



Summary of Judgment

803 Funds Limited (“Applicant”) v Secretary for Education HCAL 1969/2020; [2021] HKCFI 2874

Decision : Leave to apply for judicial review granted; application for judicial review dismissed

Date of Hearing : 20 May 2021

Date of Judgment : 28 September 2021

Background

1. In this judicial review, the Applicant¹, a company limited by guarantee, sought leave to apply for judicial review of the decision of the Education Bureau (“**EDB**”) refusing to disclose the “names of the schools and the teachers involved and the findings and results of investigation” in the substantiated cases of professional misconduct of teachers (“**Withheld Information**”).
2. From June 2019 to March 2020, EDB received a total of 192 complaints of suspected professional misconduct of teachers relating to the social events arising out of the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019. Of the 192 complaints, 39 cases were substantiated.
3. On 4 February 2020, Applicant through its solicitors made a request under the Code on Access to Information (“**Code**”) to EDB for information relating to substantiated cases of professional misconduct of teachers for the alleged purpose of “enabling parents of local students to make an informed decision on whether their children should study or continue to study in a particular school” (“**Applicant’s Purpose**”).
4. EDB provided part of the information sought and refused disclosure of the Withheld Information pursuant to §§2.14(a) and 2.15 of Part 2 of the Code², which

¹ As stated in paragraph 4 of Part A (Mandatory Articles) of the Applicant’s Articles of Association, its object is “for the organization and carrying out of activities to promote law and order and civic-minded activities, on a non-profit-making basis”.

² §2.14(a) of the Code concerning “Third Party Information” states as follows –

“(a) Information held for, or provided by, a third party under an explicit or implicit understanding that it would not be further disclosed. However, such information may be disclosed with the third party’s consent, or if the public interest in disclosure outweighs any harm or prejudice that would result.”



provide that certain types of information could be withheld from disclosure.

5. The Applicant's application for leave to apply for judicial review was heard on 20 May 2021. The Court of First Instance handed down its judgment on 28 September 2021 granting leave to apply for judicial review but dismissed the application for judicial review.

Grounds of Judicial Review

6. The Applicant relied on 3 grounds of judicial review:
 - (1) Errors of law;
 - (2) Irrationality; and
 - (3) Fettering of discretion.

Department of Justice's Summary of the Court's rulings

(Full text of the judgment at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=139047&QS=%2B&TP=JU)

(1) Errors of law

7. The Court held that the 3 items of the Withheld Information (i.e. names of teachers, names of schools and findings and results of investigation), looking as a whole, constitute third party information, the disclosure of which is restricted under para. 2.14(a) of the Code on Access, as most part of the information was provided by the complainants, teachers and/or schools involved. The rest consists of EDB's analysis that would not be meaningful or useful to be disclosed to the Applicant without the former part. (§§ 39-44)
8. The Applicant's Purpose of allowing parents to choose schools is obviously a new purpose under Data Protection Principle 3³ in Schedule 1 to the Personal Data

§2.15 of the Code concerning "Privacy of the Individual" states as follows -

" Information about any person (including a deceased person) other than to the subject of the information, or other appropriate person, unless -

- a. such disclosure is consistent with the purposes for which the information was collected, or
- b. the subject of the information, or other appropriate person, has given consent to its disclosure, or
- c. disclosure is authorised by law, or
- d. the public interest in disclosure outweighs any harm or prejudice that would result."

³ Data Protection Principle 3 (1) states that "Personal data shall not, without the prescribed consent of the data subject, be used for a new purpose". In relation to the use of personal data, a "new purpose" is defined under Data Protection Principle 3(4) to mean any purpose other than - (a) the purpose for which the



(Privacy) Ordinance, Cap 486 (“PDPO”) different from EDB’s original purpose of collecting the data for misconduct investigation. (§§ 48-50)

9. 3 items of the Withheld Information should be dealt with as a whole given that the Applicant had never indicated it was content to receive only a part of them and that partial disclosure would be wholly unfair on the rest of the teachers and the students of those schools and could seriously affect the teaching environment in those schools. Hence, it would be unreasonable for EDB to disclose the part of the Withheld Information that do not *per se* constitute personal data (i.e. just the name of the school involved and the nature of the misconduct and penalty imposed), but omitted the name of the teacher concerned. (§§ 44, 51)

(2) Irrationality

10. The Court held that the question of whether more harm or prejudice than benefit would result from the disclosure of the Withheld Information, being one of the tests set out in §2.15 of the Code is a matter for EDB to consider.

11. The threshold for judicial review on the ground of *Wednesbury* unreasonableness is a high one, particularly in relation to a decision based on the weighing of conflicting public interests. In the circumstances, the Court found that EDB’s decision to refuse to disclose the Withheld Information is entirely reasonable in the circumstances and well within the boundary of *Wednesbury* reasonableness. (§ 54)

12. The Court also rejected the Applicant’s other contentions:-

- (a) The Court disagreed that EDB gave undue weight to one-sided considerations and found that EDB had taken into account the Applicant’s Purpose in the balancing exercise. (§ 56)
- (b) The Court rejected the contention that parties in disciplinary process should be named similar to parties named in the judgments according to the general rule of open justice. According to case law, such principle only applies in legal proceedings and there is no general principle that disciplinary proceedings must be open to the public. (§ 57)
- (c) The Court disagreed that EDB had failed to consider or give sufficient weight to various negative impacts following the non-disclosure of the Withheld Information as proposed by the Applicant and considered that the EDB’s

data was to be used at the time of the collection of the data; or (b) a purpose directly related to the purpose referred to in (a).



decision is well within the range of reasonableness in the public law sense. (§ 58)

- (d) The Court also disagreed that EDB's decision to refuse to disclose the Withheld Information is inconsistent with certain proposed measures to enhance transparency as set out in a Legislative Council Paper on the handling of misconduct of teachers, as the names of the teachers and schools involved were not also disclosed in the Paper. (§§ 59-63)

(3) Fettering of discretion

13. The Court disagreed with the Applicant's suggestion that EDB unlawfully fettered its discretion in making blanket non-disclosure given that the Applicant's Request herein was not for specific facts and circumstances but a general one. (§64)

14. While the Court granted leave to apply for judicial review on the basis that the intended application for judicial review is reasonably arguable with a realistic prospect of success, the Court dismissed the substantive application for judicial review and rejected all the grounds of judicial review. Considering that Applicant made the intended judicial review application not for its own private interest but apparently to advance public interest and that the intended application was considered reasonably arguable, the Court made no order as to costs.

Civil Division

Department of Justice

28 September 2021