



**Tribunals Service**  
Information Tribunal

**Information Tribunal Appeal Number: EA/2009/0026**  
**Information Commissioner's Ref: FS 50152758**

**Freedom of Information Act 2000**

**Determined on the papers  
on 16 September 2009**

**Decision Promulgated on: 2 November 2009**

**BEFORE**

**INFORMATION TRIBUNAL DEPUTY CHAIRMAN**

**Anisa Dhanji**

**and**

**LAY MEMBERS**

**Marion Saunders and Paul Taylor**

**BETWEEN**

**KENNETH BLAKE**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

**-and-**

**WILTSHIRE COUNTY COUNCIL**

**Additional Party**

## **Subject matter**

Freedom of Information Act 2000: personal data and absolute exemption: section 40(2)(c)  
Data Protection Act 1998: Schedule 1, Part 1, Schedule 2, paragraph 6(1)

## **Cases**

Commons Services Agency v Scottish Information Commissioner [2008] 1 WLR 1550

Waugh v Information Commissioner and Doncaster College (EA/2008/0038)

Corporate Officer of the House of Commons v Information Commissioner (EA/2007/0060)

Roger Salmon v Information Commissioner and King's College Cambridge  
(EA/2007/0135)

Guardian News & Media Limited v Information Commissioner and Ministry of Justice  
(EA/2008/0084)

London Borough of Camden v Information Commissioner (EA/2007/0021)

A v Information Commissioner (EA/2006/0012)

## **DECISION**

The Decision Notice dated 5 March 2009 is upheld. This appeal is dismissed.

## **REASONS FOR DECISION**

### **Introduction**

1. This is an appeal by Mr Kenneth Blake (the "Appellant"), against a Decision Notice issued by the Information Commissioner (the "Commissioner") on 5 March 2009, relating to a request for information made by the Appellant to the Wiltshire County Council (the "Council").

### **The Request for Information**

2. On 10 January 2007, the Appellant made a request to the Council for the investigatory report (the "Report") relating to a disciplinary hearing of Ms G, a head teacher of a school in Wiltshire.
3. The Council responded on 12 February 2007, stating that it was withholding the majority of the information. It relied on the exemptions in section 40 (personal information), and 41 (information provided in confidence) of the Freedom of Information Act 2000 ("FOIA"). The Council stated that it believed that a limited amount of information in the report constituted the Appellant's personal data and this had been disclosed to him under the Data Protection Act 1998 ("DPA").

4. The Appellant asked the Council to undertake a review of its decision. The Council did so, but maintained its original decision.

### **The Complaint to the Commissioner**

5. On 1 March 2007, the Appellant complained to the Commissioner. The Commissioner undertook inquiries. Following his investigations, he issued a Decision Notice finding that the Report constituted personal data of the head teacher, that disclosure would engage section 40(2) of FOIA and would contravene the first data protection principle. The head teacher had already indicated that she was unwilling to consent to disclosure of the Report and there appeared to be no reason why it would be fair to disclose it in this case. The head teacher's right to a private, properly conducted disciplinary process outweighed the legitimate interests of the public in understanding the allegations made and the actions recommended following the investigation.
6. Although the Commissioner upheld the Council's decision, he noted that the Council had not specified, in its refusal notice and internal review, that it was relying on sub-section 2 of section 40. The Commissioner considered that a public authority's failure to specify the sub-section relied on when an exemption is being claimed, constitutes a breach of section 17(1)(b) of FOIA.
7. Having reached the finding that section 40(2) was engaged, the Commissioner considered that it was not necessary to consider the application of section 41.

### **The Appeal to the Tribunal**

8. On 31 March 2009, the Appellant appealed to the Tribunal against the Decision Notice. His grounds of appeal are set out in a letter to the Tribunal, in which, he says, amongst other things, that:
  - (a) he wants to have sight of the Report because he believes there was no transparency during the investigation;
  - (b) there has been considerable public interest in the Report within the school and surrounding area;
  - (c) he also has a personal interest in seeing the Report because his daughter suffered due to the head teacher's failings, and he has a right to judge for himself if matters were properly investigated; and
  - (d) the Commissioner should have made his own inquiries into the Council's claim that the head teacher was not prepared to consent to the release of the Report.
9. The Appellant goes on to say that he would be prepared, in the alternative, to consider a redacted version of the Report.
10. All parties were content for the appeal to be determined by the Tribunal without a hearing, pursuant to Rule 16 of the Information Tribunal (Enforcement Appeals)

Rules 2005. Having regard to the issues raised, and the nature of the evidence, we were satisfied that the appeal could properly be determined without an oral hearing.

### **The Tribunal's Jurisdiction**

11. The scope of the Tribunal's jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the notice is not in accordance with the law, or to the extent it involved an exercise of discretion by the Commissioner, he ought to have exercised that discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.
12. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, as in this case, the Tribunal will often receive evidence that was not before the Commissioner.
13. The Appellant has raised certain issues, including in particular, as to the fairness and thoroughness of the investigation into the head teacher's conduct. Such matters fall outside the Tribunal's jurisdiction. The Tribunal's jurisdiction is concerned with access to information held by public authorities; it does not extend to reviewing the conduct of public authorities more generally. There may be other avenues which can be pursued by those who are dissatisfied with the conduct of public authorities, but their remedy does not lie by way of appeal to this Tribunal.

### **Evidence and Submissions**

14. We have considered all the documents received from the parties (even if not specifically referred to in this determination), including, in particular, the documents in the agreed bundle. We have also considered the witness statements served by the Appellant from Mrs T (a former teacher at the school), Mrs N Coughlan, (a parent of a child at the school), and Councillor Chettleburgh (who had been asked by the Appellant to intervene), as well as the statements served by the Council from Ms G (the head teacher), and Mr G Newbury (Senior Regional Officer of the National Association of Head Teachers). No witness evidence has been served by the Commissioner.
15. We have also considered such written submissions as have been lodged by the parties. The Commissioner's submissions, and indeed the Decision Notice, have been relatively brief. The Council has for the most part, simply relied on the Commissioner's submissions.
16. The Report has been provided to the Tribunal, but has been kept confidential from the Appellant since disclosure would, of course, defeat the purpose of this appeal. For that reason we will describe it only briefly. It is dated 19 October 2006 and details the investigation into allegations made against the head teacher. It sets out the allegations against the head teacher and lists the interviews that were carried

out as part of the investigation. It then sets out the findings made, in relation to each allegation. Finally, it sets out a number of recommendations. There are various appendices, numbered A – J, which consist largely of notes of various meetings, relevant to the allegations.

17. So as not to disclose any of the Report, we will only refer, in general terms, to the evidence in the witness statements and to submissions which involve the factual background to the investigation. In our view, the issues raised by this appeal can be addressed without the need for a confidential annex for such material. Such an annex would, in any event, have to be withheld from the Appellant. Also, we have referred to the head teacher as Ms G rather than by her full name on the basis that the Council has informed the Tribunal that the fact that she has been the subject of disciplinary proceedings is not in the public domain, and in particular, it has not been published in any document available to the public. Likewise, we have referred to a former teacher at the school who has given evidence as Mrs T, since to use her full name would identify the school and hence Ms G.

### **Statutory Framework**

18. Under section 1 of FOIA, any person who has made a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with that information. Under section 2, the duty on the public authority to provide the information requested does not arise if the information is exempt under Part II of FOIA.
19. The exemptions under Part II are either qualified exemptions or absolute exemptions. Information that is subject to a qualified exemption is only exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Where however, the information requested is subject to an absolute exemption, then, as the term suggests, it is exempt regardless of the public interest considerations.

### **Issues**

20. The first issue for determination is whether the Report is exempt under section 40(2) of FOIA. If it is, then by virtue of section 2(3)(f), it is an absolute exemption (unless section 10 of the DPA in relation to processing likely to cause damage or distress would be breached).
21. If section 40(2) is not engaged, we must go on to consider whether the exemption in section 41 applies.

### **Findings**

22. To the extent that it is relevant, section 40 provides as follows:

#### **40. Personal information**

- (1) *Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.*
- (2) *Any information to which a request for information relates is also exempt information if—*
  - (a) *it constitutes personal data which do not fall within subsection (1), and*
  - (b) *either the first or the second condition below is satisfied.*
- (3) *The first condition is—*
  - (a) *in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the [1998 c. 29.] Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—*
    - (i) *any of the data protection principles, or*
    - (ii) *section 10 of that Act (right to prevent processing likely to cause damage or distress), and*
  - (b) *in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.*
- (4) *The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject’s right of access to personal data).*

23. Under section 40(2), personal data of third parties is exempt if disclosure would breach any of the data protection principles set out in Part I of Schedule 1 of the DPA (as interpreted in accordance with Part II of Schedule 1), or section 10 of the DPA (right to prevent processing likely to cause damage or distress).
24. Section 40(2) is a complex provision. As the Tribunal has previously observed (see for example London Borough of Camden v Information Commissioner (EA/2007/0021), and A v Information Commissioner (EA/2006/0012)), section 40(2) seeks to ensure that the interests of those requesting information from a public authority do not undermine, unnecessarily, the interests of those individuals whose personal data might find its way into the public domain as a result of the public authority complying with such a request. When section 40(2) is engaged, the Tribunal is required to undertake quite a different task from when it deals with other FOIA exemptions. FOIA promotes the right to information but when section 40(2) is under consideration, the DPA determines the proper approach, and the interests of data subjects receive a high degree of protection.
25. The Council and Commissioner say, and the Appellant appears to accept, that the Report contains personal data of the head teacher (and indeed, it may in part also contain the personal data of others). What they disagree about is whether disclosure would contravene the first data protection principle. The Council has not claimed that any of the other data protection principles would be breached. For

completeness we would also note that section 10 of the DPA (right to prevent processing likely to cause damage or distress) is not in issue here. Ms G has not given any notice under section 10 of her objection to disclosure. Also, the Report does not contain any “sensitive personal data” as defined under section 2 of the DPA. The only issue before us, therefore, is whether the first data protection would be breached by its disclosure.

26. The data protection principles regulate the way in which a “data controller” (in this case the Council), must “process” personal data. The word “process” is defined in section 1 of DPA and includes disclosure to a third party or the public at large.
27. The first data protection principle provides that personal data shall be processed fairly and lawfully and in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met.
28. The use of the expression “in particular” in the first principle, means that there is a general obligation to process data fairly, in addition to the requirement to comply with the detailed conditions listed in Schedule 2. The general obligation to process data fairly does not involve a consideration of the interests of the requester or third parties; however, certain of the conditions set out in Schedule 2, do. What this means is that disclosure may amount to unfair or unlawful processing and therefore not permitted, regardless of what the interest in disclosure may be.
29. There are two conditions in Schedule 2 of relevance to the present case, namely conditions (1) and (6).

Condition (1) is where:

*“The data subject has given his consent to the processing.”*

Condition (6) provides that:

*“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.”*

30. To determine whether disclosure of the Report would contravene the first data protection principle, the questions we must address, therefore, are these:
  - (a) Would disclosure of the Report amount to fair and lawful processing of the head teacher’s personal data?
  - (b) Has the head teacher given her consent?
  - (c) Is disclosure necessary for the purposes of a legitimate interest of the data controller or the third party or parties to whom the data are disclosed, and if so, is disclosure nevertheless unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

Would disclosure of the Report amount to fair and lawful processing of the head teacher’s personal data?

31. In the present context, the question is whether the Council's disclosure of the Report to the Appellant would be fair. In the often quoted decision in Corporate Officer of the House of Commons v Information Commissioner and Norman Baker (EA/2006/0015), the Tribunal drew a distinction between information concerning the public as opposed to the private life of the data subject:

*"...when assessing the fair processing requirements under the DPA [that] the consideration given to the interests of data subjects, who are public officials where data are processed for a public function, is no longer first or paramount. Their interests are still important, but where data subjects carry out public functions, hold elective office or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their private lives.*

32. We have taken into account that the Report in the present case does not relate to the private life of the head teacher. However, we have also taken into account that she is not a public official in the sense of being elected, nor do the issues involve concerns about disbursement of public funds. She is effectively a private individual employed as a head teacher. The issues covered by the Report relate to her conduct as a head teacher. This is at quite a different end of the scale from the Norman Baker case where the request was for the travel claims of MPs.

33. In the Tribunal's decision in Roger Salmon v Information Commissioner and King's College Cambridge (EA/2007/0135), we find support for treating someone in the head teacher's position quite differently from say, an MP or high level executive of a public company. In that case, the request was for information about the resignation of the Provost of a College. In finding that disclosure would not be fair, the Tribunal considered that there is a sliding scale of protection dependent on where the data subject stands with regard to his carrying out public functions and the public authority's duty to respect its employees' reasonable expectations of privacy.

34. We also attach considerable weight to the fact that the personal data in the present case was obtained for the purposes of an internal investigation of issues which arose during the course of the head teacher's employment at the school. By its very nature, information relating to an internal investigation or disciplinary hearing carries a strong general expectation of privacy. As the Tribunal observed in Waugh v Information Commissioner and Doncaster College (EA/2008/0038):

*"...there is a recognised expectation that the internal disciplinary matters of an individual will be private. Even among senior members of staff there would still be a high expectation of privacy between an employee and his employer in respect of disciplinary matters."* (paragraph 40)

35. The head teacher says, in her witness statement, that she expected that the information given during the course of the disciplinary proceedings would be kept confidential. We have no reason to doubt that this was indeed her expectation, and we note that her evidence in this regard is supported by Mr Newbury.

36. In these circumstances, we find that disclosure would not amount to fair processing in relation to the head teacher. We also accept that the other members of the school staff who, during the investigation, gave evidence which is referred to in



Report, also had a reasonable expectation that the information they provided in the course of that investigation would not be released to the public. To the extent the Report constitutes their personal data, we find that disclosure would be unfair in relation to them as well.

37. There is also a separate question as to whether disclosure of the Report would amount to lawful processing. Neither the Commissioner nor the Council have addressed this. In connection with its reliance on section 41 of FOIA, however, the Council has said that the Report was provided to it in confidence and that both the individual who wrote the Report, as well those interviewed, all had an expectation that it would be treated in a confidential manner. If the Report is indeed subject to a duty of confidentiality, then arguably, disclosure would not be lawful and there would be a breach of the first data protection principle for this reason as well. However, none of the parties have made any submissions on this issue and there is insufficient evidence before us to make any specific findings.

Has the head teacher given her consent?

38. As regards condition (1) of Schedule 2, it is clear the head teacher has not given her consent. The Appellant has asserted, in his grounds of appeal, that the Commissioner failed to make his own enquiries into the claim by the Council that the head teacher was not prepared to consent to the release of the Report. The Commissioner's position is that the Council had advised him that the head teacher was asked and had refused to give her consent. We consider that in the absence of any evidence that the head teacher had been willing to consent to the release of the Report, it was reasonable for the Commissioner to accept that the Council had accurately reported the head teacher's position. We note, in any event, that in her witness statement, the head teacher has confirmed that following the Council's receipt of the Appellant's request, she was asked but had refused to give her consent. Clearly therefore, condition (1) is not met.

Is disclosure necessary for the purposes of a legitimate interest of the data controller or the third party or parties to whom the data are disclosed, and if so, is disclosure nevertheless unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

39. Effectively, condition 6 calls for the balancing the legitimate interest of the requester (bearing in mind however that under FOIA, disclosure to the Appellant would be disclosure to the world at large), with the effect of disclosure on the data subject. In Norman Baker, the Tribunal observed that the balance to be struck is comparable, but not identical to the balance that applies in relation to the public interest test for qualified exemptions under FOIA as a whole. However, as the Tribunal pointed out, because the processing must be "necessary" for the legitimate interests of members of the public to apply, it is only where the public interest considerations outweigh or are greater than the prejudice to the rights and freedoms and interests of the data subject that personal data should be disclosed.
40. Applying condition 6 to the present case, does the Appellant have a legitimate interest in disclosure of the Report? We accept that as the parent of a child who was attending the school in question at the relevant time and was affected by the matters that were the subject of the allegations against the head teacher, he does

have a legitimate interest. However, we are not persuaded that there is any wider public interest in the Report. Although we note that Mrs T says that “...*it is obvious that public interest exists and in view of not being covered in the press, is substantial*”, there is no actual evidence of any widespread or substantial public interest, and we agree with the Commissioner that the issues raised in the Report are such that they are likely only to be relevant to this particular school, and that the interest to the general public as a whole would be modest.

41. Is disclosure of the Report necessary for the Appellant’s legitimate interests? We find that the Appellant’s evidence is not clear on whether his concerns can be satisfied through other channels without disclosure of the head teacher’s personal data being necessary. We have reservations, therefore, as to whether disclosure is indeed necessary for the purposes of the Appellant’s legitimate interests.
42. Even if it were necessary, however, that would only satisfy the first part of condition (6). We would still need to go on to consider whether disclosure would be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the head teacher.
43. In her witness statement, the head teacher says that the investigation was carried out on the implicit assurance of confidentiality. She says that the governing body that carried out the investigation made a decision which she accepted and she has moved forward. She says that disclosure of the Report could have a detrimental impact on her role as a head teacher, including in relation to parent confidence in her, in other staff, and in the reputation of the school.
44. We are satisfied that disclosure could have a prejudicial effect on the head teacher, her career, and her ability to carry out her functions. We also accept that it would cause her distress by re-opening issues that she regards as having been dealt with, and would expose her to the judgment of those in her local community, whether or not they have any connection with the school. There would be prejudice also to her right to a confidential investigation of her conduct.
45. In our view, disclosure is unwarranted. We find that the interests in disclosure do not outweigh the prejudice to the rights and freedoms and interests of the head teacher. The Appellant argues that “*it is hard to imagine any parity between the importance to protect the personal data of a head teacher and the disclosure of a report purporting to highlight her alarming failures .....*” The allegations were not by any means insignificant, but as a matter of proportionality, we do not consider that they were such that the interest in the disclosure of the Report outweighs the prejudice that we find would be caused to the head teacher by its disclosure.
46. We find, in short, that condition (6) is not met. Disclosure would be unfair and would contravene the first data protection principle. It follows that we find that the Council was entitled to rely upon section 40(2) of FOIA to refuse the request. Having reached these findings, it is not necessary to go on to consider the application of section 41.
47. We therefore uphold the Decision Notice. Our decision is unanimous. However, our findings should in no way be taken as a reflection on how we view the Appellant’s

interest in the Report. We are entirely sympathetic to his reasons for wishing to have sight of the Report. However, the fact that he may have an understandable interest in seeking access to it is not sufficient. As we have already noted, where personal data of a third party is concerned, the data subject's interests receive a high degree of protection from the DPA.

48. The Appellant has asked, in the alternative, for a redacted version of the Report. However, if the Report were to be redacted so as to remove the personal data of the head teacher and others, there would be virtually nothing left and certainly nothing meaningful left to disclose. Redaction is not therefore a possibility.

**Anisa Dhanji**  
**Deputy Chairman**

**Date: 31 October 2009**