. EA 2022/230) did not involve the making of an error on a point of law. This appeal is DISMISSED under section 12(1) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Introduction

Terminology and meaning of certain references

1. In these reasons:

- "Commissioner" means The Information Commissioner (1st Respondent);
- "EA 1996" means the Education Act 1996;
- "EA 2002" means the Education Act 2002;
- "FOIA" means the Freedom of Information Act 2000;
- "relevant sex education" means sex education in respect of which a parent has the right under section 405(1) or (3) EA 1996 to request that a pupil be excused attendance in whole or in part (in these reasons, this right is often referred to as the right of withdrawal although the right under section 405(3) is not absolute: see paragraph 105 below);
- "RSE" means relationships and sex education;
- "the School" means Haberdasher's Hatcham College which is a secondary school with academy status and a member of the Trust;

- "the Session" means a presentation about consent given by SoSE facilitators to 15/16 year old pupils at the School on 20 September 2021;

- "the Slides" means *Powerpoint* slides displayed to pupils at the Session and which the Appellant sought in her FOIA request for information from the School. In these reasons, unless the context otherwise requires, a reference to 'the Slides' includes the information within them;

- "Statutory Guidance" means guidance issued in September 2021 by the Secretary of State for Education named *Relationships Education, Relationships and Sex Education (RSE) and Health Education*;

- "statutory sex and relationships education" means education provided under section 80(1)(d) EA 2002;

- "the Trust" means Haberdashers' Aske's Federation Trust, which is a multi-academy trust;

- "SoSE" means the School of Sexuality Education (2nd Respondent). SoSE is a registered charity but not a school within the meaning of the Education Acts;

- "UK GDPR" means Regulation (EU) 2016/679 as it forms part of the law of England and Wales, Scotland and Northern Ireland by virtue of section 3 of the European Union (Withdrawal) Act 2018.

2. Neither the School, being an academy, nor the Trust, being a multi-academy trust, is a maintained school. I have not been provided with a copy of the Trust's funding agreement with the Department for Education nor, if different, the School's. However, this case has been argued on the basis that the School was subject to obligations which mirror the statutory obligations imposed on maintained schools and the governing bodies of maintained schools. These reasons should be read accordingly.

3. The parties accept that the Trust was the proprietor of an Academy so that, in respect of information held for the purposes of its functions under Academy arrangements, it was a public authority for the purposes of FOIA (see section 3(1)(a)(i) of, and paragraph 52A

of Schedule 1 to, FOIA). In these reasons, a reference to a duty owed by the School under FOIA is to be read as a duty owed by the Trust.

4. Unless otherwise indicated, a reference in these reasons to a numbered paragraph is to a paragraph within the reasons given by the First-tier Tribunal for its decision.

Secretary of State for Education's involvement in these proceedings

5. The Secretary of State for Education appointed under the previous administration applied to be made a party to these proceedings. The application was granted. Following July 2024's general election and the formation of a new government, the new administration's Secretary of State for Education requested that she be removed as a party to be proceedings. The Secretary of State's request, drafted by the Government Legal Department and dated 14 August 2024, stated as follows:

> "…As the Upper Tribunal will be aware, since [the Secretary of State for Education was made a party to these proceedings], a general election has taken place resulting in a change of government. At this time, ongoing work and engagement with stakeholders is taking place in the relationships, sex and health education policy space. This work is unlikely to be resolved in advance of the upcoming litigation timelines and the September 2024 fixture. Accordingly, while the Secretary of State wishes to note her agreement with the principle that parents should be able to see what their children are taught, the Secretary of State respectfully seeks leave to be withdrawn as a party to this appeal due to the circumstances set out above…".

6. The Upper Tribunal granted the Secretary of State's for Education's request.

Factual background

The Session

7. The Appellant's first witness statement, prepared for proceedings before the First-tier Tribunal, said:

> "On the 16th September [2021] the school notified us by email of a 'Drop Down Day' for RSE, which would be given by an external provider called [SoSE]. The

> subject concerned the legality of sexual consent. The school offered parents the right to withdraw children from this lesson but having no concerns about the subject matter, we agreed to our daughter attending".

8. The School's email of 16 September 2021, referred to in the Appellant's witness statement, included the following:

> "…[SoSE] will be running age appropriate RSE Sessions on the topic of "Consent" on Monday 20th September 2021. They run trusted, high quality sessions, which aim to give the students clear and important information regarding the topic. If you would rather your child not take part in this scheduled session. you do have the right to withdraw them under the DFE guidelines and within our Sex and Relationships Policy…If you do decide to remove your child from Monday's RSE session, please complete the attached Appendix 4: Right to Withdraw.
>
> We wish to continue to support all our students with a broad curriculum and provide them with high quality RSE in line with the DfE guidance. If you have any questions, or would like to discuss this further, please do not hesitate to contact me."

9. The Session on 20 September 2021 was attended by the Appellant's 15-year-old daughter, who was a pupil at the School. According to the Appellant, the Session was "delivered in an assembly style set up, with around 200 children in the…daughter's year all attending and watching" and "there has never been any suggestion that the children were told the Session was confidential, nor that they were unable to take notes etc.".

10. The Appellant's first witness statement reported that her daughter did not find the Session enjoyable. On 22 September 2021 (two days after the Session), the Appellant emailed the School as follows:

> "…[Daughter] explained to me that amongst reasonable guidance about consent, the visiting teachers still lectured her on heteronormativity. Could you please explain to me what that theory has to do with 'consent', why parents were not notified that the lesson would include the issue of heteronormativity, and whether this theory was introduced with suitable balance of opinion and opportunity for debate?"

Appellant's interaction with the School / Trust before she made her FOIA request

11. On 22 September 2021, the Appellant emailed the School as follows:

> "…I'd like to ask you directly - and I'm sure I am entitled to do so, and to have an answer:
>
> *Please will you provide me with the PDFs or other plans for the PSHE lessons listed on the map recently circulated for consultation, including details of any third party providers and external resources that you plan to use?*
>
> If the school cannot or will not provide this information, will you at least be good enough to explain why you are not prepared to tell parents exactly what you are going to teach their children about their culture, nation, sexuality, relationships and other matters that are contentious on both a political and personal level?
>
> … Can you therefore please explain to me exactly what this company taught about consent at Hatcham College and please direct me to any material and lesson plans they used?"

12. On 5 October 2021, the Appellant emailed the Friends of Hatcham College as follows:

> "… A recent third party provider called 'School of Sexuality' visited the school to discuss consent with my daughter's year group. I asked for the school to provide me with a detailed lesson plan of exactly what they taught my daughter, which she informs me not only dealt with consent, but with the subject of 'heteronormativity', which I believe parents were not informed about. The school has not replied to my request for details. Could I therefore ask the school leaders why I have not received that information?..."

13. On 6 October 2021, the School's Deputy Head emailed the Appellant:

> "…The element of sex education enables a parent/carer the right to withdraw their child from the sex education learning if they wish to…Sex education is taught on a Drop Down Day and this took place on 20th September 2021 this term. The external company that we used are called The School of Sex Education

> [*sic*]…They were also able to offer us sessions on 'Consent' which, in line with the updated Keeping Children Safe in Education 2021, we felt was most appropriate at this time…The sessions that were led by them were tailored towards each year group with age-appropriate material…
>
> …[Senior Teacher] will be collating all the resources so far this term, along with the scheme of learning for you. Then, we can provide another set if required during Half Term 2…".

14. The School's Deputy Head emailed the Appellant again on 8 October 2021:

> "…we wanted to focus on consent which was key to the KCSIE 2021 update with peer-on-peer abuse. Before any agreement is made for an external company to come into the College we discuss our needs with them to see what they can offer. As we had used them in the past [Senior Teacher] met with them to agree material and what the session would include. We are not fixed to this organisation, nor are we 'standing by' them as you say. Like any curriculum area, we aim to use a wide variety of material and resources to ensure it meets the needs of our students…Although the School of Sexuality are unable to provide the material to use for copyright reasons they have given a brief synopsis of the Key Stage 4 sessions [*see below*]…".

15. On 12 October 2021, the Appellant emailed the School's Deputy Head as follows:

> "…Hatcham College is a state - i.e. taxpayer funded - school. Refusing to show what it has taught my daughter because of private 'Copyright reasons' is, as far as I understand it, not at all acceptable.
>
> If this is what School of Sexuality Education has told you, then it should further alert you to the inappropriateness of this company because they are refusing to offer transparency to parents. The school should not accept that on behalf of its families. But even if they do have the right to withhold information, I'm afraid that does not release the school from its obligation to explain what has been taught. You inform me [Senior Teacher] met with the providers and agreed their material, so it ought to be possible for the school to give complete information.

> …[daughter] reported to me - and I hope you will agree she is a reliable person - that she was categorically told that we live in a heteronormative society, which means it is assumed that everyone is heterosexual or should be heterosexual and that this is an undesirable situation.
>
> If [daughter] understood this correctly (and please do correct us with the accurate information if she didn't), not only was that indoctrinating teaching, which was not advertised to parents in advance (i.e. we were told the lesson was about consent), but it is patently untrue. We quite evidently no longer live in a heteronormative [*sic*] society by most measures, including the fundamental matter of law.
>
> *I would therefore like to ask one more time: please will you supply the lesson plan and teaching resources used by School of Sexuality Education - or if they can legitimately refuse, then please provide the school's own accurate version, so as to confirm what they taught specifically regarding heteronormativity…*".

16. On 13 October 2021, the School sent an email to the Appellant with the subject line "Response to your complaints dated 12.10.2021 and 13.10.2021", which included the following:

> "…[SoSE's] teaching fits with our programme and published policy. We have shared the content information from that specific session (as attached). I am satisfied that it was age appropriate for the pupils and accessible to them…
>
> …From my enquiries, the facilitator stated that we live in a "largely heteronormative society" which can be argued to be correct, due to the fact that more people claim to be, and identify themselves as heterosexual…There was no preference being made and nor was there any judgement being made. It was an observation by the facilitator…
>
> A letter outlining details about the external provider's name and how to withdraw from Sex Education (if a parent/carer wanted to) was sent to all parents and carers by the College in a letter dated Thursday 16th September 2021…
>
> …if a parent wishes to take on the responsibility of teaching sex education themselves, using another resource or do not wish for their child to be taught sex

education within the College, they have the right to withdraw their children from the non-statutory components of sex education within RSE up to and until 3 terms before the child turns 16.

…As our Sex Education provision is being taught during the Drop-Down Days, a child can be withdrawn from those specific sessions…

…Details about how to request withdrawals from Sex Education lessons can be found in Appendix 3 of the RSE Policy. A letter (electronically) dated Thursday 26th August 2021 was sent out to all parents and carers across all key stages within the College. They were also all given the opportunity to provide their comments or feedback. The RSE Policy was available on the website at the time and the updated version has been available on our website since September 2021.

Complaint about The School of Sexuality

In your email dated 13th October 2021, you complained about your experience in contacting the external provider directly. You asked them for copies of their lesson plans and as explained by them they had copyright concerns.

It is important to note that The School of Sexuality had offered to write a more detailed overview of what was taught during the consent session upon our request to my Senior Teacher. However, on the same day, following an alleged phone call that you had with them, the manager [A] intercepted, raising concern that [D] is being harassed by a parent of the College. Hence, they have subsequently retracted from providing us additional detailed lesson plan information…

Requested Lesson Plan

Please see the attached the document that was shared with you via [Vice Principal]. This was made available to you and I have attached it again. This is what has been provided to us and we are satisfied with what was delivered…".

17. On 15 October 2021, the Appellant emailed the Trust's CEO:

"…I cannot sit by when our school is … exposing my daughter to a very dubious company, who are prepared to try threatening parents with evidently false

> allegations, telling children to withdraw from their lessons and keeping their publicly funded work secret. (I presume I will need to make a Freedom of Information request to see the state funded lesson plans and slides shown to my daughter?)…".

18. According to the School's internal review of their initial refusal to comply with the Appellant's request for information:

> "…you met with…the CEO of the Trust, on 4 November 2022 [*presumably 2021 intended*] and were shown some of the materials requested under part one of the Request. This was done with the agreement of SoSE on the understanding that the materials would be shared in confidence and then deleted and not shared more widely. In addition to being shown the slides in question, you also have copies of the other information that you requested from Hatcham College, including the College's own lesson plans. I am therefore satisfied that we have made clear the content of the session.
>
> … they were shared with you on the express understanding that the materials would be kept confidential and not disclosed publicly…".

19. The Appellant's first witness statement gave her account of the offer to view the Slides on 4 November 2021:

> "64. She [CEO] then suddenly announced that she had a copy of the lesson slides with her but that she wouldn't show them to me unless I 'moderated my behaviour'…
> 65. She then offered her laptop to me with the slides on. I was very surprised and also concerned about the terms under which I was being given access to the material. I didn't consider this a proper process – there was nothing on paper to confirm I had seen the slides, and I realised I couldn't prove anything I saw and that I was viewing material that had been claimed to be commercially sensitive and so I might be entering a tacit non-disclosure agreement. I also was deeply uncomfortable that I hadn't been told this was going to happen in advance so that I could consider the situation properly in consultation with my daughter's father.

66. I looked at the first few slides that were open and noted that there was indeed reference to 'heteronormativity' and 'sex positivity', as my daughter suggested, and I think I recall 'intersectionality' too… but I instinctively returned the laptop after seeing just three or four slides out of 20+ and said I'd seen enough to confirm that the lesson breaches the Education Act. I purposefully didn't look at the rest of the slides and explained that I needed to have a copy of the plan to take into a Stage 3 Complaint, I also wanted the space and time to consider it and to be able to show my husband, who was not there. Also I felt that without an actual copy I would only half remember it and therefore could not speak accurately to my daughter about the material."

20. The Appellant's second First-tier Tribunal witness statement said as follows:

"33…I was concerned about the terms upon which the viewing was offered to me. As a professional designer, I am well aware that viewing material described as commercial sensitive and withheld under copyright restrictions is not a wise thing to do and can be construed as a tacit agreement to non-disclosure and I had no desire to be put in that position…

34. I note the email from SoSE dated 8 November 2021 time stamped 19.25…which states to the CEO of [the Trust] that the slides should not be shown to me, and hence (given the animosity I had already received from SoSE) I think I made a good decision, in not viewing the material when the CEO spontaneously tried to show them to me, without any warning or explanation of the terms on which I was being permitted to view them…".

21. On 7 November 2021, the Appellant emailed Trust's CEO as follows:

"…**CONCERNS REGARDING THE SCHOOL LEADERS' JUDGEMENT AND CONDUCT**

1. Informing Parents
The Hatcham RSE Policy is clear that parents should be properly informed about RSE teaching - this is important so they can assess their right to withdraw. The school advertised the lesson for the Drop Down Day as being about 'Consent'. They did not refer to training about 'heteronormativity', nor that the charity

conducting the lesson advocates for the partisan opinion of 'sex positivity', amongst other views. This misinformed the parents about the nature of the lesson and the provider. Whilst the school is tasked with integrating LGBT perspectives within the curriculum, the views given about heteronormativity were not related to consent and hence represented a lack of transparency and honesty about the training given.

…**4. Lack of Transparency**
On requesting to see what my daughter was taught about heteronormativity, [Vice Principal] and [Principal] at first repeatedly refused to provide me that information and when they did agree to at least describe the lesson plan, they delivered a false account - writing a short list that omitted the subject of heteronormativity, despite my having specifically asked about it…

…**7. Poor judgement by [Principal]**
… I suggest it should automatically concern the school if an external provider refuses to share lesson plans. The school should not hide lesson plans from parents at anyone's request and if this charity is not transparent they should not be used again…

…**RESOLUTIONS I SEEK**

1. The School Should Provide the SoSE Lesson Plan for the Drop Down Day on Consent…and they should make arrangements that no external provider is ever in a position to hide material shown to children, from their parents. The school should apologise for creating (or finding themselves) in this situation and for being influenced by this charity into failing to be transparent with a parent.

I gratefully acknowledge [Trust's CEO]'s preparedness to at least let me view the lesson plan in our meeting and appreciate that she intends to secure a copy for me. I await receiving it….".

22. On 12 November 2021, the Trust's CEO emailed the Appellant as follows:

"…I have therefore completed enquiries rather than a thorough investigation and have focused on the areas we agreed when we met. These were:

1. Your request to have a copy of the PowerPoint used by the School of Sexuality in September…

I have spoken with the CEO at the School of Sexuality and she is unwilling to give permission for their PowerPoint to be shared. I have pasted below her response and the reasons for their decision. They are aware that I have showed you the slides. If you wish to have ownership of the presentation, you should contact them directly. It is not unreasonable, or unusual, for an organisation – particularly a Charity – to have this stipulation…

> *We would really prefer that you do not share our slides with the parent. You are welcome to say that 'School of Sexuality Education says that it does not share its resources including slides for copyright reasons'. (These slides are our intellectual property so such a procedure is completely normal and reasonable.)*
>
> *We have been happy to share the slides with Hatcham College but hope that this is just for the purposes of clarifying what was covered - though presumably the staff who attended the session can also provide this information and comment on whether anything concerning was said - and we would request that the slides are then deleted and not shared more widely.*
>
> *…*".

23. The Appellant made her formal request for information under FOIA on 7 December 2021 (see paragraph 45 below).

24. An email from the Appellant to the School on 28 January 2022 stated as follows:

> "the SoSE have chosen to make the material freely available to all the pupils - none of whom have signed non-disclosure agreements and who are free to communicate the details to anyone they like."

Discussions between the School / Trust and SoSE about access to the Slides

25. On 7 October 2021, the following email, with the subject line "Re: years 12 and 13", was sent (both sender and recipient details redacted, but it seems clear it was sent by SoSE to the School):

> "…we have had a request from a parent to see the resources you used for the KS4 session when you visited us. I wonder if it would be possible for you to send me a PDF version? I understand this may not be possible, however if it is we would be appreciative!".

26. A reply to that email was sent on 8 October 2021:

> "…We can't share slides unfortunately because of copyright, but I'd be happy to provide a breakdown of resources and/or support services we signposted students to. Would that be helpful? Very happy to discuss this further…".

27. The response, sent on 8 October 2021, presumably by the School was as follows:

> "Yes that would be fantastic thanks so much, and if you could a brief breakdown of what we covered?"

28. The next email in the 8 October 2021 string, presumably sent by SoSE to the School, read as follows:

> "…please see below –
> - The session built on their learning around assertive communication in relationships, through exploration of a framework for understanding positive relationships; consideration, equality, trust and honesty.
> - A part of the session involved analysing scenarios showing an unhealthy teen relationship from the Netflix show, Trinkets. Students were given activities to identify negative and abusive relationship behaviours to reinforce key learning:
>   - These behaviours are never are never okay and it's not our fault if we experience them,
>   - Everyone deserves to be valued and respected in all of their relationships,

- Have our feelings validated and to feel supported,
- We all have a right to privacy

- Students also explored conflict resolution in relationships and positive discussion.
- The session guided students in how to support a friend who may be experiencing an unhealthy relationship and how they can seek support for themselves…".

29. The reply to that email said, "Thanks so much and just to confirm this is the 'consent' session yes?". The next email, presumably sent from SoSE to the School, read as follows:

> "Apologies, the consent session breakdown is below –
>
> Consent & Digital Consent
>
> - In this session students explored what 'consent' as a concept is, and agreed on an inclusive definition.
> - A part of the session guided students through the law around sexual consent both online and offline.
> - Students were given activities to examine how to know if someone is or is not consenting, building on their understanding that everyone has personal boundaries and how it's our responsibility to seek consent.
> - The session looked at some scenario based discussion where students were guided through the role of 'capacity' and 'freedom' in consent…".

30. An email sent from SoSE to the School, on 13 October 2021, with the subject line "Re: Haberdasher's Y12&13", read as follows:

> "…I've just had a call from a parent, Claire Page I think the name was, who was asking about the lesson plan…
>
> Were you able to share the plan I sent through via email for the consent lessons at all? Do let me know if there is anything else you need from us to send through to parents. I'm very happy to put more of a detailed lesson plan together if that's helpful for the parent."

31. An email sent on 13 October 2021, at 10:48, presumably from the School to SoSE, replied to the above email as follows:

> "…Yes that is a parent of ours who has raised some concerns. [*redacted*]
>
> Please could you send me as much information as you can in terms of what was covered in the KS4 session [*redacted*]."

32. An email sent on 19 October 2021, at 11:28, which may have been an internal School email, said, "Do we have the plans that they used? Or do they have these?" An email sent on 19 October 2021, at 11:40, with the subject line "Re: Haberdasher's Hatcham", read as follows:

> "They will not send us any lesson plans. They have their copyright [*redacted*].
>
> But I am seeking to obtain the PowerPoint that was used on the day. This will be only for your and my reference. We have assured The School of Sexuality that we will not share this with any other party."

33. An email sent on 8 November 2021, at 10:41, with the subject line "SOS contact details" (sender and recipient redacted but, presumably, sent from SoSE to the School), read as follows:

> "Please see the message below from [redacted] regarding the slides she sent over for the KS4 Consent Session and also her contact details.
>
> …
>
> > "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?"
>
> …".

34. An email sent on 8 November 2021 at 14:27 by the Trust's CEO (recipient redacted but, presumably, SoSE), read as follows:

> "Your team did a presentation (attached) to pupils at the school in September, the focus of which was 'consent'.
>
> I believe you are aware that one of the parents has complained quite strongly about the presentation – particularly the reference to society being heteronormative. She has asked for a copy of the PPT.
>
> I would like to be able to share it with her as I believe that she would be entitled to it under a FOI request but fully accept that it is your IP and I assume has copyright. I am confident that she will progress to such a request and refusing to share it at this stage might be counter-productive.
>
> I met with the parent concerned last week and refused to share it but said that I would seek your permission to do so, ideally by the end of this week.
>
> If you are not prepared for me to release it, it would be helpful to have an explanation as to why which I could share with her…".

35. An email sent on 8 November 2021 by a member of SoSE's staff to a redacted recipient but, presumably, the School, at 19:25, read as follows:

> "We would really prefer that you **do not share our slides with the paren**t. You are welcome to say that 'School of Sexuality Education says that it does not share its resources including slides for copyright reasons'). (These slides are our intellectual property so such a procedure is completely normal and reasonable.) The parent is welcome to pursue an FOI request if they choose to though as a charity it's unlikely we'd be subject to this.
>
> We have been happy to share the slides with Hatcham College but hope that this is just for the purposes of clarifying what was covered – though presumably the staff who attended the session can also provide this information and comment on whether anything concerning was said – and we would request that the slides are then deleted and not shared more widely.
>
> Separate to the copyright matter, I have various other concerns regarding sharing the slides with the parent:

- That seeing the slides won't actually appease the parent if their complaint is that we talk about particular definitions of sex being heteronormative…
- That the parent generally has an issue with the fact that our approach to RSE is LGBTQIA+ - which again, it is. There are some fringe parent groups which have an issue with organisations like ours because we are explicitly LGBTQIA+ inclusive, and this parent could in theory be part of one of these groups. These groups have done some fairly unpleasant things in the past…I am therefore extremely wary about what might happen if we start sharing materials with members of such groups, and I am sceptical that the parent will simply look through the slides and be put at ease.

I am more than happy to arrange a phone call to discuss this in more detail. 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?".

36. An email sent on 9 November 2021 by the Trust's CEO to, presumably, SoSE, with the subject line "Re: Hatcham College and parental complaint", read as follows:

"I understand your position and will not share it. I did show her the slides from my laptop when we met last week."

Appellant's concerns about, and interaction with, SoSE

37. On 22 September 2021 (two days after the Session), the Appellant emailed the School:

"… I also note that the 'The School of Sexuality' recently visited the school. I have just looked at their website and found multiple examples of partisan opinion presented as fact (especially about gender, trans and social justice issues), and they have an overall approach that I find is lacking in respect for children's privacy, dignity, intelligence and their right to have a personal, sexual development at their own, private pace, undefined by restrictive terminology, theorising, contrived role plays and labelling by adults.

> I am not in the least bit convinced that this group are the right people to teach children about anything, let alone the delicate matters of sexuality and sexual relations - not least because they promote material from Netflix…and because they also advise children to go unsupervised, looking for advice from Youtube and even presenting themselves in videos on Tiktok on the subject of Asexuality, for example. This is surely contrary to internet safety guidance - and indeed all common sense!
>
> Tiktok and Youtube are full of deeply unhealthy teen trends regarding mental health and sexuality, and many parents steer their children away from this social media (as our family has chosen to do). It is worrying that the school is employing a company that teaches our children to do otherwise. Can you therefore please explain to me exactly what this company taught about consent at Hatcham College and please direct me to any material and lesson plans they used?".

38. The Appellant's second witness statement said:

> "4. I called the SoSE on the 13th October 2021 because the School had explained they would not be able to show me the resources used to teach my daughter, because of the SoSE's position not to grant copyright to the school. They seemed to be saying effectively that the matter was out of their hands. I found this surprising and so wanted to understand SoSE's decision and ask them to reconsider. I did not think it was unreasonable to call an organisation that was paid to deliver services to my daughter's school, and which taught my daughter, and ask them what they had taught.
>
> …6. During the call I did ask to know what had been taught but I wouldn't characterise it as "demanding". I certainly disagreed with Ms. Padalia regarding the idea that she thought it was acceptable to keep resources shown to my daughter secret from me and other parents, but again I don't think it is fair to characterise it as me getting "very annoyed"."

39. On 12 November 2021, the Trust's CEO emailed the Appellant:

> "…I am not prepared to release the names of the facilitators. This again is something which you should request directly from the school of sexuality."

40. According to the first First-tier Tribunal witness statement given by D Padalia, of SoSE, she had a 16-minute telephone conversation with the Appellant on 13 November 2021. At this time, D Padalia was SoSE's Deputy CEO (and subsequently became its CEO). The statement described the conversation as follows:

> "I found Ms Page to be quite confrontational…I found her views to be very much contrary to the SSE's way of working, as well as our approach to inclusive education.
>
> Ms Page was firm that the suggestion of Heteronormativity was not based in fact, and that our activities were illegal and against the law. Due to her confrontational attitude, I tried not to engage with her views, and at no point did I inform her that I would provide her with a copy of a lesson plan. I contest that the call was in any way "civil" in nature."

41. The Appellant's second witness statement set out her concerns about SoSE:

> "15. The point that I was making in referring to the paper at §73 of my first statement was that the paper clearly demonstrates the kind of work the SoSE thinks is acceptable in the classroom and the intentions behind it. In this case it included discussion, potentially with children who are as young as 11, on biological sex as being non-binary, as well as having children draw sexually explicit images to process the trauma of being sent such images – and the SoSE seem to have undertaken this in part because they think the notion of childhood innocence is "false" and because they employ "risky practices". If this is their practice, then I think it is something that parents should be informed of, and again illustrates why it is necessary for parents to be able to know what was taught by SoSE and who by, so that they can make a decision as to whether to withdraw their children.
>
> 16…I believe providers and schools safeguarding procedures are not infallible, and therefore public service complaint systems, and the transparency provided under the Freedom of Information Act are essential elements to ensure proper practice and safety.
>
> …43. It is also vital that parents know who is teaching their children – and especially so when these are people from external unregulated organisations. It is

> self-evident that in a social media age children and young people can easily discover the activities of those who teach them. Where such people are engaged in promoting or portraying controversial and explicit sexual activities, which can readily be identified, this can give rise to serious safeguarding concerns…".

Evidence about the potential determent for SoSE were the Slides to be disclosed

42. An email sent on 2 March 2022 (sender and recipient redacted but, presumably, from SoSE to the School) with the subject line "Re: Internal review – Hatcham College FOI" read as follows:

> "Yes, this information is commercially sensitive. Our income is reliant on delivering this lesson plan, and our commercial position is reliant on the confidentiality of the materials that we create.
>
> Furthermore, it is unclear why the school continues to hold this information, since it was provided exceptionally for the sole purpose of alleviating the parent's concerns and was provided on the agreement that the information would be deleted immediately.
>
> It has been several months since we provided this information, [*redacted*] a meeting has even been had with the parent she was shown the slides. Therefore, as per the agreement, the lesson plan provided should not still be held by the school, and therefore should not be subject to an FOI. If the school discloses the information this would constitute a breach of confidence, since the information was obtained from us in confidence and on the condition of being immediately deleted and therefore should not still be held by the school. We understand that this constitutes an exemption to FOI under Section 41.
>
> We are a charity and so not subject to the same FOI rules as a school. If the FOI request was made to us directly we would not be under the same obligation to disclose. If the school discloses our intellectual property as a result of failing to delete them as per the agreement then we are in a position where commercially sensitive information has been disclosed that we would not have been obligated to disclose.

In response to your questions:

• We do not want our information to be shared with the parent. We are confident that both the school and our charity have made clear to the parent the content of the workshop. As far as we are aware, the parent has in fact already visited the school and been shown the slides by the Principle [*sic*] - so we do not believe the parent's request to be in good faith. It is unclear how providing the resource directly to the parent could add to what has already been established. The levels of disruption, irritation, distress and commercial harm are therefore disproportionate given the unclear benefits of the FOI. We therefore believe it would also be possible to refuse the request as vexatious.
• No, the lesson plan is not in the public domain.
• This information is commercially sensitive, since our income is reliant on delivering this lesson plan, and our commercial position is reliant on the confidentiality of the materials that we create.

Finally, given the significant risk that this situation poses to our charity we would appreciate liaising with legal team directly regarding this. As explained, given that this our confidential information and our intellectual property covered by copyright, it is unclear why the school is in a position to disclose of the information which should no longer be held by the school."

43. The Appellant's second witness statement said:

"18…I think it unlikely that showing the contents of one lesson plan to the public at large would be fatal to the charity, especially if the materials were of good quality and suitably protected by the charity's enforcement of its own copyright for commercial reasons, which really should be a normal part of their occupation in my view, if they want to teach in schools."

The outcome of the Appellant's complaint about the School

44. On 10 May 2022, the School informed the Appellant of the decision of the stage 3 complaint panel (following a complaint hearing on 3 May 2022) convened to consider her formal complaint:

"…3. Impropriety and falsehoods by the Senior Leadership Team

…the evidence…did not support allegations against Ms Page of harassment – she was a very concerned parent on an area which is very important to her, and so was insistent. The School was slow to deliver information that Ms Page felt she needed and, while not every request for information by a parent can reasonably be met, in cases of such sensitivity, the Panel felt the School could have been more helpful…

… The Panel recognises that the lessons and lesson plans were still being developed when Ms Page requested them but also understands why on such a sensitive area, in particular where a parent has a right to withdraw a child, Ms Page wanted more information about what was being taught. Parents need to understand the limits on the School's resources and the School needs to try to meet parents' legitimate requests for information…

4. The School of Sexuality Education

…The Panel felt that it was reasonable for the School to have commissioned the SoSE, and the Panel was told that no other complaints about them have been received by the School and the staff were happy with them. It would certainly be desirable to look more closely at the website etc. of any outside provider being commissioned by the School in the future to check the background to the organisation and individuals being put forward and whether their values are consistent with those of the School. Also, the School should make sure that slides etc. can be made available to the School in advance of any lessons, not for its own use but to enable it to deal with questions etc.

The Panel was very concerned about some of the information that has come to light about the SoSE and its Team and felt that some of their values appeared to be inconsistent with the School's RSE Policy. The Panel was concerned that when these issues started to come to light, the School did not seem to understand the potential importance and that a reconsideration of the suitability of the SoSE was needed. Not enough attention was paid to Ms Page's concerns. Given the issues that have been exposed, the Panel (as well as the Complainant) welcomed the confirmation from [interim Principal] that the SoSE will no longer provide a service

> to the School and efforts will be made to bring this component of PHSE teaching and learning inhouse. The Panel thought that termination of the relationship with the SoSE was correct…
>
> 5. Failure to be transparent about lessons taught to children
>
> …The Panel noted that the School had been told by the SoSE that for copyright reasons the School could not supply copies of the slides for the Consent session to Ms Page and the Panel understood the School had received legal advice from its outside lawyers that in those circumstances it should not supply the copies.
>
> The Panel regretted this, but Ms Page has submitted a request to the Information Commissioner's Office to obtain the lesson plans she is seeking. She is awaiting the outcome of her request. If the Information Commissioner so orders, that would presumably enable the School to share the lesson plans…".

The Appellant's FOIA request

45. On 7 December 2021, the Appellant made the following requests for information to the School / Trust (omitting those requests that are not in issue on this appeal to the Upper Tribunal):

> "[1] Please can I receive a copy of the lesson plan and accompanying slides and other written or visual material used for the lesson on Consent that was presented to my daughter last term.
>
> …
>
> [5] Please will the school inform me of which School of Sexuality Education staff members taught my daughter the lesson on Consent…"

46. On 21 January 2022, the Trust responded to the Appellant's request for information:

(a) the Slides / information within them were withheld under section 43 FOIA (commercial interests). The Trust's response recorded that, "we have spoken to the SoSE about

disclosing their materials and they have expressed that they do not wish for this material to be provided under FOIA exemption of commercial interests (section 43 FOIA)";

(b) identities of SoSE staff were withheld under section 40 FOIA (personal information).

47. The outcome remained the same following an internal review. However, as explained by letter dated 4 March 2022, the Trust now also relied on section 41 FOIA (information obtained in confidence) to justify withholding the Slides:

> "The information was provided by SoSE under an implied obligation of confidence, as when the SoSE provided it to the College, they confirmed that it should be kept confidential and deleted within a certain period.
>
> … At no stage did SoSE permit disclosure to you or generally under FOIA. Indeed, the SoSE have specifically said that they do not want the information to be disclosed under FOIA. As such, to share the materials would also be an unauthorised use of the information and one that would be to the detriment of the confider, the SoSE since, as demonstrated above, SoSE's commercial interests would be prejudiced by disclosure.
>
> Therefore, I believe that the SoSE could bring an action for breach of confidence against the College. I do not consider that the College would have any public interest defence for such a breach of confidence and therefore believe that a claim from the SoSE for breach of confidence would succeed."

48. The Appellant complained to the Information Commissioner.

The Information Commissioner's decision

<u>The School's written representations.</u>

49. During the Commissioner's investigation, the School wrote to the Office of The Information Commissioner on 3 August 2022 as follows:

> "SoSE presented its materials to the College's students (and not to the public) during the Consent Lesson, for the sole purpose of delivering the RSE / PSHE

> Lessons and not otherwise. No hard or soft copies of materials used were provided to students or left with them following the presentation. SoSE did not share records of the Consent Materials and/or Other Materials requested in the Lesson Plans Request with the Trust until the Trust asked SoSE to do so for its Consent Meeting with the Complainant to take place on 4 November 2021.
>
> … The Trust does not consider the SoSE's sharing of its teaching materials (the Consent Materials and Other Materials) with the College's students in the course of RSE / PSHE Lessons:
>
> - to have removed the confidential quality of the relevant materials (since such disclosure was limited to a private invited group of students for a limited purpose only and with no further disclosure or publication or rights granted); and/or
> - to be relevant to the ongoing obligation of confidence the Trust owes to SoSE, since the delivery to the College students of lessons involving the Consent Materials and/or Other Materials during the Consent Lesson (or any other lesson at the College) would not have and has not resulted in the information being put in the public domain and losing its quality of confidence…not least because the Trust itself did not receive a copy of such materials at this stage."

50. The 3 August 2022 letter also explained why the School still possessed a copy of the Slides:

> "…The Consent Slides were explicitly shared on the basis that they remained confidential and could not be re-used, further disclosed, shared or published (and should be deleted following the Consent Meeting). Despite this, a copy of the Consent Slides were not deleted and were retained (pending the outcome of the Consent Complaint)…
>
> …the Trust does not intend to delete the Consent Slides until conclusion of the ongoing FOIA complaint in respect of the Request…".

51. The School's 3 August 2022 letter further explained the School's / Trust's position regarding the Appellant's request for disclosure of the identities of SoSE facilitators at the Session:

"…the Trust…refused to provide the names of the Consent Staff…on the basis that doing so would involve a breach of the data protection laws.

… the Trust considers that the information held falls within the exemption under section 40(2) FOIA. This is on the basis that providing information…would involve providing the names of individuals from the SoSE…in the context of activities that they had been undertaking at or for the College, in respect of specific lessons/events/involvement, at specific times. This would clearly involve a disclosure of such individuals' personal data (individual name, plus connection to SoSE and/or the College and in the context of RSE/PSHE education and their involvement with relevant lessons/presentations). It should be noted that disclosure to the Complainant under FOIA would also involve disclosure to the world at large.

… the individuals involved have not consented to the disclosure of their personal data in this manner, the Trust considered that the only potential lawful basis is that the processing is necessary for legitimate interests pursued by the Trust or a third party, in making the requested disclosure under FOIA (including trying to assist the Complainant under FOIA and being transparent about the RSE / PSHE Lessons).

… The Trust does not feel that disclosure of any of the requested information about Consent Staff…is necessary for the legitimate interest(s) identified by the Trust. This is because the Complainant has already been provided with a great deal of information about the RSE / PSHE Lessons and the SoSE, including the information sought under the Lesson Plans Request (albeit she was only shown the Consent Slides in person, outside FOIA and in confidence, and has not been provided with a copy under the Request).

…Details of the individuals comprising the Consent Staff…involved in delivering the Consent Lesson, would not add to the Complainant's understanding of the content of those lessons or any of the other issues raised in her complaint…

… The Trust notes that disclosure under FOIA is to the world at large and there would be nothing to prevent the Complainant, or indeed anyone else, from any further use, publication or disclosure of the individuals' personal data. The Trust considers that employees have a reasonable expectation of privacy in their work

> life and should not, and would not, expect information about them to be disclosed publicly in this manner. The Trust has no evidence that would indicate SoSE, or relevant College/Trust, staff would reasonably expect disclosure of their details to the public on request.
>
> … The Trust has not asked any of the relevant individuals if they are willing to consent to disclosure of their personal data. The Trust did not consider it was appropriate or reasonable to approach the individuals in the circumstances, particularly considering the stress or upset it may cause…".

The Commissioner's decision notice (ref. IC-171936-C9H8)

52. The Commissioner decided that sections 40(2) and 41(1) of FOIA were engaged by the Appellant's request for information. Section 43 was not addressed in the Commissioner's decision notice.

53. In relation to section 41, the Commissioner's decision notice found that the Slides contained information that:

(a) was obtained from another person, SoSE, who was capable of bringing an action for breach of confidence;

(b) was SoSE's intellectual property;

(c) was not trivial and had the necessary quality of confidence;

(d) had been provided to the Trust for a specific limited purpose and it was only supposed to retain the information for a very short period of time;

(e) the Trust was not permitted to further distribute and was supposed to delete immediately afterwards;

(f) was subject explicit conditions of confidence set by SoSE which it should reasonably have expected the Trust to maintain;

(g) any reasonable person, standing in the shoes of the Trust, should have realised attracted an obligation of confidence.

54. The Commissioner went on to:

(a) find that disclosing the information would prejudice SoSE's commercial interests. It would limit SSE's ability to exploit the information for commercial gain;

(b) find that the Trust would be unlikely to be able mount a viable public interest defence to an action for breach of confidence. A review of the withheld material led the Commissioner to conclude that nothing within it clearly misrepresented the law or was so obviously inappropriate as to justify overriding the Trust's duty of confidence;

(c) recognise that, in this 'area', parents have rights to decide what is and is not taught to their children and that those rights cannot meaningfully be exercised without knowledge of the subject matter of lessons. Nevertheless, unrestricted disclosure would not be a proportionate or necessary means of achieving any legitimate interest in keeping parents informed.

55. In relation to the request for information in the form of identities of SoSE facilitators at the Session, the Commissioner found that this was a request for personal information, and that the Trust were entitled to withhold the information under section 40(2) FOIA.

56. The Appellant appealed against the Commissioner's decision notice to the First-tier Tribunal.

First-tier Tribunal's decision

57. The First-tier Tribunal granted SoSE's application to be made a Respondent to the Appellant's appeal against the Commissioner's decision notice. The Appellant and SoSE were both represented by counsel at the hearing before the First-tier Tribunal (SoSE were represented by the same counsel who now represents them before the Upper Tribunal but the Appellant was represented by different counsel). The Commissioner was not represented although he had provided quite extensive written submissions opposing the appeal.

The Appellant's arguments

58. The Respondents submit that much of the Appellant's case before the Upper Tribunal relies on arguments that were not put to the First-tier Tribunal. It is therefore necessary to set out in some detail how the Appellant's case was argued before the Tribunal. I derive the Appellant's case before the Tribunal from her 24-page notice of appeal, 21-page skeleton argument and any additional arguments recorded in the Tribunal's reasons for its decision.

59. The Appellant advanced three grounds of appeal:

(1) the Commissioner erred in holding that the Slides could be withheld in reliance upon s.41 of the FOIA;

(2) the Commissioner erred in holding that the identities of SoSE's facilitators were exempt as personal data; and

(3) the Commissioner erred in accepting that no further information was held in relation to other parts of the Appellant's request for information. The Tribunal's determination of this ground of appeal is not challenged.

Whether section 405 of EA 1996 carries an implied obligation to provide parents with sex education teaching materials: Ground 1

60. The Appellant argued that the School was under an implied statutory duty to disclose the Slides to her. This prevented, as a matter of law, any obligation of confidence arising to keep the information within the Slides secret.

61. The implied duty to disclose arose, argued the Appellant, as a necessary implication of the parental right under section 405 EA 1996 to withdraw a child in part from sex education (various authorities about statutory implications were cited). It meant that parents were entitled to sex education curriculum materials in advance of any lessons taking place. In the absence of such a duty, the parental right to withdraw in part would be meaningless. Such an entitlement was supported by the Statutory Guidance and the terms of a letter sent to schools in England by the Secretary of State for Education on 31 March 2023. If curriculum materials are not provided by a school, a FOIA request can be

made as a 'last resort' to obtain information that a school should have freely disclosed. If FOIA is used, the request for information will not be defeated by section 21 of FOIA. The Commissioner's argument that, if the Appellant was right that section 405 included an implied duty to disclose curriculum materials, section 21 would apply was inconsistent with the Commissioner's own guidance.

62. The Commissioner's argument that, if section 405 EA 1996 includes a duty to disclose, it is a duty to disclose to the Appellant whereas disclosure under FOIA is to be world at large, missed the point. The Appellant should not have needed to resort to FOIA. If the School had acted correctly, SoSE would have been told that parents needed to be allowed access to their materials. SoSE should have known that the information was disclosable and had the opportunity to 'build this into the price of the service'.

63. The implied duty to disclose arose from the language of section 405 EA 1996 but was given further weight by 'the parental right to educate their children how they see fit' which itself reflected the requirements of Article 1 of Protocol 1 to the European Convention on Human Rights.

64. The existence of separate statutory obligations placed on schools regarding the making statements of sex education policy was a neutral point, and the Commissioner wrongly suggested otherwise.

65. Even if the Appellant was wrong that section 405 EA 1996 included an implied duty to disclose information, the special sensitivity of sex education meant that parents should still be supplied with sufficient information to make a decision as to whether their child should attend sex education. This was relevant to 'the test' under section 41 of FOIA.

66. The Appellant disputed the Commissioner's argument that there was limited public interest in disclosure. The Commissioner failed to take into account the School's failure to vet the material in advance, 'concerning' material on SoSE's website, the daughter's report that matters unrelated to consent were taught at the Session, that schools should not, as a matter of general principle, be required by third parties to keep curriculum material secret, and the public interest in knowing how public funds are expended on sex education.

The law of confidence

67. The three-stage test in *Coco v AN Clark (Engineers) Ltd* [1969] F.S.R. 415 was not satisfied so that the Slides were not subject to an obligation of confidence. An obligation of confidence would be incompatible with the implied duty under section 405 EA 1996. SoSE would not suffer detriment were the information disclosed because all third-party providers of sex education should be commissioned on the understanding that their teaching materials will be made available to parents. In any event, the School would be able to avail itself of the public interest defence if SoSE brought an action for breach of confidence.

68. At the First-tier Tribunal hearing, it was argued that, if SoSE's materials were disclosed and used by other providers, 'it can be protected by copyright'.

Disclosing identities of SoSE facilitators

69. There was a strong legitimate interest in disclosing this information to a parent. No parent would feel comfortable about handing over their child's education to an unnamed individual, especially where the sensitive topic of sex education is concerned (its sensitivity being demonstrated by the existence of section 405 EA 1996). The Statutory Guidance provided that parents should know who is responsible for sex education.

70. It was necessary for the Appellant to know the facilitator's' identities to enable her to research them and potentially complain to the School about their suitability. The School/Trust's statutory safeguarding duties were of no weight in a case where there was no evidence that the School took any steps to vet suitability. The fact that, at the date of the Appellant's request, the Session had been delivered was of no weight since, at that date, the School intended to continue to use SoSE, and the Appellant's daughter might investigate online material about an inappropriate individual. At the First-tier Tribunal hearing, it was argued that there was 'no confidentiality agreement entered into between SoSE and the School in advance setting out that identities cannot be disclosed'.

Observations on the Appellant's case before the First-tier Tribunal

71. The Appellant's First-tier Tribunal skeleton argument said very little about the law of confidence. The Appellant's case in this respect was mostly set out in her notice of appeal

but her arguments were almost exclusively predicated on her submission that an obligation of confidence would be incompatible with the implied obligation under section 405 EA 1996 to provide parents with sex education teaching materials. The Appellant did not advance the sort of highly developed arguments about the law of confidence that are at the forefront of her grounds of appeal to the Upper Tribunal.

The First-tier Tribunal's decision

Whether section 405 of EA 1996 includes an implied obligation to provide parents with sex education teaching materials

72. Even if there was a statutory duty to provide parents with information to enable a meaningful decision as to whether to exercise the right under section 405 EA 1996 to "wholly or partly" withdraw a child from sex education classes', the First-tier Tribunal held that compliance with that duty would not require parents to be provided "with copies of curriculum materials, or, for example, all written materials used during any sex education lessons and detailed lesson plans" (paragraph 133). There were other means of providing "sufficient information" examples of which were given in paragraph 134. But if there was an implied duty under section 405 to provide curriculum materials, supplying the materials "without any confidentiality restriction" would not be the exclusive means of doing. For that reason, such an implied duty would not necessarily be inconsistent with "an obligation of confidence as required under section 41 [FOIA]" (paragraph 136).

73. In any event, the First-tier Tribunal found "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". Given the statutory wording and context, and the legislative purpose, the Tribunal did not accept that Parliament must have intended an implied duty as contended for by the Appellant because "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" (paragraph 137). The Statutory Guidance meant that "the right to withdraw is not meaningless without a statutory duty" (paragraph 138).

Section 41 FOIA / law of confidence: disclosure of the Slides

74. The Appellant's case before the First-tier Tribunal, regarding the law of confidence, was largely that a duty of confidence would be incompatible with the asserted implied duty under section 405 EA 1996. However, the Tribunal did make various wider findings of fact, and rulings, about the application of the law of confidence:

(a) the email of 8 November 2021 by which the Slides were provided to the School stated, "'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?" The Tribunal ruled:

> "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…";

(b) the Slides / information within them had the 'necessary quality of confidence' because "they are a unique product that has been created by SoSE. The slides were not public knowledge or publicly available" (paragraph 140);

(c) SoSE would suffer a detriment were the Slides to be disclosed. Had providers been freely disclosing their materials in January 2022, it was unlikely that the Secretary of State for Education would have needed to write to schools in March 2023. The Secretary of State's letter "strongly suggests that providers were not freely disclosing their materials at the relevant time" (paragraph 143). While there were many freely available resources about 'consent', "a ready-made set of slides created by an experienced organisation would be attractive to competitors and to schools" and "would be likely to significantly decrease the appeal of engaging SoSE to deliver this particular lesson on consent" (paragraph 144). Also, "enforcing copyright is slow, expensive and uncertain" (paragraph 144);

(d) regarding the public interest defence to an action for breach of confidence, the Tribunal instructed itself that, "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" (paragraph 147);

(e) the Tribunal found in paragraph 150 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" and "this offer accords with SoSE's general practice of offering to run through the sessions with parents". These factors "significantly reduce the public interest in ordering disclosure of these slides to the public in general" (paragraph 151). The Tribunal also instructed itself that "an important factor in the balance" was the public interest in "the importance of upholding duties of confidence";

(f) the Tribunal identified a number of factors in support of the proposition that disclosing the information sought, despite it being subject to an obligation of confidence would be in the public interest:

(i) 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" (paragraph 152);

(ii) there was "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". The Appellant's request, however, was made after the lesson had been delivered. Disclosure could not therefore serve the public interest in material being shared in advance (paragraph 153);

(iii) there was "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" (paragraph 154);

(iv) there was "a public interest in parents being able to make an effective complaint about a lesson" (paragraph 155);

(v) there was "a particularly strong public interest in parents having access to teaching materials where the organisation that delivered the teaching" had a website that linked to material unsuitable for children and recommended an

> 18+ *Netflix* programme, and whose CEO [*UT judge's note: it appears this was not D Padalia, but a predecessor*] "had formed 'an intra-activist research and pedagogical assemblage to experiment with relationship and sexuality education (RSE) practices in England's secondary schools'" (paragraph 156);

(g) the above-mentioned public interests were served by "the availability of a 'run through' where parents can see the slides and are talked through the content". It did not make a difference that no such 'run through' occurred in the Appellant's case (paragraph 157);

(h) the Tribunal accepted some residual public interest that would be served by disclosure, rather than a 'run through' alone (convenience, facilitation of parent-child discussions and enabling more effective parental complaints) (paragraph 158);

(i) more generally, disclosure would be of some value to the public who may wish to know the content of publicly funded sex education, although that was limited in a case such as this where the information consisted of one set of slides on a particular topic (paragraph 159). The Tribunal also accepted a transparency related public interest in disclosure of educational materials of "organisations such as SoSE" in the light of "public debate and sensitivity" relating to political impartiality and partisan teaching. However, that was a limited interest in this case since the materials sought concerned a single lesson (paragraph 161).

75. The First-tier Tribunal held that section 41 FOIA applied to the Appellant's request for the Slides / information within them so that the information was therefore absolutely exempt from disclosure under FOIA. In dismissing this aspect of the Appellant's appeal, the Tribunal expressed its overall conclusion as follows:

> "162…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."

Section 40 FOIA: disclosure of identities of SoSE's facilitators

76. The First-tier Tribunal made a finding of fact that the names of both SoSE facilitators at the Session appeared on SoSE's website in January 2022 (paragraph 165), and remained there until at least March 2022 (paragraph 166).

77. The Appellant's request for information in the form of the facilitators' identities pursued a legitimate interest. The First-tier Tribunal held:

(a) the legitimate interest was not simply 'knowing who is teaching her child sex education' (paragraph 168);

(b) the Appellant had "a legitimate interest in her daughter being taught sex education by appropriate, properly qualified and safe individuals" (paragraph 170), and in "being able to complain effectively if she has concerns about those teaching her children" (paragraph 171);

(c) the Tribunal also accepted a "legitimate interest in the public being aware of who is responsible for delivering sex education in publicly funded schools", which was supported by the Statutory Guidance which provided for schools to publish a sex education policy including 'who is responsible' for teaching sex education (paragraph 172). This general public interest was served by public knowledge that SoSE were delivering the Session, and that SoSE's website contained names and biographies of its facilitators. The public interest in transparency was not added to by knowing which facilitators taught the Session and it was not reasonably necessary to disclose their identities in pursuit of this general public interest (paragraph 173);

(d) in relation to the Appellant's particular legitimate interests:

(i) it was necessary to ask whether those interests could be served by a less intrusive means than releasing facilitators' identities to the world at large (paragraph 174);

(ii) in connection with the legitimate interest of ensuring that appropriate, properly qualified and safe individuals teach sex education, this was met by the existence of a statutory framework for regulating who works in schools, and "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" (paragraph 174). The Appellant's interest was further served by the contents of SOSE's website; the Appellant's suitability concerns were prompted by the information she read on the website (paragraph 175);

(iii) ignorance of the facilitator' names did not render the Appellant unable to make a complaint. If she had concerns about the way that the Session was taught, and made a formal complaint, facilitators' names would be available to the body responsible for determining a complaint (paragraph 176).

78. The First-tier Tribunal's overall conclusion was that "disclosure of the names of the facilitators who taught this individual session to the world is [not] reasonably necessary for the purposes of the legitimate interests". This meant that the information was absolutely exempt from disclosure under FOIA. The Tribunal dismissed the Appellant's appeal against the Commissioner's decision that the School were entitled to rely on section 40 FOIA.

Legislative and policy context

Freedom of Information Act 2000

Right of access to information

79. A general right of access to information held by public authorities is provided by section 1(1) FOIA:

> "(1) 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."

80. The information to be communicated under section 1(1)(b) of FOIA is "the information in question held at the time when the request is received" (section 1(4)).

81. The right of access to information under section 1(1)(b) of FOIA is subject to section 2 (subsection 1(2)). Section 2(2) provides as follows:

> "(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.".

82. The provisions of Part II FOIA that confer absolute exemption from disclosure include sections 21 (information accessible by other means), 40(2) so far as relating to cases where the first condition referred to in that subsection is satisfied (personal information), and section 41 (information provided in confidence). None of the provisions in issue on this appeal confer qualified exemption from disclosure under FOIA.

Information accessible by other means

83. Section 21(1) FOIA 2000 provides that "information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information". However:

(a) "information is to be taken to be reasonably accessible to the applicant if it is information which the public authority…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" (section 21(2)(b)); and

(b) where information does not fall within section 21(2)(b), it is "not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme…" (section 21(3)).

Personal information

84. Section 40(2) FOIA provides that information is exempt information if it constitutes personal data and "the first, second or third condition below is satisfied". "Personal data" has "the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(2), (4) and (14) of that Act)" (section 40(7)). Section 3(2) of the 2018 Act provides that ""personal data" means any information relating to an identified or identifiable living individual".

85. The first condition referred to in section 40 FOIA (which, if satisfied, renders the information absolutely exempt from disclosure under FOIA) 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…" (section 40(3A)). The "data protection principles" are the principles set out in Article 5(1) of the UK GDPR (Regulation (EU) 2016/679 as it forms part of the law of England and Wales, Scotland and Northern Ireland by virtue of section 3 of the European Union (Withdrawal) Act 2018), and in section 34(1) of the Data Protection Act 2018 (section 40(7)).

86. The agreed bundle of authorities and legislative provisions prepared for the purposes of this appeal included various provisions of the Data Protection Act 2018 but not the UK GDPR. These were not particularly helpful because the six data protection principles given effect by section 34(1) of the 2018 Act concern processing of personal data for law enforcement purposes, which was not an issue in this case. Furthermore, the legislative provisions within the bundle were not always those applicable at the date of the Appellant's request for information, and its determination, and instead incorporated subsequent amendments.

87. The data protection principles in Article 5(1) of UK GDPR include the requirement for personal data to be "processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency')" (Article 5(1)(a)).

88. The lawfulness of the processing of personal data is dealt with by Article 6 of UK GDPR. At the date of the Appellant's request for information, and its determination, Article 6.1 provided as follows:

> "1. Processing shall be lawful only if and to the extent that at least one of the following applies:
>
> (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
>
> …(c) processing is necessary for compliance with a legal obligation to which the controller is subject;

> (d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;
>
> (e) processing is necessary for the performance of a task carried out in the public interest…
>
> (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 require protection of personal data, in particular where the data subject is a child."

89. At the relevant date in the Appellant's case, the second sub-paragraph of Article 6.1 of UK GDPR provided that "Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks". However, at that date section 40(8) of FOIA also provided as follows:

> "(8) In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (disapplying the legitimate interests gateway in relation to public authorities) were omitted."

90. In relation to Articles 6.1(c) and (e) of UK GDPR, at the relevant date Article 6.3 provided as follows:

> "3. The basis for the processing referred to in point (c) and (e) of paragraph 1 shall be laid down by domestic law.
>
> The purpose of the processing shall be determined in that legal basis or, as regards the processing referred to in point (e) of paragraph 1, shall be necessary for the performance of a task carried out in the public interest…The domestic law shall meet an objective of public interest and be proportionate to the legitimate aim pursued."

91. At the relevant date, Article 6.4 of the UK GDPR provided as follows:

> "Where the processing for a purpose other than that for which the personal data have been collected is not based on the data subject's consent…the controller shall, in order to ascertain whether processing for another purpose is compatible with the purpose for which the personal data are initially collected, take into account, inter alia:
>
> (a) any link between the purposes for which the personal data have been collected and the purposes of the intended further processing;
>
> (b) the context in which the personal data have been collected, in particular regarding the relationship between data subjects and the controller;
>
> …(d) the possible consequences of the intended further processing for data subjects…".

Information provided in confidence

92. Section 41(1) of FOIA provides as follows:

> "(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."

93. Since Megarry J's judgment in *Coco v AN Clark (Engineers) Ltd* [1969] F.S.R. 415 featured prominently in argument, I shall endeavour to summarise it here. At [419], Megarry J held that "three elements are normally required if, apart from contract, a breach of confidence is to succeed":

(a) "First, the information itself, in the words of Lord Greene, M.R. in [*Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.* (1948) 65 R.P.C. 203] on page 215, must "have the necessary quality of confidence about it";

(b) "Secondly, that information must have been imparted in circumstances importing an obligation of confidence";

(c) "Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it".

94. In relation to the first element, Megarry J said, "the information must be of a confidential nature" and "as Lord Greene said in the *Saltman* case at page 215 "something which is public property and public knowledge cannot per se provide any foundation for proceedings for breach of confidence". However, "this cannot be taken too far" because "something new and confidential may have been brought into being by the application of the skill and ingenuity of the human brain". Megarry J added, "where confidential information is communicated in circumstances of confidence the obligation thus created endures, perhaps in a modified form, even after all the information has been published or is ascertainable by the public: for the public must not use the information as a springboard" and "the mere simplicity of an idea does not prevent it being confidential" ([419] and [420]).

95. In relation to the second element, Megarry J observed, "From the authorities cited to me, I have not been able to derive any very precise idea of what test is to be applied in determining whether the circumstances import an obligation of confidence" [420]. However, he went on:

> "…if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that on reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence" [421].

Commissioner's guidance about section 41 of FOIA

96. In April 2017, the Commissioner issued a guidance note *Information Provided in Confidence (section 41)*, which offers the following view as to the meaning of 'actionable' in section 41 FOIA:

> "**The action for breach of confidence must be likely to succeed**

69. The final part of the test for engaging section 41 is whether the action for breach of confidence is likely to succeed. This is supported by the statements made by Lord Falconer (the promoter of the legislation), during a debate on the Freedom of Information Bill.

70. "*Actionable', means that one can go to court and vindicate a right in confidence in relation to that document or information. It means being able to go to court and win*." (Hansard HL (Series 5), Vol.618, col.416)

"... *the word "actionable" does not mean arguable … It means something that would be upheld by the courts; for example, an action that is taken and won. Plainly, it would not be enough to say, "I have an arguable breach of confidence claim at common law and, therefore, that is enough to prevent disclosure". That is not the position. The word used in the Bill is "actionable" which means that one can take action and win*." (Hansard Vol.619, col. 175-176).

71. Section 41 is an absolute exemption, so there is no public interest test to be carried out under FOIA.

72. However, the authority will need to carry out a test to determine whether it would have a public interest defence for the breach of confidence."

Education

Legislation

97. Section 7 EA 1996 requires the parent of every child of compulsory school age to cause the child to receive efficient and suitable full-time education. This duty may be met "either by regular attendance at school or otherwise".

98. Section 9 EA 1996 requires the Secretary of State, and local authorities, in exercising their powers and duties under the Educations Acts, 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" (see section 578 EA 1996 for the definition of "the Education Acts").

99. Part 6 EA 2002 is headed “The Curriculum in England” and includes sections 80, 80A and 80B.

100. Section 80(1)(d) EA 2002 requires the curriculum for every maintained school in England to include “provision for relationships and sex education for all registered pupils at the school who are provided with secondary education”. Section 80A(1) requires the Secretary of State to give guidance about the provision of education under section 80(1)(d) to which the governing body of a maintained school must have regard (section 80A(3)). Section 80A(2) provides that the guidance:

> “must be given with a view to ensuring that—
>
> (a) the pupils learn about—
>
> (i) the nature of marriage and civil partnership and their importance for family life and
> the bringing up of children,
> (ii) safety in forming and maintaining relationships,
> (iii) the characteristics of healthy relationships, and
> (iv) how relationships may affect physical and mental health and wellbeing…”.

101. Section 80B(1)(a) EA 2002 requires the governing body of every maintained school in England to “make, and keep up to date, a separate written statement of their policy with regard to the provision of education under” section 80(1)(d). The statement must be published on a website (section 80B(1)(b)) and include a statement of the effect of section 405(3) EA 1996 (section 80B(2)). Section 80B(3) requires the governing body to “consult parents of registered pupils at the school before making or revising a statement”.

102. Section 403(1) EA 1996 requires a governing body and head teacher to “take such steps as are reasonably practicable to secure that where sex education is given to any registered pupils at a maintained school…it is given in such a manner as to encourage those pupils to have due regard to moral considerations and the value of family life”.

103. Section 404(1)(a) EA 1996 requires the governing body of a maintained school to make a “written statement of their policy with regard to the provision of sex education”.

Here, "sex education" does not include sex education given as part of statutory relationships and sex education under section 80(1)(d) EA 2002 (section 404(1B)). Copies of the statement must be made available for inspection by parents and a copy provided to any parent who asks for one (section 404(1)(b)). The statement must include a statement of the effect of section 405 (section 404(1A)).

104. Section 405 EA 1996 is headed "Exemption from sex education". It makes different provision for different categories of sex education namely:

(a) "sex education";

(b) sex education comprised in the National Curriculum;
(c) sex education provided at a maintained school in England as part of statutory relationships and sex education (education required to be provided at a school in England under section 80(1)(d) of the Education Act 2002: see section 405(4)).

105. Under section 405(1) EA 1996, a parent has the right to request that a pupil "be wholly or partly excused" from receiving certain sex education at a school. The categories of sex education, in respect of which there is no parental right to request excusal under section 405(1) are (a) sex education comprised in the National Curriculum; and (b) sex education provided as part of statutory relationships and sex education (section 405(2)). To the extent that a parental request relates to sex education within section 405(1) it must be given effect. Where a parental request relates to sex education provided as part of statutory relationships and sex education, it is to be given effect "unless or to the extent that the head teacher considers that the pupil should not be so excused" (section 405(3)). It is not disputed that, in the present case, the Appellant sought information relating to excusable sex education.

106. Section 406(1)(b)(i) EA 1996 forbids "the promotion of partisan political views…in the teaching of any subject at the school".

107. Section 407(1) EA 1996 provides that, where political issues are brought to the attention of pupils, such steps as are reasonably practicable shall be taken to secure that pupils are offered a balanced presentation of opposing views.

Statutory Guidance

108. In September 2021, the Department for Education issued the statutory guidance *Relationships Education, Relationships and Sex Education (RSE) and Health Education*. The guidance states that "Schools must have regard to the guidance, and where they depart from those parts of the guidance which state that they should (or should not) do something they will need to have good reasons for doing so" (p.6). It is not disputed that this is an accurate description of the legal effect of the Statutory Guidance.

109. The Statutory Guidance includes the following:

(a) a school's RSE policy should "set out the subject content, how it is taught and who is responsible for teaching it" (paragraph 16);
(b) "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…" (paragraph 16);

(c) "Schools should also ensure that, when they consult with parents [in preparing a RSE policy], 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." (paragraph 24);

(d) "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." (paragraph 41);

(e) "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." (paragraph 42);

(f) "Parents have the right to request that their child be withdrawn from some or all of sex education delivered as part of statutory RSE. Before granting any such request it would be good practice for the head teacher to discuss the request with parents and, as

appropriate, with the child to ensure that their wishes are understood and to clarify the nature and purpose of the curriculum…" (paragraph 45);

(g) "Working with external organisations can enhance delivery of these subjects, bringing in specialist knowledge and different ways of engaging with young people." (paragraph 51);

(h) "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…" (paragraph 52).

Other material

110. On 22 November 2022, Amanda Spielman, Chief Inspector of OFSTED, gave evidence to the House of Commons Education Committee. The Chief Inspector said:

> "…I do think that in these difficult and contested areas to withhold material from parents is worrying. Commercial confidentiality may have stood up to the Information Commissioner's legal test. Nevertheless, as a matter of principle, I would expect every school to be comfortable showing its parents what it is teaching." (HC58)

111. On 9 February 2023, Baroness Barran, Parliamentary Under-Secretary of State for the School System at the Department for Education, gave the following written answer in the House of Lords:

> "Schools are responsible for what is taught in Relationship, Health and Sex Education (RHSE) lessons, including anything taught by external providers. Schools should agree reasonable requests from parents to view curriculum materials. We would expect schools to avoid entering into any agreement that seeks to prevent them from ensuring parents can be made properly aware of the

> materials that are being used to teach their children. The department will soon be writing to schools to clarify this…". (UIN HL5022)

112. On 31 March 2023, the Secretary of State for Education, The Rt Hon Gillian Keegan MP, wrote to "Headteachers and School Leaders" in England:

> "…I have become aware of an increasing number of cases where parents have had concerns about the materials used to teach their children. Some have been prevented from viewing those curriculum materials because their children's schools believed they were unable to do so for commercial reasons.
>
> The Department is clear that parents should be able to view all curriculum materials. This includes cases where an external agency advises schools that their materials cannot be shared due to restrictions in commercial law, or a school's contract with the provider prohibits sharing materials beyond the classroom. Parents are not able to veto curriculum content, but it is reasonable for them to ask to see material if it has not already been shared, especially in relation to sensitive topics.
>
> …the Department would expect schools to avoid entering into any agreement with an external agency that seeks to prevent them from ensuring parents are properly aware of the materials that are being used to teach their children. Schools should not agree to contractual restrictions on showing parents the content used in RSHE teaching or agree to this being subject to a third party's right of refusal. There is a strong public interest in parents being able to see the full content of RSHE teaching. Schools must ensure that their statutory duty to have regard to the RSHE guidance is communicated to third party providers, together with the expectation that the default position must always be that the content is shared with parents.
>
> We know that some schools will have already entered into contracts with providers that prevent them from sharing materials with parents. Even where this is the case, schools can show resources to parents in person on the school premises without infringing copyright in the resource, so this should not be an obstacle to sharing materials with parents who wish to see them. Having to come to the school is, however, likely to be inconvenient for parents and schools, so should not be a long term arrangement. We would expect schools to take urgent steps to either

> renegotiate these contracts or find an alternative provider at a suitable time, so that materials can be sent out or made available online to parents.
>
> …
>
> Curriculum materials may be copyright works owned by those external agencies, and we appreciate that schools will be concerned to avoid infringing an external agency's intellectual property rights. This is why we hope it is helpful to clarify that we expect schools to adopt a transparent approach, and not work with providers whose copyright issues prevent this…".

Human Rights Act 1998 – European Convention on Human Rights

113. Article 2 of the First Protocol to the European Convention on Human Rights provides for two requirements:

(a) the first is negative in nature namely that "no person shall be denied the right to education";

(b) the second conditions the way in which the State provides education:

> "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 secure such education and teaching in conformity with their own religious and philosophical convictions".

Copyright

114. Section 50 of the Copyright Designs and Patents Act 1988 (headed "Acts done under statutory authority") provides as follows:

> "(1) Where the doing of a particular act is specifically authorised by an Act of Parliament, whenever passed, then, unless the Act provides otherwise, the doing of that act does not infringe copyright."
>
> …(3) Nothing in this section shall be construed as excluding any defence of statutory authority otherwise available under or by virtue of any enactment."

Grounds of appeal and arguments

115. For the most part, SoSE agreed with, and adopted, the Commissioner's submissions on this appeal. Where SoSE advanced additional arguments, these are described below.

Ground 1 – whether section 405 EA 1996 imposes an implied obligations to provide information

116. Ground 1 argues that the First-tier Tribunal erred in law by failing to recognise the existence and extent of an implied obligation to provide parents with information under section 405 EA 1996.

Appellant

117. Section 405 EA 1996 confers on a parent the right 'to withdraw' a child from sex education in whole or *in part*. A purpose of section 405, therefore, is to allow a parent to choose whether their child is to attend some but not all sex education lessons. This right is consistent with the primacy given to parents generally by the Education Acts as well as Article 2 of the First Protocol to the European Convention on Human Rights. How, asks the Appellant, can a meaningful decision be made by a parent as to whether a child is to be withdrawn in whole or in part if the parent is denied access to teaching materials?

118. Parental primacy in the context of sex education is reflected, and parental rights protected, by domestic legislation. Section 7 EA 1996 allows parents to decide how to fulfil their duty to cause their children to be educated, and section 9 provides a general principle that state education is to be provided in accordance with parental wishes. The parental right to withdraw a child "wholly or partly" from sex education under section 405 EA 1996 reflects these legislative principles, as well as the requirements of Article 2 of the First Protocol, provided that a parent is enabled to exercise the right meaningfully.

119. The parental right under section 405 EA 1996 may be a total or partial withdrawal from sex education. By permitting partial withdrawal, section 405's purpose must include enabling parents meaningfully to decide to which parts of sex education they wish their children to be exposed. Accordingly, section 405 imports a necessary implied obligation that parents are to be provided with sex education teaching materials.

120. The Respondents do not, argues the Appellant, appear to dispute that a meaningful exercise of parental rights under section 405 EA 1996 calls for the provision of some information. The Appellant submits that what is required is provision of any lesson plan and "any teaching materials such as the slides used in this Case". According to the Appellant's skeleton argument, this is logical: "to decide whether to withdraw your child you must need to know what is going to be taught in each session (i.e. have the lesson plan), and what materials will be used in the teaching (i.e. have the slides)". It is also consistent with the Statutory Guidance.
121. Parents have a crucial role in ensuring that sex education is provided compatibly with section 403 EA 1996, that the stricture against the promotion of partisan political views in section 406 is adhered to, and that pupils are offered a balanced presentation of opposing political views as required by section 407. To perform this role effectively, parents need to know what their children are being taught.

122. The Commissioner's argument that all that is required is provision of a school's statutory sex education policy is inconsistent with the Statutory Guidance. It would fail to give parents "every opportunity" to understand the content of sex education classes and inhibit meaningful exercise of section 405 EA 1996 rights because a policy alone does not tell a parent what is going to be taught and how.

123. The Commissioner's argument that, had Parliament intended to impose this implied duty, it could have said so misses the point. The question is not whether the drafter could easily have made express provision, but whether the implication in question is proper. As *Bennion, Bailey and Norbury on Statutory Interpretation* (Lexis Nexis, 8th ed'n) says at 11.5, "it is suggested that the question whether an implication should be found within the express words of an enactment depends on whether it is proper, having regard to the accepted guides to legislative intention, to find the implication; and not on whether the implication is 'necessary' or 'obvious'", and "although caselaw suggests that only necessary implications may be drawn from the wording of legislation, it is submitted that this is too high a threshold, and that an implication may be found where the court considers that it is proper to do so".

124. The correct approach requires the purpose of a statutory provision to be considered. Since a purpose of section 405 EA 1996 is to allow parents to withdraw a child from some but not all sex education, achieving that purpose implies a need for parents to be provided with sufficient information to make a withdrawal decision on a rational basis. In the present

case that meant lesson plans and the Slides. The statutory duty to consult with parents under section 80B(3) EA 2002, in preparing a RSE policy, does not determine the issue. Information provided during a consultation exercise cannot be sufficient to enable a parent meaningfully to decide whether to partially withdraw their child from sex education.

125. The First-tier Tribunal erred in law by failing to recognise the extent of section 405 EA 1996's implied obligation to provide information. The Commissioner now argues, but did not before the Tribunal, that section 21 FOIA could be relied on by the School/Trust if the implied duty is as the Appellant submits. The argument is wrong. As a matter of fact, the information sought by the Appellant was not "reasonably accessible" to her by other means. The Appellant has attempted other reasonable means. She made a formal complaint, but the information was not provided. The Appellant could only compel compliance with section 405 by bringing a claim for judicial review and there is no authority to suggest that judicial review would make the information "reasonably accessible". Moreover, such an approach would dilute the access rights conferred by FOIA.

126. The First-tier Tribunal found that there is no implied statutory obligation under section 405 EA 1996 to provide parents with "sufficient information" because the legislation's purpose could be as well achieved by schools providing sufficient information in accordance with the Statutory Guidance. That is illogical. Whether or not statutory guidance exists cannot determine whether, as a matter of statutory interpretation, section 405 imposes an implied obligation. The Tribunal also overlooked that the Statutory Guidance clearly states that parents should be given every opportunity to understand the content of sex education.

127. The 'other ways' in which parents might be provided with sufficient information, described in paragraphs 134 to 137 of the First-tier Tribunal's reasons, pose considerable practical problems. The 'ways' in paragraph 134 are not compatible with the Statutory Guidance. The legal force of statutory guidance given by the Secretary of State for Education, under the Education Acts, is that a school must have regard to it and act in accordance with it unless there is good reason to depart from its provisions (*R (Khatun) v Newham LBC* [2005] QB 37, at [47]).

128. The First-tier Tribunal in fact recognised, at paragraph 158, that providing parents with copies of teaching materials would enable more detailed discussion with children,

make it easier to take advice and pursue a complaint. Yet the Tribunal failed properly to take this into account in its conclusion. It also failed to acknowledge that providing teaching materials could prevent a complaint from arising where parents, acting with a full understanding, exercised their right to withdraw.

129. The First-tier Tribunal's 'other ways' finding was inadequately reasoned. A meaningful exercise of the right to withdraw calls for provision of teaching materials. The alternatives in paragraphs 134 to 136 of the Tribunal's reasons restrict parental access and run counter to the express views of the Secretary of State in her letter of 31 March 2023. It cannot be right for parents to have to sign what would effectively be a non-disclosure agreement in order meaningfully to exercise their statutory right to withdraw.

130. The First-tier Tribunal also erred by failing to take into account that, in the Appellant's case, none of the suggested/supposed alternatives ways of providing sufficient information happened. That is why she had to resort to FOIA. The Tribunal should not have relied on SoSE's abstract generalised offer to view the Slides when, on the facts, such offer was never put to the Appellant. While the Trust gave the Appellant the opportunity to view the Slides, she did not "fully view the same due to misunderstanding the Materials to be confidential in nature, for fear of being bound by a non-disclosure agreement". In any event, a viewing alone could not have been sufficient. It would not have allowed the Appellant to use the materials if she wished to make a complaint, report a concern to OFSTED or discuss them with her daughter. Moreover, the Secretary of State's policy stance is that a 'view only' option is inadequate. Her letter of 31 March 2023 states that "we would expect schools to take urgent steps to either renegotiate these contracts or find an alternative provider at a suitable time, so that materials can be sent out or made available online to parents".

The Commissioner

131. The Commissioner understands the Appellant's argument to be that section 405 EA 1996 includes an implied obligation to disclose all sex education teaching materials to a parent, which includes "lesson plans, slides and visual and written resources". The Commissioner asserts that, at no point, was it put to the School that this was required by section 405. The issue was first raised in proceedings before the First-tier Tribunal. Had the argument been put to the School, it was likely to have responded that section 21 FOIA

applied so that the information sought was, on that basis, absolutely exempt from disclosure under FOIA.

132. According to the Commissioner, the test for determining whether an implication is to be drawn from a statutory provision is whether it is necessary. The Commissioner relies on Lord Hobhouse's words in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] 3 All ER 1:

> "45. A necessary implication is not the same as a reasonable implication as was pointed out by Lord Hutton in *B v DPP* [2000] 2 AC at 481. A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation."

133. In *R (Black) v Secretary of State for Justice* [2017] UKSC 81, Lady Hale said, at [36], that Lord Hobhouse's words "must be modified to include the purpose, as well as the context, of the legislation".

134. The Commissioner submits that a high hurdle must be surmounted in order to establish a necessary implication: "the test is whether such an implication is necessary, not whether it would be convenient" (*R (Piffs Elm Limited) v Commissioner for Local Administration in England* [2023] EWCA Civ 486 at [93]); "courts should be slow to give a statute an effect that is not expressly stated" *NYKK v Mark McClaren* [2023] EWCA Civ 1471 at [44].

135. The Appellant places significant reliance on the views in Bennion's *Statutory Interpretation*. However, the passage relied on was *expressly* disapproved in *NYKK*:

> "45. Miss Ford relied upon a passage in *Bennion…*in support of a submission that the test is whether the implication is "proper" and that it need not be necessary: "It is suggested that the question whether an implication should be found within the express words of an enactment depends upon whether it is proper, having regard

> to the accepted guides to legislative intention, to find the implication; and not whether the implication is 'necessary' or 'obvious'."
>
> 46. The suggestion that an implication may be made if it is proper, rather than necessary, is erroneous and apt to mislead. The authors appear to base it on a passing remark of Willes J in *Chorlton v Lings* (1868) LR 4 CP 374, 387; and a number of Commonwealth authorities which have adopted that formulation as expressed in earlier editions. The distinction between what is "proper" and what is "necessary" which the authors appear to be drawing is that what may qualify as "proper" is something which is not "logically necessary": see p 404. The distinction between what is necessary and what is logically necessary is a narrow one. For my part I would accept that necessary does not mean "logically necessary", because context and purpose have their part to play as well as logic. But the test is still one of necessity as the statements of principle from the House of Lords, Supreme Court and this court, cited above, make clear. Adopting a test of what is "proper" is unhelpful because the concept is elusive: it offers no guide as to what standard is to be applied; and is apt to mislead if interpreted to mean something different from necessity...".

136. The First-tier Tribunal correctly held that section 405 EA 1996 does not impliedly confer on a parent the right to be provided with sex education teaching materials. Such a right would be difficult to reconcile with the express statutory requirement, in section 80B EA 2002, for maintained schools to make available for inspection and, on request, provide a parent with a copy of, a statement setting out their RSE policy. It is unlikely that Parliament, having turned its mind to the provision of information to parents and made express provision for parental access to sex education policies, impliedly legislated for schools to provide all written materials and lesson plans. Has Parliament intended such an outcome, it would have made express provision.

137. While access to all sex education teaching materials might be desirable or convenient for the exercise of the parental right under section 405 EA 1996, that does not make it necessary. The Commissioner submits that a school retains flexibility (or discretion) to decide what to provide the parent, and this is recognised in the Statutory Guidance: see its reference to "existing mechanisms" in paragraph 44 and the generally non-prescriptive approach taken. It is true that, at paragraph 42, the Guidance provides that parents "should be given every opportunity to understand the purpose and content

of Relationships Education and RSE" but that is not a synonym for providing all written teaching materials. The First-tier Tribunal also correctly gave weight to the fact that the Appellant made her request for information *after* the Session had been delivered, and correctly instructed itself that there is a practical difference between 'sufficient' information and all information.

138. The broadly expressed duty in section 9 EA 1996, regarding education in accordance with parental wishes, cannot be construed so as to require parents to be supplied with all teaching materials on request. And, even if section 405 EA 1996 has the effect contended for, that does not mean that disclosure under FOIA would be necessary to give effect to it. Disclosure under FOIA is to the world at large but it is arguable that, if section 405 operates as the Appellant submits, the duty to provide information could be satisfied by providing teaching materials subject to conditions as to onward use / transmission.

139. The First-tier Tribunal correctly held that the Appellant's statutory implication was inconsistent with the existence of other ways, set out in it reasons, by which parents may be provided with sufficient information to enable a meaningful withdrawal decision. In fact, the Tribunal could also have relied on:

(a) the parental right to access a school's sex education policy statement. The Statutory Guidance says that a sex education policy should "set out the subject content" and include "details of content/scheme of work and when each topic is taught, taking account of the age of all pupils";

(b) the statutory duty to consult parents before making or revising a statement of sex education policy under EA 2002. The Statutory Guidance says that consultation should include "examples of the resources that they plan to use" (and examples cannot possibly mean all resources).

140. The Commissioner further submits that the Appellant's implied duty is unlimited and disproportionate. If she is correct, a school would be required to provide a parent with materials that a teacher could not reasonably have expected to be disclosable such as rough, handwritten notes.

141. The Appellant's argument that the implied duty, if recognised, would enable more detailed parent-child discussions and make it easier to pursue a parental complaint misses the point. These may be desirable outcomes but there are certainly not "necessary" or "compellingly clear". It is also irrelevant whether the School had kept parents properly informed. This can have no bearing on Parliament's intention in enacting section 405 EA 1996.

142. The Appellant's case is self-defeating. If she is correct, the Trust/School would have been able to rely on section 21 FOIA, which provides an absolute exemption from disclosure. The Commissioner draws attention to *Glasgow City Council v Scottish Information Commissioner* [2009] CSIH, at [66-7]: "if "a person is obliged by law (an enactment) to provide the applicant — as opposed to the public — with the information requested then it is likely to be "readily accessible" to the applicant unless some feature of the access scheme indicates otherwise". The Commissioner accepts, however, that while this argument was put to the First-tier Tribunal, it did not consider it necessary to deal with it.

143. The First-tier Tribunal properly relied on the undisputed legal fact that any disclosure of material under the supposed section 405 EA 1996 obligation would not be the same as disclosure to the whole world under FOIA 2000. It correctly concluded that, even if there were an implied duty as contended by the Appellant, it could be satisfied in ways other than "the provision of copies without any confidentiality restriction". That contrasts with disclosure under FOIA to the world at large, not just the requestor. The Tribunal rightly held that an implied duty to disclose all teaching materials would not be determinative when, in the words of the Commissioner's skeleton argument, "considering Trust's reliance on section 41 FOIA"

<u>Ground 2 – Tribunal's assessment of the law of confidence, and application of section 41 of FOIA</u>

144. Ground 2 is that the First-tier Tribunal misdirected itself in law because it misunderstood the law of confidence. Had the law of confidence been properly applied, the Tribunal could not have found the information to be confidential. The Tribunal 'failed at every step' of its legal analysis.

Appellant: principles of the law of confidentiality

145. The application of section 41 FOIA is contingent on an "actionable" breach of confidence. The Appellant submits that the Commissioner's section 41 guidance note provides an accurate description of an actionable breach of confidence that is:

(a) disclosure of the information in question would constitute a breach of confidence, contrary to the principles expounded in *Coco v Clark*; and

(b) court action to restrain the breach would be likely to succeed, i.e. "one can take action and win"; and
(c) no public interest defence is available. No action subsists if a defendant shows that the breach was justified in the public interest: *Evans v Information Commissioner* [2012] UKUT 313 (AAC) at [38]. For this purpose, the test is one of proportionality: *HRH The Prince of Wales v Associated Newspapers Limited* [2008] Ch 57 at [67] and [69]).

146. The first *Coco v Clark* condition requires information to have "the necessary quality of confidence", which means:

(a) the information must be more than trivial; and

(b) the information must be inaccessible (Arnold LJ in *The Racing Partnership Ltd & Ors v Sports Information Services Ltd* [2020] EWCA Civ 1300, [2021] Ch. 233 at [48]), and "the claimant…must demonstrate that it has sufficient control over the information to render it relevantly inaccessible" (*The Racing Partnership* at [72]);

(c) the information must be worthy of confidentiality by virtue of a quality central to it, which is of particular relevance where component parts, but not the information itself, may be in the public domain. The thrust of the case law is a requirement for "some product of the human brain" which elevates the information to that of a confidential nature (*Coco v Clark*, pages 419-20);

(d) the industry/sphere in which the parties operate may be relevant because "whether information should be treated as confidential will be judged in the light of the usage and practices of the particular industry concerned" (*Clark & Lindsell on Torts* (24th edn, Sweet & Maxwell) at 25-10). It is therefore highly relevant that SoSE operates in the education sector because teaching is the paradigm example of sharing knowledge.

147. Information may lose the necessary quality of confidence and cease to be confidential. Once information has entered the public domain, "then, as a general rule, the principle of confidentiality can have no application to it" (*Attorney-General v Guardian Newspapers Ltd (No. 2)* [1990] 1 A.C. 109 at [282]). Confidentiality may therefore be lost if information is published on the internet; whether it is lost depends on the degree of availability (*Barclays Bank plc v Guardian News and Media Ltd* [2009] EWHC 591 at [22].)

148. The second *Coco v Clark* condition requires information to have been imparted in circumstances importing an obligation of confidence. Those circumstances may themselves destroy or counteract otherwise confidential information. As was said in *Coco v Clark* at page 420, "however secret and confidential the information, there can be no binding obligation of confidence if that information is blurted out in public or is communicated in other circumstances which negative any duty of holding it confidential."

149. The Commissioner's confidentiality guidance note emphasises the role of explicit conditions, advising that confidentiality arises where (a) the confider of information attaches "explicit conditions to any subsequent use or disclosure" or (b) if not attached, the "restrictions on use are obvious or implicit from the circumstances". The Appellant submits that (b) (implied restriction) was at issue in this case was because "there was no explicit obligation of confidence asserted by [SoSE] at the time they were delivering the Session in issue". The courts will more readily imply an obligation of confidentiality where the context of the relationship between the parties calls for it such as, according to *Clerk & Lindsell* at 25-13, commercial relationships, trade custom, and professional advisors such as lawyers or bankers. It is submitted that none of these relationships come close to that of teacher and pupil.

150. There was clearly no contractual duty of confidence in this case. In the case of an equitable duty of confidence, "the touchstone by which to judge the scope of the confidant's duty and whether it had been breached was "his own conscience"" (*R v Department of Health Ex p. Source Informatics Ltd (No.1)* [2001] Q.B. 424 at [31]. However, the test is not solely subjective. In *De Maudsley v Palumbo and Others* [1996] E.M.L.R. 460, Knox J, reflecting *Coco v Clark* at pages 420-21, held at page 471:

> "The test in my view is objective - the question is were the circumstances such as to import a duty of confidence and, if so, the obligation is not to be avoided simply by not addressing the problem. On the other hand I accept that a factor, and it may

> be an important factor, is whether the parties did in fact regard themselves as under an obligation to preserve confidence, just as is a proven trade or industry usage in that regard but I do not accept that the test is exclusively subjective as to the parties' intentions."

151. The third *Coco v Clark* condition includes a requirement for unauthorised use. The Appellant submits that this does not arise. There can be no question of unauthorised use since the information has not been disclosed to the Appellant.

152. Insofar as copyright is relevant to section 41 FOIA, *Office of Communications v The Information Commissioner* [2009] EWCA Civ 90 demonstrates, at [51], that any intellectual property right (such as copyright) is not extinguished by its release under the FOIA. Richards LJ said, at [56]:

> "where use of information in breach of intellectual property rights has beneficial as well as adverse consequences, the proposition that only the adverse consequences can be taken into account seems to me to run wholly counter to that scheme."

153. The Appellant submits that, in this case, the public interest is to be considered from both the point of view of parents knowing what their children are being taught, and also from that of children being able to talk to their parents. The essence of the public interest defence is proportionality. The proposition that an exceptional case is required to override a duty of confidence that would otherwise exist is no longer good law (*London Regional Transport v The Mayor of London* [2001] EWCA Civ 1491). The test is simply whether there is a public interest in disclosure which overrides the competing public interest in maintaining the duty of confidence.

154. As to what the public interest defence may permit, Lord Denning, in *Initial Services Ltd v Putterill* [1968] 1 QB 396, made it clear, at page 405, that its ambit is broad, extending to "any misconduct of such a nature that it ought in the public interest to be disclosed to others", and that "no private obligations can dispense with that universal one which lies on every member of the society to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare". Now, the right to freedom of expression under Article 10 of the European Convention on Human Rights must also be served, as noted in *Clerk & Lindsell* at 29:

> "[a]t issue is whether there is a compelling social need to prevent disclosure in order to protect the confidential information; any restriction imposed on the art.10 right by a court must be rational, fair and not arbitrary, and the right must be impaired no more than is necessary."

155. If the application of the law of confidence to children is relevant, in *Matalia v Warwickshire County Council* [2017] EWCA Civ 991; [2017] E.C.C. David Richards LJ held, at [49], that 10 or 11-year-old candidates for an 11-plus examination would owe a duty of confidentiality so that a local education authority could restrain a candidate's proposed publication of examination questions on social media. Richards LJ did not go so far as to hold that children could not disclose the information to their parents but said it would "be entirely consistent with principle to impose the duty of confidentiality on the parents". Any duty of confidentiality would not persist beyond the sitting of the examination.

Appellant: First-tier Tribunal's application of the law

156. The First-tier Tribunal failed properly to consider whether the information was confidential at all. It did not address the first condition in *Coco v Clark*, and simply assumed that the information was confidential. The Tribunal's assumption derived from an email in which SoSE asked the School not to share the slides further, and delete once used. Paragraph 140 of the Tribunal's reasons betrays a misunderstanding of the law of confidence which, on its own, is sufficient for Ground 2 to succeed. The Tribunal found that "the slides were provided to the School in circumstances importing an obligation of confidence" (emphasis added). The slides themselves were not the issue. For the purposes of the law of confidence, what mattered was the information within the slides.

157. The First-tier Tribunal found, in paragraph 140, that SoSE's email included wording "akin to an express statement that the information is being provided in confidence" and "any reasonable person" would have so read it. This finding is untenable. What SoSE's email said was "could I request" that the Slides not be shared with the Appellant. That could not properly be construed as an express statement that the information was provided in confidence. The notional reasonable person, referred to in paragraph 140, should have been framed as a reasonable person who was aware of the statutory educational context. A properly defined reasonable person would not have read the email in accordance with paragraph 140.

158. Before analysing the circumstances in which the information was provided to the School, the First-tier Tribunal should have asked whether it possessed the necessary quality of confidence and considered the *first* disclosure (during the Session). Had the first condition in *Coco v Clark* been considered, the Tribunal would have been bound to find that the information did not have the necessary quality of confidence because (a) there was nothing in the information that was confidential, and (b) if the information was confidential (not conceded), SoSE's own actions destroyed any confidentiality because the Session undoubtedly put the information in the public domain. The facts admit of only one conclusion – no equitable duty of confidence applied to the pupils who attended the Session and, as such, the information imparted was made public (to the extent that it had not already been made public by SoSE) so that, thereafter, no confidentiality could exist in the Slides.

159. Regarding the inherent confidentiality of the Slides / information within them, the First-tier Tribunal itself acknowledged that they were "not necessarily particularly sensitive", drew on a variety of sources and contained information some of which could be found elsewhere in the public domain (paragraphs 16 and 17). The Appellant submits that slides for a sex education class on consent, taken from materials already in the public domain, are not the sort of information that is protected by the law of confidence (something is not made confidential 'just because someone says it is': see *Mosley v News Group Newspapers Ltd* [2008] EWHC 687 (QB)). Mr Moss, for the Appellant, rightly points out that the Appellant's argument that the Slides did not contain inherently confidential information is hampered by the fact that her legal representatives have not been able to see them but, nevertheless, 'one struggles to see' what could be in Slides prepared for a lesson on consent that was not already in the public domain.

160. Paragraph 140 of the First-tier Tribunal's reasons describes the Slides as a 'unique product', not 'public knowledge' and 'not publicly available'. This is a further indication that the Tribunal failed properly to distinguish between the Slides and the information within them. What, asks the Appellant, could possibly be confidential about information that conveys ideas about consent in the sexual arena?

161. The First-tier Tribunal failed to take into account that the Appellant's request for information, insofar as it related to lesson plans and other material generated by the School, was complied with and the information provided.

162. The Appellant concedes that, in law, a collation of public information may become confidential by, as Megarry J said in *Coco v Clark*, "the application of the skill and ingenuity of the human brain". However, it is 'hard to imagine' what that might be in the case of slides prepared for a lesson on consent and sex education and SoSE fail to establish the requirement for 'more' identified by Hirst J in *Fraser* as necessary for the inherent quality of confidentiality. Indeed, the Slides were prepared for the very purpose of being shown in public to pupils and they were not bespoke. Mr Moss argues that, if an action for breach of confidence were brought, SoSE would be bound to face real difficulty in satisfying the requirement identified in *Fraser* that "unquestionably…the idea must have some significant element of originality not already in the realm of public knowledge" (page 66C).

163. The Commissioner criticises the Appellant for the 'entirely unevidenced' assertion that the Materials were created for widespread dissemination, but this overlooks that the Appellant is not required to show that the Materials were not confidential; it is for SoSE to show that they were. In any event, SoSE disseminates its resources at a wide number of schools ("we…deliver these same lessons repeatedly") and it gave evidence before the First-tier Tribunal that its normal practice is to offer to run through sessions with parents which, of itself, destroys any claim to confidentiality.

164. The very purpose of the Slides was to educate, and thereby equip the recipients of education (pupils) with tools to use and pass on. If the Slides were confidential, pupils who did this would breach confidentiality. The flaws in the Respondents' cases are heightened when one bears in mind that the Session was about consent, and the giving of consent is not a solitary activity. No reasonable recipient (15-year-old pupil) could possibly have believed that they / their consciences were bound to refrain from using or disseminating the information to others.

165. There could not have been anything about the information within the Slides that merited protection by the law of confidence, and it is of note that, before asserting that disclosure of the Slides would breach a confidence, SoSE initially relied on 'copyright' and then 'commercial interests'. This smacks of using confidentiality as a last-ditch attempt to hide the slides from genuine public scrutiny. Further, a reasonable person would clearly not regard as confidential a slideshow designed for presentation to the public. Teachings materials are designed for public dissemination. These were not bespoke materials and any suggestion that they were designed to be shown to the

School, and no other party, would, in the words of the Appellant's skeleton argument, "be anathema to the safeguarding principles of teachings materials being transparent". SoSE's argument that the Slides were a commercial product, not learning materials, flies in the face of reality.

166. The Appellant asserts that SoSE has "habitually shared information and its resources in the public domain" so that it may reasonably be inferred that the information in the Slides had, before the Session, already been put in the public domain. In particular:

(a) SoSE has posted photographs of materials from its workshops on social media, including photographs of its slides;

(b) SoSE shares information and resources on an on-line blog;

(c) SoSE published a book in September 2021 *Sex Ed: An Inclusive Teenage Guide to Sex and Relationships*. The book was in the public domain at the date of the Appellant's FOIA request and contained a chapter on consent, the same subject as the Session. It cannot reasonably be suggested that the Slides contained information distinct from that in this chapter. At the hearing, Mr Moss took the Upper Tribunal through the book at some length, arguing that it is reasonable to assume that much of its 21 pages of material on consent would be replicated in the Slides and that anything that is in the book cannot also be confidential;

(d) according to the School, SoSE is used by 300 other schools. It may therefore be presumed that the Slides had already been presented at other schools;

(e) the Commissioner found, at paragraph 17 of his Decision Notice, that at least some of the information in the Materials was replicated elsewhere in the public domain.

167. While the Slides may attract copyright protection in some form, this does not make them worthy of protection under the law of confidence. The Commissioner's Decision Notice conflated confidentiality and copyright, shown by his reference to 'originality', which is part of the test for copyright protection, but not confidentiality which requires inaccessibility. The Decision Notice also relied on the ICO's guidance *Intellectual Property Rights and Disclosures under the Freedom of Information Act*, which makes no mention of the law of confidence. The Commissioner mistook copyright for confidentiality and

considered that potential copyright protection is sufficient to render information confidential. This is wrong but the error was carried forward into the First-tier Tribunal's reasoning, shown by its reference to the Materials as 'unique', a byword for originality, without considering whether they were confidential at all, and its focus on copyright infringement as the true potential detriment (paragraph 144 of the Tribunal's reasons).
168. The First-tier Tribunal seemed to accept that releasing one set of slides would destroy SoSE's business. Its reasons for doing so are unclear. The real 'added value' in this context is the teaching, and the way in which SoSE facilitators present material to pupils could not be replicated, by a competitor or school staff, by disclosure of the Slides.

169. SoSE's suggestion that the pupils were somehow bound by a duty of confidence (or 'gagged' as it was put at the hearing) has no proper basis. Leaving aside the legal difficulties with that suggestion, as well as the undisputed fact that no instruction was given to pupils not to discuss the Materials, it is antithetical to SoSE's stated mission of 'starting conversations' around sex education. No reasonable pupil attending the Session would have realised that information was being given in confidence. *Kieran Corrigan & Co. Ltd v OneE Group Ltd* [2023] EWHC 649 (Ch) refers, at [189] to the test being "objective in the sense that it requires the claimant to show that the defendant ought to have appreciated that it was confidential, irrespective of her actual state of mind". The question here is whether, viewed objectively, a 15-year-old pupil would appreciate that the material was confidential. The only sensible answer is 'no'. And the requirement for 'notice, as described in *Attorney-General v Guardian Newspapers Ltd (No. 2)* at page 281B, could not have been satisfied. No equitable duty of confidence could have arisen during the Session and, if not already made public, the information in the Slides was made public through delivery of the Session. Pupils would have been free to take pictures of the slides, make notes and discuss the content with anyone. Even if the information was confidential before the Session, which is not conceded, it could not have been afterwards. Once the Slides were made public by SoSE's disclosure to some 200 pupils in the Session, section 41 FOIA could not properly have been relied on to prevent its disclosure; any confidentiality that might have existed was lost. A reasonable recipient of the information, in the shoes of a 15/16-year-old in a class on sex education presented to 200 children in an assembly setting, could not have believed that they were restrained from repeating the contents to anyone outside of the class. The Commissioner's case is effectively that every child in that Session is liable to be sued for breach of confidence, which is patently unreasonable.

170. The argument above is consistent with the Commissioner's confidentiality guidance note which states, at paragraph 36, that "in the case of commercial confidentiality, we consider that confidentiality will be permanently lost if the information has entered the public domain at any time, even if the material is no longer in the public domain at the time of the request". The First-tier Tribunal erred in leaving this matter out of its analysis.
171. The First-tier Tribunal's finding that the email which SoSE sent to the School on 8 November 2021 amounted to the Slides being shared with the School in circumstances importing an obligation of confidence is legally unsupportable. As the Tribunal itself found, the slides were sent to the School after the presentation (paragraph 139). Even if the Materials had been confidential, no confidentiality remained following disclosure in the Session. SoSE's own disclosure could not be retrospectively 'cured', by the purported imposition of a duty of confidence. As Lord Justice Arnold held in in *The Racing Partnership Ltd & Ors v Sports Information Services Ltd* [2020] EWCA Civ 1300, [2021] Ch. 233 at [48], "the basic attribute which information must possess before it can be considered confidential…[is] inaccessibility", "the starting point in any confidential information case is to identify with precision the information which is alleged to be confidential" [49] and, to secure the attribute of inaccessibility, "the claimant…must demonstrate that it has sufficient control over the information to render it relevantly inaccessible" (at [72]). This was not the case here, since SoSE had already released the information in the Slides thereby putting it out of its control. There is a heightened need for precision in a 'compilation' case and, if an action is brought, pleadings need to be lengthy in order properly to establish inaccessibility. The Upper Tribunal should note that, in *Ocular Sciences Ltd. & Anr. v Aspect Vision Care Ltd. & Anr.*, Laddie J said, at page 359(15), that the courts "are careful to ensure that the plaintiff gives full and proper particulars of all the confidential information on which he intends to rely". SoSE's claim to confidentiality is further weakened by its willingness to provide the School with a synopsis of the Session which, moreover, contained nothing that could possibly be considered confidential.

172. The First-tier Tribunal's reasons refer to only one of the emails sent to the School by SoSE on 8 November 2021, which requested the School not to share them 'further' and delete once matters had been clarified with 'the parent'. The reasons do not mention SoSE's other email which stated: SoSE did not want the Slides shared 'for copyright reasons'; it had 'various other concerns' about this particular parent namely that seeing the slides would not appease her if her complaint concerned heteronormative matters; 'in theory' the parent might be a member of a fringe group with a record of doing 'some fairly

unpleasant things; and SoSE were willing to show the parent the Slides on one of their devices and discuss the contents. Earlier, on 8 October 2021, SoSE had relied only on copyright to justify non-disclosure to the Appellant. This evidence was relevant to the question whether the information had the necessary quality of confidence and the circumstances in which it was imparted to the School. On 21 January 2022, the School sent an email to the Appellant which, again, made no mention of confidentiality only copyright. It seems confidentiality was first mentioned in a communication of 4 March 2022.

173. SoSE's 8 November 2021 email (the one relied on by the First-tier Tribunal) did not require the Slides to be withheld from the parent. It was sent so that the Slides could be shown to the parent. It is entirely unclear how the Tribunal construed this email as generating an obligation of confidence.

174. The First-tier Tribunal failed to appreciate that the School's RSE policy was highly relevant to the question whether an obligation of confidence was established. The policy repeatedly mentioned the importance of discussions with parents. It refers to the involvement of outside speakers on 'drop-down' days but without differentiating between education provided by outside speakers and school staff. The Tribunal failed to mention that part of the RSE policy under the heading 'role of parents'.

175. This is a case of a type referred to in *Kieran Corrigan Ltd*, at [210], where "raw materials in the public domain are combined to produce the information". At [212], the High Court identified relevant questions to be asked in determining whether such information will or will not be considered readily accessible:

> "The test of ready accessibility focuses attention in such a context to whether these are ideas that others can readily come up with or not, and if so with what degree of effort or expenditure. The concepts of how novel the idea is, what skill it involves to come up with it and, in some cases, how valuable it is may all be relevant to answering how accessible the information is, but they are not tests in themselves."

176. Despite not being able to argue by reference to the Slides themselves, the Appellant submits that, if the *Kieran Corrigan* questions were asked, it must be highly unlikely that they would be answered in the affirmative. As the High Court noted in *Kieran Corrigan* at

[216], "the creation of tax planning schemes involves significant skill" but that cannot reasonably be said of a lesson on consent prepared for school children.

177. The Commissioner places particular reliance on *Barclays Bank Plc v Guardian News and Media Ltd* [2009] EWHC 591 (QB) but without, in the Appellant's submission, acknowledging that case's very different context. It was an interlocutory determination and involved material (bank documents) that was self-evidently confidential and 'leaked' in breach of a fiduciary duty.

178. The First-tier Tribunal found that disclosure of the slides would cause detriment to SoSE because (a) disclosure would decrease SoSE's commercial attractiveness and (b) enforcing copyright is slow and expensive (paragraph 144). Finding (a) was based on reasoning that a "ready-made set of slides created by an experienced organisation would be attractive to competitors and to schools" but this is not detriment by way of misuse of confidential information and the Tribunal identified no detriment from use of information within the Slides. The 'attractiveness' referred to does not relate to any quality of the information *per se*; there is no suggestion that it is sensitive such that competitors would benefit by acquiring new, non-public information (as the Tribunal accepted). Any competitive benefit would derive from access to materials that are complete and ready to use. The risk identified by the Tribunal relates to the expression of information but that is not something protected by the law of confidence. To avoid that risk, SoSE would have to rely on protection against unauthorised reproduction under the law of copyright, and any copyright in the Slides would not be extinguished by disclosure under FOIA. SoSE could rely on the law of copyright to restrain unauthorised reproduction, but it cannot rely on alleged difficulties in enforcing copyright as a form of detriment recognised by the law of confidence. While the third limb of *Coco v Clark* speaks of injury if sensitive, commercial information were to be released, there could have been no such information in this case. The Tribunal's finding (b) is wholly unsupported and unfounded.

179. Like the Commissioner, the First-tier Tribunal conflated copyright and confidentiality. The fact that the Slides might attract copyright protection in some form does not transform them into confidential information. Originality (required for copyright to arise) does not of itself establish the 'necessary quality' of confidence. Material that attracts copyright protection is not necessarily confidential. The Tribunal's finding, at paragraph 140 of its reasons, that the Materials were "unique" – a byword for originality – shows that it misdirected itself in law.

180. The Commissioner criticises the Appellant for drawing an artificial distinction between the intrinsic qualities of the Slides and their use. But the Commissioner misunderstands the Appellant's case. The Appellant draws a distinction between the information within the Materials (content) and their expression (colour, font, graphics etc.). The expression of the Materials cannot be protected by the law of confidence, but might be protected as a literary or artistic work under copyright law. Copyright and confidentiality are different branches of the law, the former statutory and the latter equitable/contractual, with very different rationales and effects. The First-tier Tribunal failed to appreciate this and thereby acted under a legal misdirection.

181. The First-tier Tribunal was referred to the Information Tribunal's decision in *University of Central Lancashire v Information Commissioner* (EA/2009/0034). The Appellant accepts that this decision did not bind the Tribunal and concerned section 43 FOIA but nevertheless argues that it is instructive because its facts were very similar. It concerned a request for information about a university's homeopathy degree programme. The Appellant draws the Upper Tribunal's attention to the following reasons given by the Information Tribunal for its decision:

(a) "36. We were not impressed by the claim that third parties with copyright in the disclosed materials would be alienated UCLAN's compliance with a decision that this information must be provided. None gave evidence to that effect";

(b) "42. It is plainly important that universities should be encouraged to innovate in the courses that they offer and in the methods of teaching that they employ. The question is whether disclosure of course material, specifically in this instance but with an eye to the wider picture, will blunt the urge to innovate by removing the incentive";

(c) "46. The public interest in disclosure seems to us appreciably stronger. Apart from the universal arguments about transparency and the improvement of public awareness, we find that there are particular interests here, arising from the nature of a university and the way it is funded.

47. First, the public has a legitimate interest in monitoring the content and the academic quality of a course, particularly a relatively new course in a new area of study, funded, to a very significant extent, by the taxpayer…

48. Secondly, this is especially the case where, as with the BSc. (Homeopathy), there is significant public controversy as to the value of such study within a university. In this case, that factor standing alone would have persuaded us that the balance of public interest favoured disclosure.";

(d) "54. We regard the claim of disruption and consequent expense resulting from a flood of similar requests prompted by disclosure of this information as tenuous…".

182. The Appellant accepts that, in principle, limited dissemination of confidential material *might* not result in a loss of confidentiality (*Barclays Bank plc v Guardian News and Media Ltd* [2009] EWHC 591). However, the Respondents' argument that this is a fixed rule must be based on a misreading of the authorities. In this case, there was clearly more than limited dissemination (see above arguments). To use the language of the Commissioner's confidentiality guidance note, SoSE has made the Materials "realistically accessible to the general public", of which school children form part.

183. Section 41(1)(b) FOIA requires disclosure to the public to constitute a breach of confidence that is "actionable". During Parliamentary debate on the Bill that became FOIA, Lord Falconer stated that 'actionable' means "that one can take action and win" (see the Commissioner's confidentiality guidance note). The Appellant submits that this means the person claiming confidentiality "must prove that they would likely win the case". At the hearing, Mr Moss conceded that the Commissioner's guidance did not say this in terms, but he argued that it should read in for it to make proper sense. In this case, this meant it had to be likely that SoSE would succeed in an action for breach of confidence brought against the pupils who participated in the Session. It is irrelevant that SoSE might not seek to bring an action against any of the pupils. What is relevant is that no court would allow a 15-year-old child to be injuncted to prevent the dissemination of a lesson on consent to sexual activities.

184. In summary, the Tribunal erred in law in holding that section 41 FOIA was available to the School to resist the Appellant's request for disclosure of information. This could not be considered a case in which a claim for breach of confidence would be likely to succeed. In fact, such a claim would be hopeless.

The Commissioner

185. The Commissioner argues that the Appellant relies on a 'host' of arguments about the law of confidence that were not put to the First-tier Tribunal. The Appellant appears to seek a re-run of the appeal that was made to that tribunal without recognising the limits placed on the Upper Tribunal's jurisdiction which, as a second-tier appellate body, may only interfere with a tribunal's decision if it made an error on a point of law.

186. At the hearing, Mr Perry, for the Commissioner, drew attention to the following features of the Appellant's case before the Upper Tribunal which he argued were either impermissible, in the light of her case before the First-tier Tribunal, or misguided:

(a) the Appellant's submissions place the burden on SoSE to show that the information was confidential. That may have been the case before the First-tier Tribunal but to maintain the argument before the Upper Tribunal betrays a misunderstanding of its role as a second-tier appellate body;

(b) Mr Moss' oral arguments concerning SoSE's core functions should have been raised, and tested, in proceedings before the First-tier Tribunal;

(c) the Appellant seeks to rely on new evidence to show that SoSE "habitually" shares information and its resources in the public domain, and has retrospectively engaged in some kind of attempt at 'damage control';

(d) the Appellant says she is hampered by not knowing whether certain statements made in a book published by SoSE are correct, but this only arises because the book was not put in issue before the First-tier Tribunal;

(e) the Appellant submits that pupils at the Session were free to take pictures on their mobile telephones, but this was not in evidence before the First-tier Tribunal;

(f) arguments about the 'gagging' of pupils who attended the Session are raised for the first time before the Upper Tribunal

187. The Commissioner agrees with the Appellant that, for the purposes of section 41 FOIA, the question whether disclosure would constitute an actionable breach of

confidence is answered by applying the three-stage test set out in *Coco v Clark*. The Commissioner also agrees that 'actionable', in section 41, means a breach of confidence action that would be likely to succeed.

188. The Commissioner accepts that a breach of confidence will not be actionable if a public authority would be able to show that the breach was justified in the public interest (*Evans v Information Commissioner* [2012] UKUT 313 (AAC)). He submits that determining the public interest involves a balancing exercise, weighing the competing factors for and against disclosure. The nature of that exercise was addressed in *Associated Newspapers Ltd v HRH Prince of Wales* [2006] EWCA Civ 1776, at [68]:

(a) "a significant element to be weighed in the balance is the importance in a democratic society of upholding duties of confidence that are created between individuals";

(b) "the test to be applied when considering whether it is necessary to restrict freedom of expression in order to prevent disclosure of information received in confidence is not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached. The court will need to consider whether, having regard to the nature of the information and all the relevant circumstances, it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public".

189. In holding that the Slides had the necessary quality of confidence, the First-tier Tribunal relied on three findings: the Slides were provided to the School by an email with the express proviso "these are not shared further, and…deleted once you've used them to clarify anything with the parent" (paragraph 139); the Slides were a unique product created by SoSE (paragraph 140); the slides were not public knowledge nor publicly available (paragraph 140). It follows that the Appellant is simply wrong that the Tribunal assumed the materials were confidential by virtue of SoSE's email, although that, in the Commissioner's submission, was an important factor in considering whether a reasonable person would have realised that the information was confidential. The evidence before the Tribunal clearly disclosed that, post-Session, SoSE had not 'lost control' of the materials.

190. The Appellant's argument that the Session 'destroyed' any confidentiality in the Slides overlooks clear caselaw authority that limited dissemination of confidential material will not in itself result in a loss of confidentiality (see *Franchi v Franchi* [1967] R.P.C. 149; *Barclays Bank Plc v Guardian News Media Ltd* [2009] EWHC 591). The Appellant cites no authority in support of the proposition that any confidentiality in the Slides was lost once displayed at the Session. The Appellant is also selective in her reliance on the Commissioner's confidentiality guidance note overlooking that passage which states, "confidential information that was only disseminated to a limited number of recipients can retain its quality of confidence, provided that none of the recipients subsequently released the material into the public domain themselves" (citing *S v ICO and the General Register Office* (EA/2006/0030, 9 May 2007). Applied to the present case, this supports the proposition that SoSE had not 'destroyed' any confidentiality in the Slides before they emailed the School on 8 November 2021. The First-tier Tribunal recognised this in paragraph 140 where it found that "the slides were not public knowledge or publicly available".

191. The Appellant's submission that there can be nothing within the Slides which is confidential is flawed:

(a) assuming the Appellant is correct that the Slides drew on a variety of sources, and included information replicated in the public domain, it does not follow that the Slides did not merit protection under the law of confidence. Information constructed from materials in the public domain may possess the necessary quality of confidentiality (*Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1948] 65 RPC 203 at 215: "it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.");

(b) the assertion that the Slides were designed to be disseminated in public and/or at a number of schools is entirely unevidenced;

(c) the assertions that SoSE has habitually shared information and resources in the public domain, and it may reasonably be inferred that the information therein had previously been put in the public domain, are entirely new points. These were not issues before the

First-tier Tribunal, have not been tested in evidence, and the Upper Tribunal should pay them no regard;

(d) the argument that the First-tier Tribunal (and previously the Commissioner) confused confidentiality and copyright is misplaced. The law of confidence often looks to the originality of information in determining whether it has the necessary quality of confidence (*Saltman and Fraser v Thames Television Ltd* [1984] Q.B. 44, at [65–66]: "the content of the idea [must be] clearly identifiable, original, of potential commercial attractiveness …"). The findings in paragraph 144 of the Tribunal's reasons are entirely consistent with *Saltman*. Paragraph 140 shows that the Tribunal recognised, and found, that the Slides were a 'unique product' created by application of human ingenuity.

192. The Appellant's submissions fail properly to distinguish between discussion of topics in the Session, which can raise no issue under the law of confidence, and dissemination of the Slides, which is capable of amounting to a breach of confidence. The Appellant seems to argue that what SoSE really sought to protect were design elements of the Slides, matters such as colour, font, graphics and layout, and says those are matters protected by copyright, not the law of confidence. However, the First-tier Tribunal was not looking exclusively at the content of the Slides, as is shown by paragraph 144 of its reasons which found that schools or SoSE's competitors could draw on freely available resources to write and deliver their own lessons on consent but, rather than doing that, might instead utilise the ready-made set of slides created by SoSE.

193. The First-tier Tribunal's approach to detriment was entirely orthodox. As recognised by the Commissioner's confidentiality guidance note, detriment usually takes the form of damage to the confider's commercial interests. If the Appellant seeks to draw a (artificial) distinction between the intrinsic quality of the Slides and their subsequent use, the argument was discounted by the Court of Appeal. In *Office of Communications v The Information Commissioner* [2009] EWCA Civ 90, at [55], the Court said that "regard can and must be had not just to the immediate effect of disclosure but also to its wider consequences, including subsequent use of the information disclosed".

194. The argument that the detriment identified by the First-tier Tribunal pertains solely to the law of copyright has no merit. The Tribunal found that, if there were a loss of confidentiality, SoSE would have to rely on copyright as a 'second line of defence', as Mr Perry put it at the hearing, and would face significant practical obstacles in doing so. That

was the approach taken by the Information Tribunal in *Ofcom*, a decision upheld on appeal to the Court of Appeal, where the Tribunal said, "once material protected by an intellectual property right has been released to a third party it becomes more difficult to discover instances of infringement (either by that third party any person to whom it passes the material), to trace those responsible for it and to enforce the right against them".

SoSE

195. SoSE submit that the Appellant's argument that the Slides cannot be considered bespoke teaching materials, designed only for presentation at the School, has no proper evidential basis. The slides are commercial product, not teaching materials, and were in fact reviewed and modified on an ongoing basis. SoSE further argue that, if the Slides were presented to other schools (a limited number of persons), that would not of itself destroy their confidential nature.

196. SoSE's skeleton argument says, "it is difficult to overstate the lengths to which [SoSE] went in order to accommodate the Appellant's request for more information". The Slides were provided to the School, albeit subject to conditions as to their use and subsequent destruction, and the Appellant took the opportunity to review them in a meeting at the School. The Appellant decided to end that review meeting. She now says that she did so due to concern at being bound by a non-disclosure agreement, but she did not mention this at the time nor seek any clarification.

197. SoSE offered to meet the Appellant although it appears that this offer was not communicated to her. The significance of this offer is that, had the Appellant not cut short the review meeting and instead asked to see the Slides in a different and more suitable setting, such a request would have been accommodated by SoSE

Ground 3

198. Ground 3 is that the First-tier Tribunal took into account irrelevant considerations in holding that disclosure of the Slides would cause detriment to SoSE.

Appellant

199. In finding that disclosure of the Slides would cause detriment to SoSE, the First-tier Tribunal took into account that other third party providers were not freely disclosing

materials, copyright enforcement is slow and expensive, and prospective customers (other schools) would withdraw from using SoSE's services after seeing the Slides. All were irrelevant considerations.

200. SoSE provided no evidence about industry norms regarding disclosure of teaching materials. SoSE spoke only of its own practices. There was no proper basis for the Tribunal's finding that it was the 'norm' for third party providers to act contrary to the Statutory Guidance.

201. The First-tier Tribunal drew an unsupportable inference from the Secretary of State for Education's 31 March 2023 letter that "providers were not freely disclosing their materials". The Secretary of State's reference to 'some schools' having entered into contracts that prevented them sharing materials with parents could not reasonably be construed to mean that third party providers normally or routinely failed to comply with the Statutory Guidance. In any event, even if there was such routine failure, so that disclosure of SSE's materials would impair competitive advantage, that should not have been effectively supported by the Tribunal through it upholding a FOIA 2000 refusal.

202. In relation to copyright and asserted difficulties in enforcement, the Appellant relies on her Ground 2 arguments. The Appellant also argues that, intrinsically, every response to a FOIA request involves an infringement of copyright but section 50 of the Copyright, Designs and Patents Act 1988 provides a defence to infringements occasioned by FOIA, as acts done under statutory authority. In addition, release of information under FOIA does not extinguish underlying copyright so that SoSE would retain the right to restrain further replication of the Slides, including by its competitors. In fact, the availability of copyright should have been taken into account by the First-tier Tribunal as a factor lessening the detriment to SoSE occasioned by disclosure.

Commissioner

203. The argument that the First-tier Tribunal found it was the 'norm' for third party providers to act contrary to the Statutory Guidance misreads the Tribunal's reasons. What it found, at paragraph 141, was that the Appellant had not adduced evidence of an industry norm that, in January 2022, providers would freely disclose their materials. The argument that the Statutory Guidance requires disclosure of all teaching materials is dealt with under Ground 1, and the Appellant's copyright arguments under Ground 2.

SoSE

204. D Padalia, SoSE's Deputy Chief Executive at the date of the Appellant's request for information, gave evidence to the First-tier Tribunal about the likely detriment to SoSE were the Slides released into the public domain. The findings in paragraphs 141-145 of the Tribunal's reasons were neither speculative nor improper.

Ground 4

205. Ground 4 is that the First-tier Tribunal's analysis of the public interest defence to an action for breach of confidence failed to take into account the public interest of parents.

Appellant

206. The First-tier Tribunal's error is disclosed in paragraph 147 of its reasons. While the Tribunal was not required to take into account the private interests of requestors that do not accord with the public interest in general, it was required to take into account the public interest of parents as members of the public. The Tribunal failed to take into account that the public interest in parents seeing sex education materials must be given significant weight which follows from Parliament's special treatment of parents regarding sex education for their children.

207. The First-tier Tribunal failed to recognise the ongoing public interest of parents after sex education has been provided (paragraph 153). The fact that, at the point at which the Appellant made her request for information, her daughter could not have been withdrawn from the SoSE Session (it had already taken place), did not mean that she ceased to have a legitimate interest in her daughter's sex education.

208. The First-tier Tribunal further erred by taking into account SoSE's purported commitment to show the Slides to the Appellant when the evidence disclosed that no offer was put to the Appellant, by either the school or SoSE. All that was communicated to the Appellant regarding SoSE's position was a false accusation of harassment.

209. The First-tier Tribunal erred by failing to take into account, or give sufficient weight to, evidence that the so-called 'run through' of the Slides would not allow a parent to rely

on the material displayed to make a complaint to the school or OFSTED, nor have meaningful discussions with their child.

210. In all the circumstances, the First-tier Tribunal wrongly concluded that the weight to be accorded to a commercial confidentiality interest outweighed the interests of parents in being able to know what is being taught in schools. Even if the Slides were confidential (not conceded), the public interest was clearly in favour of disclosure. An exceptional case is not required in order to override a duty of confidence that would otherwise exist (*London Regional Transport v Mayor of London* [2001] EWCA Civ 1491; [2003] EMLR 88). The recognised test is whether there is a public interest in disclosure which overrides the competing public interest in maintaining the duty of confidence. In this respect, there is a strong public interest in ensuring that public authorities are transparent, accountable and open to scrutiny. These considerations are of particular public importance in the context of children's education given the need to safeguard children from inappropriate materials and the statutory obligations under sections 406 and 407 of EA 1996 to provide non-partisan teaching. A mechanism must exist for parents, and the public, to keep materials under review and holds providers of such materials to account. The Tribunal failed to afford sufficient weight to this consideration. The need for accountability and transparency is 'compounded' in the case of sex education given the right of parents to withdraw children "in part" from such education.

211. The First-tier Tribunal accepted that there was a very strong public interest in curriculum and lesson materials on sex education being shared with parents in advance so that they may make an informed decision as to whether to withdraw their children, in whole or in part (paragraph 153). However, it went on to hold that, as the Session had already taken place, that public interest no longer applied. In this respect, the Tribunal failed to appreciate that SoSE presumably intended to present the Session at other schools, and that post-Session receipt of the Materials would enable parents thoroughly to discuss the subject matter with the children. These factors meant that the public interest remained 'live'.

212. The First-tier Tribunal also accepted a "particularly strong public interest in parents having access to teaching materials" (paragraph 156). However, it went on erroneously to conclude that the public interest would be served by the availability of a 'run through' of the Slides despite having acknowledged that this would not be convenient for all parents, and that taking copies of the Slides home would enable more detailed

parent/child discussions and make it easier to make a complaint (paragraph 158). Given the Tribunal's acceptance of some 'residual public interest' not served by a run-through (paragraph 158), it was surprising that it went on to rule against disclosure, a ruling which further undermined its conclusion that the balance of public interests favoured preserving confidentiality.

213. The First-tier Tribunal failed to take into account that the Appellant's formal complaint about the School was, in part successful, and led to changes in practice. This undermined the Tribunal's public interest analysis.

Commissioner

214. The Commissioner argues that the submission that the First-tier Tribunal failed to consider the public interest of parents of children attending the Session is puzzling. The Appellant's arguments overlook that, in paragraphs 152 to 156 of the Tribunal's reasons, it recognised a number of public interest factors relating to parental awareness of teaching materials used. The Tribunal's references to "parents" clearly meant parents of children attending the Session, otherwise attending the School and/or children who might have been taught by SoSE at another school.

215. The argument that the First-tier Tribunal should not have given weight to SoSE's offer to 'run through' the Slides with parents, because the offer was not communicated to the Appellant, overlooks that (a) the Appellant was able to view the Slides in the meeting with the Trust's CEO on 4 November 2021 (while she describes this process as inappropriate, at the time she did not seek a further run-through or meeting); and (b) the Appellant did not pursue the CEO's suggestion that she contact SoSE in order to seek access to the Slides. The argument that the Tribunal failed to take account of, or give sufficient weight to, the limitations of a 'run-through' ignores the findings in paragraph 158 of the Tribunal's reasons which accepted a 'residual public interest' in disclosure of the Slides that was not met by a run-through.

Ground 5

216. Ground 5 is that, in holding that the circumstances in which the Slides were provided to the School imported an obligation of confidence, the First-tier Tribunal failed to take into account relevant considerations.

Appellant

217. Paragraphs 139 and 140 of the First-tier Tribunal's reasons disclose a failure to take into account the absence of a confidentiality agreement applicable to the Session. Having disclosed the materials publicly without an obligation or expectation of confidence at the Session, it was not open to SoSE subsequently to attach new conditions (even if, which is not conceded, the Materials were confidential before the Session).

218. The First-tier Tribunal erred by accepting the Commissioner's erroneous conclusion that the Appellant's statutory complaints had been dismissed. The Appellant's first complaint was upheld and led to special conditions being applied to PSHE / RSE teaching at the School to prevent future mistakes.

219. The Commissioner criticises the Appellant's case for overlooking that obligations of confidence may be equitable rather than contractual. However, some form of 'notice' is required to establish an equitable duty of confidence (*Attorney-General v Guardian Newspapers Ltd (No. 2)*). The Commissioner's Ground 5 arguments also confuse the first and second limbs of the *Coco v Clark* tests. No matter how confidential information may be, if it is communicated without attaching an obligation of confidence, confidentiality will be lost.

Commissioner

220. The Commissioner submits that Ground 5 covers much of the same ground as Ground 2. The Appellant's reliance on the absence of any confidentiality notice/restrictions given to pupils who attended the Session is at odds with her argument that information does not become confidential merely because the provider says so. The Appellant's submission also overlooks that obligations of confidence may be equitable rather than contractual, and confuses limited dissemination with release into the public domain.

221. The Appellant criticises the First-tier Tribunal for failing to recognise that her complaint to the School was partly upheld and led to special conditions being applied to future PSHE / RSE lessons. This is incorrect (see paragraph 154 of the Tribunal's reasons). In any event, this is a point that weighs in favour of non-disclosure since it demonstrates that alternative accountability mechanisms were effective.

Ground 6

222. Ground 6 is that the First-tier Tribunal erred in law in finding that it was not reasonably necessary for parents to know the identities of the SoSE facilitators at the Session. The Tribunal took irrelevant considerations into account and misdirected itself in law.

Appellant

223. The First-tier Tribunal:

(a) failed to take into account that Parliament has already determined that it is reasonably necessary for the public to know the identity of those who teach sex education in School. The Statutory Guidance provides that a school's sex education policy must be available to the public, and include the names of those teaching sex education ("who is responsible for teaching it"). The Appellant submits that it is "widely recognised" that it is reasonably necessary for parents, and the general public, to know who is teaching sex education in schools. Therefore, anyone teaching sex education cannot have any expectation that, in normal circumstances, their identity will not be disclosed to parents;

(b) failed to take into account the primacy of parental rights to determine what education their child receives;

(c) at paragraph 174, wrongly concluded that the statutory framework regulating who works in schools was sufficient in circumstances where (i) none of the parties had made submissions on what that statutory framework was, or how it functioned, and (ii) that statutory framework must include the Statutory Guidance which expressly states that this information should be made public. The Commissioner's argument that it was for the Appellant to show that the statutory framework provided inadequate protection misses the point. The Appellant's case was that the statutory framework provided adequate protection if the requirements of the Statutory Guidance were followed. The Tribunal made the same mistake as the Commissioner;

(d) at paragraph 176, wrongly took into account whether the Appellant was 'unable' to make a complaint, when the relevant question was whether the effectiveness of a complaint was limited by her not knowing the identity of 'that individual'. It ought to stand

to reason that it is easier for a parent to make an effective complaint about the appropriateness of a named, rather than anonymous, person;
(e) failed to take into account that the Appellant's ability to discuss the teaching of 'that individual' with her daughter was limited by her ignorance of identity. It was not for the Appellant to prove that knowledge of identity would enable better parent-child discussion when the parent did not know the identity of those teaching their child.

224. The Appellant accepts that a person's name is their personal data (*Edem v Information Commissioner & Financial Services Authority* [2014] EWCA Civ 92).

225. Of the instances of lawful processing of personal data set out in the UK GDPR, the Appellant submits that the only one of relevance in this case was that in Article 6(1)(f) of the UK GDPR. The Appellant's skeleton argument asserts that Article 6(1)(f) provides as follows:

> "The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject".

226. However, it seems to me that the version of Article 6(1)(f) relied on by the Appellant only had effect between 31 January 2020 and 31 December 2020. As I understand it, at the date of the Appellant's request for information, and when it was determined by the School/Trust, Article 6(1)(f) provided as follows:

> "(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 require protection of personal data, in particular where the data subject is a child."

227. In the light of the arguments advanced by the Appellant, her reliance on what appears to be a superseded version of Article 6(1)(f) probably does not matter. The Appellant argues that 'necessary', which appears in both iterations of Article 6(1)(f), means "reasonably necessary", means more than merely desirable but less than indispensable or absolutely necessary (see *Goldsmith International Business School v*

Information Commissioner & Home Office [2014] UKUT 563 (AAC) at [37 – 38]; approved in *Cooper v National Crime Agency* [2019] EWCA Civ 16, at [89 – 93]).

228. In *Cooper v National Crime Agency* [2019] EWCA Civ 16, the Court of Appeal approved the following analysis / summation of the meaning of 'necessary, given by Green J in *Hussain v Sandwell Metropolitan Borough Council* [2017] EWHC 1641:

> "… The test of necessity in the conditions means more than desirable but less than indispensable or absolutely necessary: see e.g. *Goldsmith International Business School v Information Comr* [2014] UKUT 563 (AAC) at [37]. A test of reasonable necessity should be applied: see the *Goldsmith International Business School* case, para. [38]. This test implies that the council [the data controller in that case] has an appropriate margin of appreciation. The parties agreed that the power had to be exercised proportionately. …"

229. It is not disputed that the First-tier Tribunal correctly held that the Appellant's request pursued a legitimate interest. At paragraph 170 of its reasons, the First-tier Tribunal accepted "that there is a general legitimate [parental] interest in appropriate, properly qualified and safe individuals teaching sex education". What the Tribunal failed to acknowledge was that, without knowing the identity of SoSE facilitators, the Appellant was unable to satisfy herself that her daughter was taught by properly qualified and safe individuals. That lack of knowledge left the Appellant unable properly to exercise her parental responsibility for her daughter.

230. The First-tier Tribunal applied too high a threshold, which required more than reasonable necessity. Its approach would be justified if schools never made mistakes, but sometimes they do. It was not for the Appellant to show that non-disclosure of identities made it more difficult to make an effective complaint. She could only do that if she knew the identities of facilitators.

231. The Statutory Guidance states that schools "should" set out in their RSE policy "who is responsible for teaching it". The Commissioner's argument that the guidance is complied with if the corporate body responsible for providing education is identified is untenable. In this case, the School advanced no good reason (in fact, no reason at all) for departing from the guidance.

232. Assessing fairness for the purposes of Article 5(1)(a) involves, submits the Appellant, balancing the interests of the data subject in non-disclosure (including their reasonable expectations of privacy) against the public interest in disclosure (see *AB v A Chief Constable* [2014] EWHC 1965 (QB) at [75]). A question to be asked is whether an individual had a reasonable expectation of privacy, and whether their role was "public facing" (*Peter Church v Information Commissioner and another* (EA/2020/0187V) (15 July 2021)). The First-tier Tribunal failed to ask this question.

Commissioner

233. The Commissioner argues that Article 6(1)(f) of the UK GDPR required three conditions to be satisfied in order to permit disclosure of the facilitators' identities:

(1) is the data controller, or third parties to whom data is disclosed, pursuing a legitimate interest?

(2) is the processing necessary for the purposes of that interest/s? The Commissioner agrees that 'necessary' means reasonably necessary rather than absolutely or strictly necessary, and further submits that if there is a less intrusive way of achieving the legitimate interest, the condition is not met;

(3) is the processing unwarranted because the legitimate interests are outweighed by the rights and freedoms of the data subject? The Commissioner submits that this is a balancing exercise to be applied separately from the test in condition (2) (*Farrand v Information Commissioner* [2014] UKUT 310 (AAC)).

234. The Appellant is wrong to suggest that the First-tier Tribunal failed to take the Statutory Guidance into account (see paragraph 172 of its reasons which quoted the Statutory Guidance's exhortation that schools should make it clear to parents "who is responsible" for teaching sex education). Moreover, statutory guidance is not legislation and may be departed from for good reason.

235. The Appellant criticises the First-tier Tribunal's finding that the statutory framework regulating who may work in schools is a sufficient safeguard. However, it was for her to make good, before the Tribunal, the contention that the framework was insufficient.

236. The First-tier Tribunal rightly addressed whether the Appellant was 'unable' to make a complaint (paragraph 176). Even if knowledge of names would make it easier to make a complaint (not conceded), it does not follow that such knowledge is 'reasonably necessary' to meet the Appellant's legitimate interest of complaining effectively. The Appellant failed to show that her right to make a complaint was rendered ineffective or made significantly more difficult by non-disclosure of identities. The same applies to the argument that knowledge of SoSE facilitators' names was reasonably necessary to achieve her legitimate aim of discussing sex education with her daughter.

SoSE

237. D Padalia gave evidence to the First-tier Tribunal. This addressed SoSE's recruitment safeguarding procedures, and also provided "concrete examples of the harassment and abuse experienced by employees and the risk posed by disclosing the names of the employees who delivered the session". The conclusions in paragraphs 126, 164 and 167-177 of the Tribunal's reasons were neither speculative nor improper.

Proceedings before the Upper Tribunal

Grounds of appeal

238. The grounds of appeal, as recounted above, were not the same as those set out in the Appellant's notice of appeal. The Appellant applied for permission to rely on amended grounds of appeal. The Upper Tribunal directed that the amended grounds of appeal were to stand as the Appellant's grounds of appeal unless either Respondent objected, but neither did.

239. The Upper Tribunal directed a 'rolled-up' hearing of the Appellant's application for permission to appeal, that is a hearing to consider whether the grounds of appeal were arguable and, if so, to determine whether any arguable grounds were made out. The parties prepared their cases as if for an appeal hearing.

Additional evidence

240. On 1 August 2024, the Appellant requested permission to rely on 131 pages of additional documentary evidence: various screenshots of pages from SoSE's website and

social media posts; material said to have been produced by SoSE or its staff including sections of a book published by SoSE in 2021 *Sex Ed – an Inclusive Teenage Guide to Sex and Relationships*; extracts from Hansard of debates on matters connected to sex education. The application was dealt with at the start of the hearing before the Upper Tribunal. SoSE objected to admission of this further evidence but the Commissioner did not. I admitted the evidence, being satisfied that it was referred to, or related to, the Appellant's amended grounds of appeal.

Hearing

241. The First-tier Tribunal bundle included a closed section that was not disclosed to the Appellant. This included the Slides and the names of SoSE's facilitators. The hearing before the First-tier Tribunal included a closed session. However, no party before the Upper Tribunal requested a closed session and the entire hearing was held in public.

242. One working day before the hearing was listed to begin, the organisation Tribunal Tweets, which is described as a collective of volunteer citizen reporters, informed the Upper Tribunal that it wished to use live text-based communications during the hearing. On the assumption that members of Tribunal Tweets are representatives of the media for the purposes of *Practice Guidance: the Use of Live Text-Based Forms of Communication (including Twitter) from Court for the Purposes of Fair and Accurate Reporting*, issued by the Lord Chief Justice in 2011, an application for permission to use live text-based communications was not required. However, it would have assisted the Upper Tribunal if more notice had been given of the intention to use live text-based communication. Upper Tribunal staff may need to take steps to facilitate live text-based communication, for example checking that internet-enabled devices do not interfere with the Upper Tribunal's electronic recording equipment and drawing to the judge's attention the use of mobile devices for live text-based communications by a media representative (otherwise the judge might assume that a mobile device was being used in court for a prohibited purposes). All this takes time, which is usually in short supply shortly before a hearing is due to begin. As it was, the Upper Tribunal's clerk dealt admirably with the last-minute need to facilitate live text-based communication from the hearing and, so far as I am aware, Tribunal Tweets were able to report the proceedings without difficulty.

The Upper Tribunal's analysis

Application for permission to appeal

243. The Appellant is granted permission to appeal on each of her six grounds, save to the extent that a ground advances arguments that simply dispute the First-tier Tribunal's findings of fact. I am satisfied that, other than to this extent, the grounds of appeal are arguable.

Ground 1

Ground 1 in context

244. The Appellant's case before the First-tier Tribunal was that (a) the School were required, by virtue of an obligation implied by section 405 EA 1996, to provide her with the Slides; (b) that requirement, being one imposed by Parliament, could not be defeated by any duty of confidence. I am not entirely certain whether (b) argued that a common law duty of confidence would be displaced, to the extent that it was incompatible with the asserted implied obligation under section 405, or that it meant that the School would undoubtedly mount a successful public interest defence to an action for breach of confidence. However, that does not matter for present purposes. As I understand the Commissioner's case, he accepts that, if the Appellant was entitled to the Slides by virtue of an implied obligation under section 405, the information within the Slides could not be exempt information under section 41 FOIA.

245. An important contextual feature of this case is the timeline of the Appellant's request for information. It was made *after* the Appellant's daughter had attended the Session. The issue for the Upper Tribunal, therefore, is whether the First-tier Tribunal made a mistake of law in holding that section 405 EA 1996 did not require a parent to be provided with teaching materials for a sex education lesson that had already taken place and in respect of which it was, of course, too late for a parent to exercise the right of withdrawal under section 405.

The First-tier Tribunal's analysis

246. The First-tier Tribunal held 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". This was because "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" (paragraph 137), and the Statutory Guidance meant that "the right to withdraw is not meaningless without a statutory duty" (paragraph 138).

247. With respect, I consider the First-tier Tribunal's approach to be wrong in principle to the extent that it relied on the Statutory Guidance to construe section 405 EA 1996. I agree with Mr Moss, for the Appellant, that the guidance was not a permissible aid to construction. The Statutory Guidance did not exist when Parliament enacted section 405 and, even if it had then existed, could have been withdrawn at any time as a matter of ministerial discretion. *Bennion*, 5th edition, p.702 makes what I think must be the uncontentious point that "nothing that happens after an Act is passed can affect the actual legislative intention at the time it was enacted" (*Bennion*, 5th edition p.702). However, as I will now endeavour to explain, the Tribunal's error of approach was not a material error.

Section 405 EA 1996: Upper Tribunal's analysis

248. There are different ways in which a parent may engage with the right to request excusal / right to withdraw under section 405 EA 1996. This is so obvious that it must have been anticipated by Parliament when enacting section 405.

249. A parent may, as a matter of personal principle, decide that their child should not receive any relevant sex education of any sort at school. In such a case, the parent does not need to know anything about the content of proposed relevant sex education in order meaningfully to exercise their section 405 right.

250. Other parents may not object in principle to their child receiving any relevant sex education at school. In other words, they might object but this depends on the content of relevant sex education. If any confirmation is needed that Parliament enacted section 405 EA 1996 with this cohort of parents in mind, it is shown by section 405's reference to a child being "partly excused" from relevant sex education.

251. Education involves the transmission of information. A parental right to withdraw a pupil from a type of education is therefore a right to prevent a type of information from

being transmitted to the pupil. For a parent who does not object in principle to all relevant sex education, section 405 EA 1996's right to prevent information from being transmitted to a child would be ineffective unless the parent were enabled to apprehend what that information is. For many parents, the right of withdrawal under section 405 would be devoid of value if it were not associated with the provision of some detail of proposed relevant sex education or the means of obtaining that detail. As Henry LJ said in *Halki Shipping Corporation v Sopex Oils Ltd* [1998] 2 All ER 23, at [75], "the presumption is that Parliament does nothing in vain". Parliament would have acted in vain in relation to those parents who do not, as a matter of principle, object to all relevant sex education, had it conferred a right to withdraw that could not meaningfully be exercised.

252. It is not disputed that a parent requires 'sufficient information' in order meaningfully to exercise the right of withdrawal under section 405 EA 1996. The Commissioner relies, at least in part, on a maintained school's separate statutory obligations to consult parents on their sex education policy statements and provide access to such statements, to supply this sufficient information. However, children move in and out of schools so that, at a given time, there will always be some parents who have not been consulted. In any event, all that is required by section 80B(1) EA 2002 and section 404(1)(a) EA 1996 is a written statement of a school's "policy with regard to the provision" of sex education, which is a broadly framed duty capable of being satisfied in a multitude of ways and with varying degrees of precision. I acknowledge that statements must also include a "statement of the effect" of the parental right under section 405 (see section 404(1A) EA 1996 and section 80B(2) EA 2002). However, compliance with that obligation would not necessarily entail the provision of information about the content of sex education. In my judgment, Parliament did not enact section 405 on the assumption that other statutory requirements would supply parents with sufficient information for a meaningful exercise of the right to withdraw a child from relevant sex education. At any rate, no such requirements have been drawn to my attention.

253. The Appellant relies on a passage in *Bennion on Statutory Interpretation* to argue that, in interpreting section 405 EA 1996, the Upper Tribunal should ask whether it is 'proper' to find a statutory implication. I agree with the Commissioner that the view expressed in that passage was expressly disapproved by the Court of Appeal in *NYKK* and should not be followed. The implication must be necessary, that is "one which necessarily follows from the express provisions of the statute construed in their context" (*B v DPP*).

254. While the education legislation rightly acknowledges the importance of parental involvement in state-funded education, the reality is that, when all is said and done, and all reasonable efforts made to accommodate parental wishes, education is largely offered to parents of pupils in a state-funded school on a 'take or leave it' basis. If a parent does not want to take it, a new school will have to be found for their child. Relevant sex education, however, is treated by Parliament as a special case. Parliament has decided that, for this part of the school curriculum, parents can decide whether it is delivered to their child (or, in the case of statutory sex and relationships education, decide subject to the headteacher's veto). This is a notable feature of the legislative context. I have already explained why I consider that Parliament must have enacted section 405 EA 1996 on the assumption that, in order to work as intended, a parent may need to be supplied with information about proposed sex education. Since my attention has not been drawn to any other provision of an Act of Parliament that will perform this function, then, in order for this exception to the standard way in which state education is provided to operate as Parliament intended, it is necessary to construe section 405 as including an obligation on a maintained school / the entity which controls the school to provide a parent who wants it with information about a school's proposed relevant sex education.

255. At this point, I note that section 408(1) EA 1996 confers power on the Secretary of State to make regulations requiring a maintained school to provide prescribed information to prescribed persons. Section 408 did not feature in argument, but it appears likely that it would permit the Secretary of State to make regulations which require maintained schools to provide parents with prescribed information about sex education (if such regulations already existed, I am sure the parties would have drawn them to my attention). The possibility of regulations being made under section 408(1) does not cause me to revisit the conclusions described above. When Parliament enacted section 405, it did so in the knowledge that no regulations might ever be made requiring the provision to parents of information about sex education.

256. Do the above conclusions mean that I accept the Appellant's argument that any parent is entitled to be provided, on request, with all teaching materials for proposed relevant sex education? No, it does not. The fact that Parliament did not consider it necessary to make express provision about providing information to parents about relevant sex education signals that what is required depends on the circumstances of a particular parent and child. What matters is that, in a particular case, a parent who is considering exercising the right of withdrawal has sufficient information to make a properly

informed decision. It is important that an interested parent is not left in any reasonable doubt about the content of proposed relevant sex education. If not, the parent may 'err on the side of caution' and withdraw their child. The risk is that a pupil may thereby be deprived of education which, had the parent been properly informed, might have been beneficial for the pupil. It would be understandable, and in my view lawful, if a maintained school decided that the best way of avoiding that risk would be to make available to parents teaching materials for proposed relevant sex education.

257. A parent may well become properly informed, for section 405 EA 1996 purposes, if the Statutory Guidance is followed (I am not going to attempt a definitive answer to that question because there is no need). But assuming the Statutory Guidance does do the job required for a properly informed parental decision under section 405, that would have no bearing on the legal meaning of section 405. It might provide the means of meeting the implied obligation under section 405, but its existence cannot make the obligation itself disappear.

258. Everything I have just said concerns the case of a parent who is considering exercising the right of withdrawal under section 405 EA 1996 in relation to proposed relevant sex education. The Appellant, however, sought the teaching materials for the Session after it had taken place. Her first request was made on 22 September 2021, which was two days after the Session. The Appellant's attempts to obtain the Slides were clearly not made with a view to deciding whether to exercise her parental right under section 405 EA 1996 to withdraw her daughter from proposed relevant sex education (in the form of the Session). It was suggested in oral argument that section 405 might require the provision of information in circumstances where a school failed properly to appraise parents in advance of relevant sex education being provided. I am not certain this issue was put before the Tribunal but, in any event, I do not consider it sustainable in the circumstances of this case.

259. On 16 September 2021 (4 days before the Session) the School informed the Appellant, and presumably other parents, by email that SoSE, who "run trusted, high quality sessions" would be "running age appropriate RSE Sessions on the topic of "Consent" on Monday 20th September 2021". The School's email also informed parents that they had the right to withdraw their child (and attached a proforma withdrawal form), and ended by stating, "if you have any questions, or would like to discuss this further, please do not hesitate to contact me". In my view, the School's actions were consistent

with section 405 EA 1996. Parents were told the identity of the external provider, the subject of the session and invited to contact the School if they wished to discuss further. The Appellant says she had no reason to doubt the School's statement that SoSE ran trusted, high-quality sessions but the School would hardly be likely to have surreptitiously commissioned an organisation about whom they had doubts. Even if section 405 might have some ongoing legal effect after relevant sex education has been provided (which I doubt), it would not have been open to the Tribunal, on the evidence before it, to conclude that the School's pre-Session actions had diluted the Appellant's section 405 rights so that some remedial provision of information might be necessary to mitigate a parental disadvantage. It follows that the Appellant's arguments about the utility and effectiveness of her post-Session viewing of the Slides at the School, and SoSE's uncommunicated post-Session offer to show her and talk through the Slides, cannot succeed (cannot demonstrate a post-Session failure to discharge section 405's implied obligation).

260. The Appellant argues that the First-tier Tribunal's decision failed to acknowledge the parental role in ensuring compliance with the statutory prohibition against promoting partisan political views (section 406 EA 1996) and the requirement to offer pupils a balanced presentation of opposing political views (section 407). I do not doubt the parental role, as described by the Appellant, but this ground of appeal is about something else, namely the parental right to withdraw under section 405.

261. It is not necessary for me to address the Commissioner's arguments in relation to section 21 FOIA. As the Commissioner acknowledges, the First-tier Tribunal did not rely on section 21 in dismissing the Appellant's appeal.

262. For the above reasons, Ground 1 is not made out.

Ground 2

Implications of the Upper Tribunal's limited jurisdiction

263. There is only one basis on which the Upper Tribunal may set aside a decision of the First-tier Tribunal. The Tribunal's decision must have involved "the making of an error on a point of law" (section 12(1) of the Tribunals, Courts and Enforcement Act 2000). Many of the Appellant's Ground 2 arguments describe no error on a point of law in the Tribunal's

decision. A pure mistake of fact cannot be an error on a point of law, and a tribunal does err in law because it failed to deal with an argument that was not put to it.

The Appellant's case on the law of confidence before the First-tier Tribunal

264. I remind myself of the extent to which the Appellant's case before the First-tier Tribunal relied on the law of confidence. Of the Appellant's three grounds of appeal before the Tribunal, her arguments were mainly concerned with the first ground which was that a duty of confidence in relation to the Slides would be incompatible with an implied statutory obligation under section 405 EA 1996 to provide parents with sex education teaching materials. So far as the application of the law of confidence in other respects was concerned, the Appellant's case bore little resemblance to Mr Moss' sophisticated and wide-ranging arguments before the Upper Tribunal.

265. If section 405 EA 1996 did not exclude a duty of confidence, the Appellant's alternative argument before the First-tier Tribunal was that SoSE would not suffer detriment were the information disclosed since all third-party providers of sex education should be commissioned on the understanding that their teaching materials would be made available to parents. In any event, the School would be able to avail itself of the public interest defence if SoSE brought an action for breach of confidence. At the hearing before the Tribunal, it was also argued that, if SoSE's materials were disclosed and used by other providers, 'it can be protected by copyright'.

Whether disclosure would constitute an actionable breach of confidence: matters of fact and law

266. The issue before the First-tier Tribunal was whether disclosure of the Slides / the information within them to the world at large would constitute an actionable breach of confidence. Dealing with that exercise involved addressing questions of pure law, questions of simple fact and questions of mixed law and fact. Questions of mixed fact and law arose because the Tribunal was engaged in the hypothetical exercise of assessing whether disclosure of the Slides would constitute an actionable breach of confidence, which required it to make findings as to the relevant features of the law of confidence for that notional action.

267. The question of pure law for the First-tier Tribunal was the meaning of an 'actionable' breach of confidence. However, the parties agreed before the Tribunal, and still agree, that the legal meaning of 'actionable', as used in section 41 FOIA, is that an action for breach of confidence would be more likely than not to succeed.
268. The Upper Tribunal's jurisdiction under the Tribunals, Courts and Enforcement Act 2007 is expressed in binary terms. Points of law fall within its jurisdiction, matters of simple fact do not. The 2007 Act does not, in terms, recognise mixed questions of law and fact. The approach I shall take is to ask whether the First-tier Tribunal's determination of questions of mixed fact and law involved a legal misdirection as to the law of confidence.

Determination of Ground 2: analysis

269. A theme of many of the Appellant's arguments is that the First-tier Tribunal failed to carry out an adequate analysis of the application of the law of confidence to the facts of this case. As the Commissioner rightly submits, the problem with many of these arguments is that the Appellant's case before the Tribunal was concerned with the application of the law of confidence to only a limited extent. All parties before the Tribunal were well aware that the issues on the appeal included whether disclosure of the Slides / the information within them would constitute an actionable breach of confidence. The Appellant was represented by counsel before the Tribunal, and the law of confidence is complex and highly developed. The Tribunal was therefore perfectly entitled to take the Appellant's case on the law of confidence at face value. It did not err in law by failing to deal with, or failing thoroughly to deal with, some aspect of the law of confidence that did not feature in the Appellant's argument. This means that the following arguments made under Ground 2 cannot succeed (cannot demonstrate that the Tribunal erred in law):

(a) the Appellant criticises the Tribunal for failing properly to consider whether the first condition in *Coco v Clark* was met (information must have the necessary quality of confidence), and simply assumed the Slides were confidential in the light of SoSE's email to the School on 8 November 2021. However, the Appellant's case before the Tribunal did not include the argument that SoSE's email was incapable of imposing an obligation of confidence. In fact, the email did not feature in the Appellant's arguments at all;

(b) the Appellant did not argue before the Tribunal that the Slides had been prepared for widespread dissemination. The fact that, on an action for breach of confidence, the provider of information is required to show confidentiality makes no difference here. The

Appellant did not put the 'widespread dissemination' point to the Tribunal and cannot now seek to challenge its decision for failing to find widespread dissemination. The same applies to the argument that the Tribunal failed to recognise that the Commissioner's and SoSE's case amounted to an attempt to reestablish confidentiality after it had been irrevocably lost at the Session;

(c) the argument that, if the information within the Slides was confidential, pupils at the Session could be restrained from talking about it, was not put to the Tribunal. It was therefore unsurprising that the Tribunal made no finding as to whether the pupils were bound by an obligation of confidence.

(d) it was not put to the Tribunal that it ought to draw the inference that the information within the Slides had, before the Session, already been put in the public domain;

(e) it was not put to the Tribunal that the real 'added value' offered by SoSE was the services of its facilitators rather than the Slides;

(f) it was not put to the Tribunal that the School's RSE policy was 'highly relevant' to the question whether an obligation of confidence had been established.

270. The First-tier Tribunal made certain rulings about the nature of the law of confidence, and findings as to its application to the facts of the Appellant's case, that were not foreshadowed in the Appellant's submissions. This does not preclude the Appellant from arguing before the Upper Tribunal that these findings disclose that the Tribunal misdirected itself in law, or that the Tribunal made an irrational finding. The Appellant does so argue (although it has not always been straightforward to disentangle these arguments from the misconceived arguments that the Tribunal erred in law by failing adequately to deal with arguments about the law of confidence that it was not asked to address). My conclusions on these aspects of the Appellant's Ground 2 case are as follows:

(a) the Appellant submits that the Tribunal made an untenable finding that SoSE's email of 8 November 2021 contained wording that was akin to an express statement that the information was being provided in confidence. Firstly, the words used – 'could I request' – were not consistent with a person requiring a recipient to keep information secret. Secondly, the notional reasonable person deployed by the Tribunal to analyse the import

of the email should have been a notional reasonable person aware of the statutory educational context. The second argument may be disposed of shortly. It rests on an assumption about the legal nature of the statutory context that I rejected in deciding Ground 1. The second argument can only succeed if the Tribunal's interpretation of the email, for the purposes of the law of confidence was irrational. It was not an irrational interpretation of the email read as a whole. SoSE's email also asked the School to delete the Slides once used to clarify 'anything with the parent'. The Tribunal was entitled to interpret this email, sent by a non-lawyer, as akin to an express statement that information was provided in confidence and that interpretation does not show that the Tribunal misunderstood or misapplied the law of confidence;

(b) it is argued that the Tribunal failed adequately to address whether there could not be anything in the information / Slides that could be confidential. Again, the Appellant did not argue before the Tribunal that the nature of the Slides was such that they did not have the 'necessary quality of confidence'. In those circumstances, the Tribunal, having instructed itself on the relevant authorities including those which emphasise the need for the application of 'human ingenuity' in order to render information confidential, adequately explained why the information did have the necessary quality of confidence. For the same reason, the Appellant's argument that the Tribunal's acknowledgement that the information within the Slides 'was not particularly sensitive' demonstrates no error of law in its other findings;

(c) the Appellant submits that the Tribunal failed to appreciate that disclosure of the information within the Slides at the Session destroyed any confidentiality they might previously have possessed. The facts, it is argued, admitted of only one conclusion which was that the Session involved the information being imparted to the public. This argument was not put to the Tribunal, and it was not required to consider the point of its own motion. As the Commissioner's submissions demonstrate, it is possible in law for a duty of confidence to survive limited dissemination of information. It cannot therefore be said that the Tribunal's decision was incompatible with the law of confidence. For similar reasons, I am not persuaded by the Appellant's argument that information about the topic of consent, that drew on material in the public domain, could not be considered confidential. The authorities demonstrate that information that is based on, or derived from, information in the public domain is capable in law of attracting a duty of confidence by virtue of 'the application of the skill and ingenuity of the human brain' (see *Mosley v News Group Newspapers*).

271. I now deal with the Appellant's arguments that the First-tier Tribunal erred in law in its treatment of copyright law. The Appellant did not, in terms, argue before the Tribunal that the interest which SoSE sought to protect was, in substance, something protected only by copyright law so that the information could not be subject to an obligation of confidence. The Appellant's copyright argument was simply that, if SoSE's materials were wrongly used by other providers, 'it can be protected by copyright'. This argument was not further developed but I read it as an argument that, if the Slides were disclosed, the detriment limb of the *Coco v Clark* test would not be satisfied so that there could not be an actionable breach of confidence for the purposes of section 41 FOIA. I do not interpret the argument that the information 'can be protected by copyright' as having been an argument that what SoSE sought to protect was not information at all but design features. Had that been what the Appellant meant, she could easily have said so.

272. The above features of the Appellant's copyright-related arguments before the First-tier Tribunal provide the relevant context to her arguments before the Upper Tribunal:

(a) the Appellant argues that misuse of a ready-made set of slides is not detriment by way of misuse of confidential information, that, on its own, 'attractiveness' does not relate to any quality of the information within the Slides, and the expression of information is not something protected by the law of confidence. These arguments were not put to the Tribunal and the Tribunal's findings do not betray a legal misdirection about the law of confidence. As the authorities demonstrate, information is capable of being protected by both the law of confidence and copyright. Furthermore, the way in which information is expressed may be the product of a unique idea and ideas are capable of constituting a form of information (a policy, for instance, is a type of idea and FOIA includes express provision about information relating to policy development: see section 35);

(b) the Appellant argues that expending resources in enforcing copyright is not a recognised form of detriment for the purposes of the law of confidence. However, this was not the argument put to the Tribunal; the Appellant's case before the Tribunal was that the availability of copyright protection itself meant that there could be no detriment recognised by the law of confidence. Futhermore, the argument is difficult to reconcile with the fact that particular information may be protected by both the law of confidence and copyright;

(c) the Appellant argues that the Tribunal conflated copyright and confidentiality. Again, this was not the argument put to the Tribunal; the Appellant did not argue that the Commissioner's decision notice was flawed because he conflated copyright and confidentiality. The Tribunal's finding that the Slides were 'unique' does not show that it assumed that anything protected by copyright was also capable of being protected by the law of confidence. The application of human ingenuity and skill to publicly available material, as referred to in the authorities, may result in something that may properly be described as unique.

273. I am uncertain as to exactly what error of law the Appellant seeks to establish by reference to the Information Tribunal's decision in *University of Central Lancashire*. It was not concerned with section 41 FOIA and did not bind the First-tier Tribunal, let alone the Upper Tribunal. Similarly, the relevance to the law of confidence of the argument that the Tribunal failed to take into account the School's compliance with the Appellant's request for information insofar as it related to teaching materials produced by the School is not obvious. Finally, the fact that the Tribunal at times referred to 'the Slides', without mentioning the information within the Slides, does not show that it failed to appreciate that the appeal was about the information recorded in the Slides. The Tribunal's reasons are thorough and clearly demonstrate a tribunal that is familiar with concepts arising under FOIA. I am sure that 'the Slides' was often used by the Tribunal as shorthand for 'the information within the Slides'.

Ground 2: conclusion

274. For the above reasons, Ground 2 is not made out.

275. The main problem faced by the Appellant's Ground 2 arguments was that, before the First-tier Tribunal, her case on the application of the law of confidence was little developed and relied almost entirely on the argument that the imposition of a duty of confidence would be incompatible with implied parental rights under section 405 EA 1996.

276. The legal meaning of 'actionable' in section 41 FOIA is a matter of law, and the parties agree what it means. When a tribunal turns to decide whether, in a particular case, disclosure of information to the world would constitute an actionable breach of confidence it is deciding a question of fact (or mixed fact and law). There is only one opportunity to argue the facts, which is before the First-tier Tribunal. It is possible that, had the

arguments that Mr Moss deployed before the Upper Tribunal, been put to the Tribunal it would have arrived at a different decision. I certainly would not discount the possibility that the cumulative effect of Mr Moss' submissions might have convinced a first-instance tribunal that there was sufficient doubt as to the viability of a claim for breach of confidence that section 41's requirement for an actionable breach was not satisfied. But Mr Moss' submissions were not those put to the Tribunal and that omission cannot be remedied now on an appeal limited to points of law.

Ground 3

277. It is argued that the First-tier Tribunal took into account certain irrelevant considerations in determining that disclosure of the Slides / information within them to the world would cause SoSE detriment. The Appellant's case on detriment before the Tribunal was that SoSE would not suffer detriment because all providers of sex education should be commissioned by schools on the understanding that teaching materials will be made available to parents, and SoSE's interests could in any event be protected by copyright. The Appellant's case on detriment was not highly developed before the Tribunal but that does not prevent her from arguing that irrelevant considerations were taken into account: an irrelevant consideration does not become relevant because it was not presaged in a party's arguments. However, on analysis, the Appellant's Ground 3 arguments are not really arguments that irrelevant considerations were taken into account. I shall deal with them anyway.

278. The Appellant argues that the First-tier Tribunal made a flawed finding that providers were not freely disclosing their materials. The Appellant submits that SoSE provided no evidence about industry norms. Therefore, this is really an argument that there was insufficient evidence to support the finding made. However, this was the Appellant's appeal, and it would have been open to her to submit evidence about industry norms. The Tribunal's finding relied on its interpretation of the Secretary of State for Education's letter of 31 March 2023. The Tribunal was entitled to interpret the Secretary of State's letter in the way that it did. There was obviously a reason why the Secretary of State thought it necessary to write to all schools in England and, given the terms of the letter, the Tribunal was entitled to find that it was because a certain number of third-party providers of sex education were not freely disclosing their materials.

279. To the extent that Ground 3 relies on copyright arguments, I agree with the Commissioner that the arguments are, in substance, duplicates of arguments made, and rejected, in support of Ground 2.

280. The Appellant further argues that the First-tier Tribunal erred by failing to take into account the availability of copyright as a factor lessening any detriment to SoSE occasioned by disclosure. So, this is an argument that the First-tier Tribunal failed to take into account a relevant consideration, rather than an irrelevant one. The Appellant's case before the Tribunal may be read as including the argument that any detriment was weakened by the availability of copyright (SoSE's material 'can be protected by copyright' was how it was put to the Tribunal). But the argument was dealt with by the Tribunal and, on my reading of its reasons, not dismissed out of hand as irrelevant.

281. For the above reasons, Ground 3 is not made out.

Ground 4

282. Before the First-tier Tribunal, the Appellant did not rely on the 'public interest of parents' as relevant to the public interest defence to an action for breach of confidence. The 'public interest of parents' generally was not a matter that the Tribunal was bound to factor into its detriment analysis of its own volition, but it did in fact do so (see paragraph 152). The Appellant argues that the Tribunal failed to take into account the general public interest in parents seeing sex education material. However, the Tribunal did in fact take into account a 'very strong public interest' in parents being properly aware of materials used to teach sex education (paragraph 152) and a 'particularly strong public interest' in access to materials for a concerned parent (paragraph 154). The Tribunal did not err in the manner suggested by the Appellant. The same applies to the arguments that the Tribunal failed to recognise the ongoing public interest of parents after sex education has been provided (see paragraphs 152 and 154), and overlooked that view-only access to the Slides was of less use in support of a parental complaint and in enabling parent-child discussions (see paragraph 158).

283. The Appellant argues that the First-tier Tribunal failed to give sufficient weight to the need for a mechanism whereby parents and the public may keep sex education materials under review and monitor providers' compliance with the requirements of education legislation. I find this argument difficult to reconcile with the argument that various matters

were simply not taken into account at all but, assuming the argument is qualitatively different, it is not made out. The weight to be given to a relevant consideration is for the Tribunal to determine, and will only be interfered with on an appeal limited to points of law on the ground of perversity (*R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] UKSC 20 at [70]). The Appellant's case overlooks this and wrongly assumes that the Upper Tribunal's jurisdiction permits it to decide for itself what weight should have been given to a particular consideration.

284. The Appellant argues that SoSE's offer to enable her to view the Slides should have been left out of account in the public interest analysis because she was not made aware of it. I note that, before the First-tier Tribunal, the Appellant argued that the opportunity to view the Slides afforded by the School was inadequate, but her case did not rely on SoSE's uncommunicated offer. The Tribunal was putting itself in the shoes of a court dealing with a (notional) action for breach of confidence brought by SoSE. In my judgment, such a court would not be bound to reject as irrelevant evidence that SoSE were prepared to use, as an alternative to disclosure of teaching materials to the entire world, other more targeted means of dealing with parental concerns about the content of teaching materials. The Tribunal was entitled to factor this consideration into its public interest analysis.

285. The Appellant argues that the Tribunal failed to take into account that the Appellant's statutory complaint was successful and led to changes in practice. The Appellant does not explain why this was relevant, which is not obvious especially as the Appellant made her complaint without the benefit of having access to the Slides.

Ground 5

286. This ground is concerned with the First-tier Tribunal's finding that the circumstances in which SoSE provided the Slides to the School imported an obligation of confidence. It was not part of the Appellant's case before the Tribunal that SoSE's email of 8 November 2021 was incapable of importing an obligation of confidence. It might well be said that this amounted to a concession that the email was capable of importing an obligation of confidence but, even if that is not the case, the Appellant's Ground 5 arguments can only succeed if they show that the Tribunal misdirected itself in law regarding the circumstances in which the law of confidence recognises the creation of an obligation of confidence.

287. The Appellant fails to establish that the First-tier Tribunal misdirected itself in law regarding the circumstances in which the law of confidence recognises the creation of an obligation of confidence:
(a) it is argued that the Tribunal failed to take into account the absence of a confidentiality agreement applicable to the Session, which meant that it was not open to SoSE subsequently to impose new conditions. This is simply a variation of earlier arguments that the Session itself destroyed any confidentiality that the Slides might have had;

(b) I cannot understand the argument that the Tribunal's finding that a duty of confidence was established was undermined by its mistaken belief that the Appellant's statutory complaint had been dismissed. The link between the two is too elusive and, in any event, the Tribunal clearly did not believe that the Appellant's statutory complaint had failed;

(c) the Tribunal failed, argues the Appellant, to appreciate that some form of notice is required in order to establish an equitable duty of confidence. However, that was the function performed, on the Tribunal's analysis, by SoSE's email of 8 November 2021.

Ground 6

288. This is the only ground concerned with the Appellant's other request for information, in the form of the identities of the SoSE facilitators at the Session.

289. As has been the case with the Appellant's other grounds of appeal, it is important to remind myself of the Appellant's case before the First-tier Tribunal. She argued:

(a) there was a strong legitimate interest in parents knowing who is teaching their children, especially who is teaching sex education. This interest is recognised in the Statutory Guidance which expects those teaching sex education to be 'named' in schools' sex education policies and consistent with Parliament having conferred on parents the right to withdraw their children from sex education (First-tier Tribunal notice of appeal);

(b) processing, in the form of disclosure of information, was necessary for the purposes of the legitimate interests pursued. Knowing a name would allow the Appellant properly to research an individual and make an effective complaint. This was an interest of anyone concerned with safeguarding in schools and it was to be noted that, unlike teachers, there

was “no separate professional regulation of these individuals” (First-tier Tribunal skeleton argument);

(c) the opposing interest of ‘those named individuals’ was comparatively weak since they were public-facing individuals, the information related only to their professional life, as individuals teaching sex education they should expect their names to be made public, and their names would already have been known to pupils at the Session and other school staff (notice of appeal);

(d) that the School failed to include identities in its sex education policy, as the Statutory Guidance required, raised concerns about the appropriateness of the unnamed individuals and the extent of their vetting by the School (notice of appeal). The School’s statutory safeguarding duties should carry no weight given the absence of any evidence that the School did any vetting or otherwise checked appropriateness but, even if they had, there is no guarantee of infallibility nor would it justify excluding parents from the safeguarding process and it was also relevant that SoSE was regulated only by the Charity Commission and not subject to inspection (skeleton argument);

(d) the Appellant’s right to make a statutory complaint was ineffective, or less effective, if she did not know the names of those teaching her daughter (notice of appeal);

(e) knowing identities would improve the Appellant’s understanding of what was taught by SoSE facilitators, and the Commissioner was wrong to argue otherwise. If a person publicly advocates for a particular position, that may indeed improve understanding (skeleton argument);

(f) the Commissioner relied on a ‘bizarre’ argument that, since the Appellant’s daughter had already been taught by SoSE facilitators, her concerns were no longer live. At the time of the request for information, the School proposed to use SoSE again and there was a risk that the Appellant’s daughter might do online research into an inappropriate individual (skeleton argument);

(g) the Commissioner’s claim that disclosure would place individuals at risk from harassment or abuse was rejected as having an “entirely unclear” evidential basis (skeleton argument);

(h) the balance of interests fell plainly in favour of disclosing identities of the SoSE facilitators (notice of appeal).

290. The Appellant argues that the First-tier Tribunal failed to take into account that Parliament has determined that it is reasonably necessary for the public to know the identity of those teaching sex education, and is also required by the Statutory Guidance. Parliament has not determined that it is reasonably necessary for the public to know the identity of those teaching sex education. No legislative provision to that effect has been brought to my attention and I am almost certain that none exists (guidance is not made by Parliament).

291. It is true that the Statutory Guidance provides that a school's sex education policy should identify "who is responsible" for teaching sex education. I do not, however, read this as a requirement to name each and every person, member of school staff or otherwise, who delivers sex education at a school. I read the guidance as imposing an expectation that a sex education policy will identify the member/s of school staff with overall responsibility for the teaching of sex education. Had the intention been to name each person who delivers sex education, the Statutory Guidance could have said so in terms. Moreover, such a requirement would be almost impossible to implement since some identities would not be known when a policy was made. Teaching staff appointed after a policy was made could not be named nor supply teachers, and the same difficulties would arise if an attempt were made to name staff of external organisations that might be commissioned to provide sex education. The First-tier Tribunal could not have erred in law by failing to take into account a non-existent requirement. It follows that the Tribunal did not err in law by failing to accept that anyone teaching sex education must reasonably expect to have their identity disclosed to parents.

292. I am not convinced that the First-tier Tribunal was presented with the argument that disclosing the facilitators' identities was consistent with parental rights to determine what education a child receives. In any case, if such a right exists, I am not persuaded by the argument because determining what education a child receives is not the same thing as determining who delivers education.

293. The Appellant criticises the First-tier Tribunal for finding that the statutory framework for regulating who works in schools was sufficient when no party made submissions on what that framework was. The Appellant's case before the Tribunal included the argument

that the School's statutory safeguarding duties should carry no weight given the absence of any evidence that the School did any vetting of SoSE staff. That did in fact amount to a submission about the nature of the framework since it presupposed that such vetting was required. The Tribunal found that "the statutory framework that has been established to regulate who works in schools meets that interest [of ensuring that appropriate, properly qualified and safe individuals are teaching sex education]" (paragraph 174). So, that was a finding that the statutory framework was established for a particular purpose. It was not in terms a finding that the framework 'was sufficient' but the Appellant had not argued that it was insufficient; she argued it should be left out of account because there was, she argued, no evidence that the School vetted the SoSE facilitators.

294. The First-tier Tribunal's key determination was that the legitimate interest pursued by the Appellant could be met by means other than disclosing the identities of SoSE facilitators. This rested on a finding of fact that, at the relevant time, the names and biographies of SoSE facilitators appeared on their website which meant that the Appellant had the opportunity to make her own assessment of their suitability. The Tribunal did not simply state that there was a statutory framework for regulating those who work in schools and leave it at that. Even if the Tribunal did impliedly find that the statutory framework was 'sufficient', its dispositive reasoning rested not on that but on its finding that the Appellant had the opportunity to make her own assessment of the suitability of SoSE facilitators. The Tribunal did not err in law as contended by the Appellant.

295. The Appellant criticises the First-tier Tribunal for wrongly taking into account whether she was 'unable' to make a complaint, when the relevant question was whether the effectiveness of a complaint was limited by her ignorance of the identities of SoSE facilitators. Before the Tribunal, the Appellant did argue that a statutory complaint would be less effective (as well as ineffective) unless she knew the identities of SoSE's facilitators. In the first sentence of paragraph 176 of its reasons, the Tribunal rejected the argument that the Appellant would be "unable to make a complaint if she does not know the names of the individual facilitators". If the rest of that paragraph is then read, it is clear that the Tribunal meant 'unable to make a complaint, or unable to make an effective complaint'. That is because the Tribunal went on to describe complaints that the Appellant would have been able to make on the information available to her, or which she had the opportunity to ascertain from SoSE's website (in its then form). The Tribunal dealt with the argument that, without knowing the identities of SoSE facilitators, the Appellant was

unable to make an effective complaint and properly explained why the argument was rejected.

296. The Appellant submits that the First-tier Tribunal failed to take into account that her ability to discuss the teaching of 'that individual' with her daughter was limited by ignorance of their identity The Appellant's case before the Tribunal did not, in terms, include the argument that ignorance of the identities of SoSE's facilitators limited her ability to discuss teaching at the Session with her daughter. What the Appellant argued was that, if she knew the facilitators' identities, she could answer questions her daughter might have about them (Tribunal skeleton argument) and their teaching (Tribunal notice of appeal). These arguments were dealt with by the Tribunal's finding that the Appellant had the opportunity to make her own assessment of individual facilitator suitability using the then-publicly available information on SoSE's website. The Tribunal did not err as submitted by the Appellant.

297. The Appellant argues that the First-tier Tribunal applied a higher threshold than that of reasonable necessity. That might be justified, she submits, if schools make mistakes but, sometimes, they do. This argument overlooks that the Tribunal's key finding was that the Appellant had the opportunity, at the relevant time, to make her own assessment of facilitator suitability. That would have involved some waste of time for the Appellant because there were several facilitators listed on SoSE's website, and only two participated in the Session, but that is not why she criticises the Tribunal's approach. She says it applied too high a threshold by failing to recognise that sometimes schools make mistakes. Had the School made a mistake in this case, all that a parent could have done to ameliorate the mistake was carry out their own assessment of suitability using publicly available information and the Tribunal found that the Appellant had the opportunity to do this. The Tribunal did not err by failing to recognise that sometimes schools make mistakes so that disclosure of facilitator identities was necessary in this case.

298. The Appellant argues that the First-tier Tribunal failed to ask itself, when considering whether SoSE facilitators had a reasonable expectation of privacy, if the role of SoSE facilitator was 'public-facing'. However, the argument rests on the assumption that the Statutory Guidance required the School's sex education policy to identify the SoSE facilitators who delivered the Session. Since I have already decided that the guidance does not require this, the Appellant's argument cannot succeed.

Conclusion

299. None of the Appellants' grounds of appeal are made out and this appeal is therefore dismissed. I should point out that I have not decided that parents have no right to see relevant sex education teaching materials. All I have decided is that the First-tier Tribunal, in the light of the circumstances of the case before it and, in particular, the arguments put to it, did not err in law in deciding that the Appellant was not entitled under FOIA to be provided with teaching materials for relevant sex education that, when the information was sought, had already taken place.

300. Finally, I apologise for the delay in giving this decision. It was not a straightforward case and has resulted in what I think is the longest reasons I have given for a decision in my ten or so years as a judge of the Upper Tribunal. My capacity to deal with the decision has also been impaired by a backlog of work consequent on my absence from duties due to serious injuries sustained in an accident. Nevertheless, the parties have still had to wait too long for this decision and for this I apologise.

E Mitchell

Judge of the Upper Tribunal.
Authorised for issue,
on 5 September 2025.

Section 12 of the Tribunals,
Courts and Enforcement Act 2007.