



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2009/0082

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50208722
Dated: 2 September 2009

Appellant: Thomas Wilson

Respondent: Information Commissioner

Decision on the papers

Date of decision:

DAVID MARKS QC

(Judge)

and

SUZANNE COSGRAVE

ROGER CREEDON

**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2009/0082

Subject matter: Freedom of Information Act 2000, section 19 (publication scheme) and section 40(2) (personal data)

Case: *Waugh v Information Commissioner* (EA/2008/0038)

**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2009/0082

DECISION

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the Appellant's appeal and upholds the Information Commissioner's Decision Notice.

IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2009/0082

REASONS FOR DECISION

The background

1. This appeal has evolved in such a way that it has now come to be concerned with a type of issue which has previously been a subject for decisions, both by the Information Commissioner (the Commissioner), as well as by this Tribunal. However, the Tribunal wishes to stress at the outset that the request which has remained unaltered since the date it was made, namely 19 June 2008, was and has remained addressed to, and only to, the provision of certain specified bank statements held in the name of a public authority. No other information was sought in the request. As this appeal has evolved, it has become clear that the Appellant seeks disclosure of the details of a settlement reached between a public authority, here a Parish Council (the Council), and one of its former employees with particular reference to the financial aspects of the settlement. The settlement followed upon the termination of the employee's employment with the Council. In the present case, and in particular, the information sought is the amount of compensation agreed in the wake of the settlement entered into and agreed out of court in the Council's prior dispute with its former clerk, a Mrs Maureen Sage (Mrs Sage). As is frequently the position, the settlement was made by way of a compromise agreement which expressly bound both parties to respect the confidentiality of the settlement. The format of the original request in the Tribunal's view remains at the heart of this appeal. Even though the Tribunal will address the expanded concerns which are itemised above, it regards itself as being fully justified in addressing the form and effect of the request itself which in retrospect perhaps could have been put in somewhat clearer terms. The fact remains that it was not.

2. Disclosure was initially refused by the Council. The Council relied on the grounds and the exemptions set out in section 40 (personal data), section 41 (information provided in confidence) and section 43 (commercial interests) of the Freedom of Information Act 2000 (FOIA). The Commissioner duly found that sections 41 and 43 were not engaged. He was, however, satisfied that such information as was not disclosed was exempt under section 40(2).
3. The information in question comprised some entries in the bank statements. In due course the Council abandoned its reliance on section 43. Any information that was not disputed has been disclosed.
4. The somewhat unusual aspect of the present appeal concerns one of the grounds of appeal as originally lodged by the Appellant. This ground is to the effect that the Council was in some way bound to reveal the financial information requested since its adoption of a formal publication scheme for local councils in England and Wales compelled such a conclusion.
5. The Tribunal is bound to observe at this point that the resolution of this appeal was not particularly helped by the combined effect of grounds of appeal which were drafted by the Appellant in person on the one hand, and on the other, a 19 page set of written submissions prepared by Counsel, albeit instructed on a *pro bono* basis on the Appellant's behalf. The Tribunal was also served with about 150 pages of Appendices.
6. Although the latter were no doubt settled with the best of intentions, the submissions are not only excessively lengthy and somewhat diffuse, but they also even within their own terms, stray beyond the original grounds of appeal as those grounds were drafted by the Appellant. The proper course would have been, despite the relative informality of the Tribunal procedure to have submitted amended Grounds of Appeal. One example where the submissions stray outside the Grounds of Appeal is by referring to the contention that it is not "clear" the financial information which is sought constituted "information within section 1(1)" of the Data Protection Act 1998

(DPA) thereby making it a “matter for determination”. Far more significantly the format of the submissions fails to follow and reflect the grounds which were set out in the original Grounds of Appeal. In addition, although the headlined grounds of appeal in the submissions make no specific reference to section 40 of FOIA, thus to that extent properly reflecting the Appellant’s original Grounds of Appeal, the latter section is addressed at some length throughout the majority of the written submissions.

7. The Tribunal expresses the hope that written submissions which are otherwise the subject of standard directions (which was the case in the present appeal) as used by the Tribunal not only do not trespass beyond the bounds of the original Grounds of Appeal but also remain relatively brief and succinct. The Tribunal feels that even though litigants in person deserve all possible legal advice and assistance, the same should not be as here somewhat counterproductive to the litigant in question and the issues in dispute, e.g. by providing excessive material in support of the litigant’s case which tends to confuse, rather than clarify the issues.

The facts

8. On 19 June 2008, the Appellant made a written request of the Council for: “... copies of all bank statements for all accounts held by the council for the months of: December 2007, January 2008, February 2008, March 2008.” The Council responded to the request on 8 July 2008 as indicated above, relying on the exemptions in FOIA as set out in sections 40 and 43. The Council maintained that information about any particular payment was exempt under section 41 of FOIA. An internal review which reflected the discussion of such effect at a full Council meeting held on 7 April 2008 upheld the original decision.
9. By letter dated 23 July 2008, the Appellant wrote to the Commissioner pointing out that the Council intended to change its publication scheme to exclude any reference to bank statements and related material from its current scheme. The Appellant urged the Commissioner to investigate the

matter. He maintained that the Council was seeking to prevent disclosure of the information which had previously been in the publication scheme. In early September 2008, the Council provided the Commissioner with some of the withheld information, as well as with a copy of a confidential settlement agreement reached between the Council and Mrs Sage. On or about 22 April 2009 the Council informed the Commissioner that it had three bank accounts, namely a savings account which has been called Account 1, a principal current account called Account 2 and a further account, namely, Account 3 which contained details of a payment or payments made to solicitors in settlement of the dispute between the Council and Mrs Sage. As for Accounts 1 and 2, the Council accepted that the information contained in those Accounts did not contain or constitute exempt information. The Council duly agreed to disclose the majority of the information relating to and contained in those accounts. The redacted information comprised account numbers, bank sort codes and a limited amount of information relating to the details as to the recipients of otherwise redacted payments. However, insofar as Account 3 was concerned, the Council maintained its contention that information relating to the account was exempt by virtue of sections 40(2) and 41 of FOIA.

10. Paragraph 20 of the ensuing Decision Notice neatly summarised the information which the Council was prepared to release in the following terms, namely:

“The information which the Council proposed to release comprised of [sic]:

Accounts 1 and 2

All information released with the exception of the bank account number, sort code, branch identifier number and details of account numbers referring to amounts paid in and paid out [see paragraph 9 of this judgment above].

Account 3

Information released with the exception of the bank account number, sort code, branch identifier number and details of account numbers referring to amounts paid in and out. In addition, as this was the account from which the settlement payment to its former clerk was made, the Council also proposed to redact the majority of the paid out columns, with the exception of transfer amounts to other accounts, the entire paid in and balance columns and the accounts summary section showing each statement. The Council also proposed to redact the name of the Solicitors via whom the settlement payment was made.”

11. Following further exchanges with the Commissioner, the Council subsequently agreed to disclose the names of the solicitors to whom the settlement payment was made.
12. In its exchanges with the Commissioner, the Council confirmed that at the time of the original request, bank statements were listed within a class of information set out in its publication scheme, the Council having adopted that scheme on 19 December 2002.
13. At one stage in his exchanges with the Commissioner, the Appellant asserted that the Council's bank statements had been available for public inspection. In response to this assertion, the Council confirmed that under The Audit Commission Act 1998 (ACA 1998), there existed a right of access but only to a limited group of persons and parties in order to inspect the accounts as well as any supporting documentation, and then only for a limited period of 20 working days. Transposed to the facts of this case, such a window would have been open only until 15 August 2008. There remains however a right under section 15 of the ACA 1998 to an “interested person” to inspect all the accounts. In the legal submissions referred to above and lodged prior to the resolution of this appeal, no mention whatever is made of the statutory provisions, nor does reference to the ACA 1998 appear in the original Grounds of Appeal. This is because in the Decision Notice, the Commissioner pointed out that the ACA 1998 did not justify a

public inspection of bank statements of the type in question and that the said Act had no bearing upon the expectations of a data subject, e.g. as here in respect of the amount of a settlement figure following upon the termination of employment. For these reasons the Tribunal proposes to refer only briefly below to these provisions.

The Decision Notice

14. The Commissioner's Decision Notice is dated September 2009 and bears the reference FS 50208722. The Tribunal feels that it is appropriate to refer to the way in which the Commissioner addressed the issues already referred to in brief above at para 4 that at the time of the request the Council's publication scheme listed the Council's bank statements as being within its published listed items. At paragraph 27 of the Decision Notice the Commissioner in observing that section 19 of FOIA sets out a duty on every public authority to adopt and maintain a publication scheme as well as an obligation to publish the same, took the view that it nonetheless remained possible for there to be exempt information contained within a class of information listed in a public authority's publication scheme. The Commissioner went on to find that by initially refusing to disclose information in response to a request, even in redacted form, the Council had failed to fulfil its commitment to publish the information thereby committing a breach of section 19(1)(b) of FOIA. No appeal has been made against that specific finding. Its impact for the purposes of this appeal finds expression in the first ground of the Appellant's Grounds of Appeal already briefly referred to above but considered more fully below.

15. The Decision Notice then goes on to consider the Council's reliance upon the provisions of section 40(2) of FOIA. However, as previously set out above a complaint about this finding by the Commissioner upholding the Council's reliance in this way does not constitute a specific ground of appeal and it is not a reason for dismissing this appeal. Nonetheless the Tribunal feels that it is incumbent upon it to address this issue, albeit in brief. It is sufficient to state for present purposes that section 40(2) of FOIA provides

an absolute exemption for information that constitutes the personal data of third parties. Personal data is exempt if its disclosure would breach any of the data protection principles set out in Section 1 of the DPA.

16. The Notice then sets out the Council's contentions as to why the redacted information in the bank statements sought to be disclosed constituted personal data. Again as referred to above this specific issue is raised the first time in the written submissions filed on behalf of the Appellant prior to the appeal. Nonetheless, the Tribunal entirely endorses the contentions of the Council as confirmed by the Commissioner in paragraphs 40 and 41 of the Decision Notice that even though the information in the bank statements did not refer to Mrs Sage in terms, in the hands of the Council details of the amount or amounts of the settlement payment constituted personal data. Such information necessarily referred to a settlement made to her solicitors which payment was directly linked to the prior dispute between the Council and Mrs Sage.
17. At the heart of the Council's case was the contention that Mrs Sage had not consented to disclosure of the settlement amount paid to her. Moreover, the settlement agreement was expressed to be confidential on its own terms. There would therefore be a breach of the second data protection principle. In addition the Council maintained there would be a breach of the sixth data protection principle since disclosure would be in breach of the rights of the data subject. The existence of the confidentiality agreement also militated in favour of promoting and protecting the private interests of the data subject as distinct from furthering any legitimate public interest for much the same reasons.
18. Insofar as the provisions of the ACA 1998 were concerned, the Council formally confirmed that any right to public inspection otherwise available for the period 21 July 2008 to 15 August 2008 did not include a right to inspect bank statements. As has been said above, particularly in paragraph 13, there is in any event no right to a public inspection of these materials.

19. The Commissioner therefore determined that:

- (1) the information requested constituted personal data: this has been dealt with above: however the Tribunal takes the view that it is the redacted items in the information requested which constituted personal data in this matter since it is only that material that the settlement figure can be identified and/or deduced from;
- (2) the Council's submission to the effect that the expectations of Mrs Sage as the former clerk and as the data subject were not outweighed by the legitimate interests pursued by the Council as the data controller was to be accepted: at paragraph 60 the Commissioner placed particular reliance on the expectation by Mrs Sage that information regarding the settlement agreement ought not be put into the public domain and on the express terms that confidentiality apparently existing in the settlement agreement itself;
- (3) a reference to an "interested person" in the ACA 1998 did not connote a right of inspection to anyone who is "interested" in the everyday sense of the word "interested" in seeing the accounts of a public authority, thereby necessarily implying that there was no general right of disclosure under FOIA; and
- (4) in the circumstances disclosure of information which would lead or might lead to identification of the amount of the settlement payment "could have an adverse impact on the recipient of the payment" and the same was "more than a slight hypothetical possibility": see paragraph 60 of the Notice.

The Notice of Appeal

20. The Notice of Appeal is dated 28 September 2009. Appended to the formal Notice is a document setting out three separate Grounds of Appeal.

21. The first relates to the argument already referred to on more than one occasion above, namely that the fact that the Council's publication scheme which was in place at the time compelled the Council to disclose all bank statements meant that there should be disclosure in the present case.

22. The second ground of appeal sought to rely on a number of documents principally of an accounting nature which were described as having "come to light" in the previous few weeks prior to the Notice of Appeal and which were said to constitute information "which has a significant bearing upon the request ...". First it was claimed that the amount which Mrs Sage received in her compensation package "can now be derived via documents put into the public domain" by the Council. The Appellant went on to allege that in the light of these materials a particular figure could be extrapolated and be said to constitute the amount of the settlement taking into account certain itemised deductions. The Appellant went on to state that the Council had failed to give sufficient weight to the information already in the public domain being a reference to the sum of £1,000 paid by way of costs to Mrs Sage's solicitors. Finally, in relation to this ground of appeal the Appellant disputed the finding of the Commissioner reflecting that of the Council, namely that Mrs Sage had not consented to disclosure of the information requested.

23. The second stated ground of appeal appears to seek to correct what are claimed to be inaccuracies in the Decision Notice regarding a number of factual matters finding reflection in the Decision Notice itself. It is perhaps not unfair to summarise this head of complaint as an allegation that overall the Commissioner had in the words of the Appellant "failed to investigate the matter properly". The reason why it can be said in the Tribunal's view not to constitute a proper ground of appeal is that there is simply no evidence which has been put in to refute these findings leaving the Tribunal in a position not to be able to address or assess the correctness or otherwise of the Commissioner's findings in this respect.

24. The third ground of appeal refers to an earlier Tribunal decision entitled *Rob Waugh v Information Commissioner and Doncaster College* (EA/2008/0038). Reference is made at paragraph 61 of the Decision Notice to this Decision in support of the Commissioner's finding that a confidentiality agreement of the type agreed to by Mrs Sage in the present case would generally give rise to: "... a reasonable expectation that no further information would be released". The Appellant appears to take the view that the *Waugh* decision sets a precedent which should be followed in this case since, in his view, there are close similarities. As will be seen below, although the Tribunal respectfully takes issue with the way in which the *Waugh* decision has been characterised by the Commissioner, the Tribunal nonetheless agrees with the general observation that the existence of a confidentiality agreement would give rise to a reasonable expectation that no further information would be released.

Evidence

25. Mrs Sage has provided a signed witness statement. Parts of the original document submitted to the Tribunal have been redacted but an unredacted version has been considered by the Tribunal and by the Commissioner. This is in accordance with normal Tribunal practice. The stated intention was to express or reflect her concern that the Decision Notice contains statements which in her own view were inaccurate or which reflected inaccurate assumptions. The Tribunal is grateful to Mrs Sage for having taken the time and care to put her version of the relevant events before the Tribunal in this way. However, the Tribunal views her exchanges with the Tribunal as being outside the terms and spirit of the directions which are made in this case and indeed as going beyond the terms of a witness statement and as thus being unnecessary, and not particularly conducive, to a proper and efficient disposal of the issues. At all times Mrs Sage has remained a witness and not a party to the proceedings, a fact which she appears on occasion to have forgotten or overlooked.

26. Her unredacted statement and its enclosures together constitute a reasonably lengthy document. However, the core of her redacted statement could not be more explicit. Before turning to her statement reference should be made to an earlier signed statement made by her and dated 24 September 2009. This earlier statement also takes issue with some portions of the Decision Notice. Without reciting the terms of the relevant passages in full it is enough to summarise it as follows, namely:
- (1) although she admits to having signed the clause as to confidentiality she “knew that the Council would need to include the amount in its annual accounts and as this was a legal requirement I could not take the council to court for breaching the confidentiality clause” adding “I could only take them to court for breach of the confidentiality clause if the amount came out in some other way, i.e. disclosed to a member of the public by a Councillor or officer of the Council”; and
 - (2) the confidentiality clause was included “at the request of the Council, and not me”.
27. In her subsequent redacted statement of 15 March 2010 in which she refers to her earlier statement, she states that as a result of her comments she understood that the Commissioner felt that she may have breached the confidentiality agreement with no reason having been given to her. However, having spoken to her solicitor she remained “confident” that she had not done so. She denied that she ever consented to disclosure and sought to make it “very clear” that she did not and “do not” consent to such disclosure. In that sense she was prepared to concede that as the Council was a public body she might have expected the amount to be included in the Council’s annual accounts and that the public could deduce or discern the amount from those but perhaps not as to the precise amount in question though “very close” to it.
28. No other material has been placed before the Tribunal. In the written submissions put in prior to the Appeal on the part of the Appellant it is

claimed that it “seems” that members of the public can calculate the compensation “fairly precisely”. The passage in question in these written submissions goes on to assert that within the area where the Council is located “it is probably known to 15 Councillors (and perhaps their partners) and at least one member of staff.”. The Tribunal is not in any way inclined to take what would be no more than a totally speculative assumption into account even were the said factor relevant to a determination of this appeal, which in the Tribunal’s view it is not.

The issues

29. In written submissions put in on the part of the Commissioner with regard to this Appeal, it is contended at paragraph 27 that apart from the first ground of appeal referred to above which in turn relied upon the Council’s then existing publication scheme, the only remaining issue was whether the Commissioner was correct in his decision that the disputed information was exempt from disclosure under section 40(2) of FOIA.
30. As indicated above, the Tribunal does not view this as being a separate ground of appeal even though the same has been addressed at length in the written submissions put in on behalf of the Appellant. As indicated above, the Tribunal is not prepared to ignore the clear and simple terms of the request in this case which was one for the disclosure of bank statements alone. In the main, they have been provided. The Tribunal has, however, already indicated that it finds it difficult, if not impossible, to accept any argument that the redacted information did not constitute personal data so as to attract and engage the absolute exemption contained in at section 40(2) of FOIA. It is true that a cross-reference is made in the Grounds of Appeal to paragraphs within that section of the Decision Notice which deals with the applicable data protection principle. However, that is not the same as constituting a specific contention that section 40(2) is not engaged.
31. However, as also indicated above, and with regard to the fact that the Appellant was at the least at the time of his original Grounds of Appeal

unrepresented and in case the Tribunal is wrong with regard to the matters set out in the preceding paragraph, it will address below the contention as to whether or not section 40(2) of FOIA applies. If nothing else, dealing with that aspect will also address the reference made to the Tribunal's earlier decision in *Waugh v the Information Commissioner and Doncaster College supra* which decision is mentioned by name, but no more than that, in relation to the heading dealing with the third ground of appeal.

Ground 1: the publication scheme

32. Section 19(1)(b) of FOIA provides that it shall be the "duty of every public authority to publish information in accordance with its publication scheme". Section 19(2)(a) provides that a publication scheme must "specify classes of information which the public authority publishes or intends to publish."
33. As of June 2008, the Council had adopted a model publication scheme for local councils in England and Wales. The version which the Tribunal has seen is described on its face as version 2 and bears the date of 03/10/02. In clause 6) described as "Audit Accounts" there is a clear reference to "Bank statements from all accounts" albeit with the additional words "limited for the last financial year".
34. In the Decision Notice already summarised above, the Commissioner confirmed that he considered that it was, and is possible, for exempt information to be contained within a class of information listed in a publication scheme. It followed that the Council's refusal in the instant case to disclose the information requested, even in the redacted form, constituted a breach of section 19, and in particular section 19(1)(b).
35. The Appellant's argument amounts to a contention that the Council must disclose the information requested in the present case, irrespective of whether or not the information in question, or any part of it, might be exempt under any specific provision contained in FOIA.

36. The Tribunal has been shown the Commissioner's Guidance on Publication Schemes in a one-page document headed "Section B: Publication Scheme Specification Text Document (Mandatory)". In a numbered section 2 headed "Each scheme must specify the classes of information which the public authority will publish, or which they intend to publish" there appears the following subparagraph, namely:

"2 c) Any classes that could contain information which may be subject to exemptions should be clearly identified as such and the reasons given."

37. The Tribunal agrees with the conclusion put forward by the Commissioner in his Reply when he points out that in the present case, the Council publication scheme did not specify or in any way state that information which might comprise or be contained in the "bank statements" class of information might be subject to exemptions.

38. However, as also noted by the Commissioner in the latter's Reply, a subsequent publication scheme due to be adopted by all public authorities as at 1 January 2009 expressly stated that:

"[t]he classes of information will not generally include ... information the disclosure of which is prevented by law, or exempt under [FOIA], or as otherwise considered to be protected from disclosure."

39. The fact remains that nothing in section 19 or indeed in any other provision of FOIA, prohibits or in any way prevents a public authority from relying on one or more exemptions in Part II of FOIA. In relation to information falling within a class included within the public authority's publication scheme it follows that, in the Tribunal's judgment, the Commissioner was entirely justified in finding that the Council in this case could continue to rely on the terms and effect of section 40(2). The Tribunal therefore respectfully does not accept the argument put forward by the Appellant on this ground.

40. The Appellant's written submissions revisit this ground of appeal at greater length, but not in a manner which the Tribunal has found particularly illuminating.

41. First, it is claimed that section 21(3) of FOIA "appears to exempt from publication under s.1(1) of [FOIA] information required to be published under a publication scheme." This point is not developed further in the submissions. The Tribunal fails totally to understand this argument. Nothing in section 21, let alone section 21(3), suggests directly or indirectly that any of the exemptions in Part II of FOIA is to any extent not applicable if the type of information sought to be disclosed is referred to in generalised form in a publication scheme. Indeed, the written submissions themselves refer to the content of another publication issued by the Commissioner, entitled "Publication Schemes, Guidance and Methodology" (April 2002) which recognised or recognises that "as a matter of good practice", a public authority should explain clearly in its scheme which information it regards as exempt.

42. Second, the written submissions maintain that the Tribunal may feel that it faces two potentially difficult choices, namely, "a claim that all information in a publication scheme must be provided", or a decision that a publication scheme has no effect. Again, with respect to the way these submissions are drafted, the Tribunal finds this a very difficult argument to comprehend. The Tribunal faces no such choice in relation to the present appeal. There is no question of principle involved, save to consider whether the Commissioner's decision on the basis of the grounds of appeal in this case should be upset or upheld. The Tribunal regards there as being no inconsistency in this case between, on the one hand a formal breach of section 19(1), and on the other, a proper application of the relevant exemption or exemptions applied in Part II of FOIA.

Ground 2: new information

43. As indicated above and in relation to the second Ground of Appeal, the Appellant alleges that it is possible to determine what the undisclosed information is based on other information which is reasonably obtainable. As can also be seen from what has already been set out in this appeal, he even goes so far as to estimate as to what the precise figure might be.
44. In the Tribunal's view, this ground must be rejected. First, in the Tribunal's view, the proper answer to these contentions is the one provided in the Commissioner's Reply. In the Tribunal's judgment and as contended for by the Commissioner, it is beyond doubt that whether or not any form of guess can be made in the way suggested by the Appellant, is entirely irrelevant to a consideration of whether the Decision Notice, or any part of it, is either wrong in law or reflects an erroneous exercise of the Commissioner's discretion such as properly to justify an appeal to this Tribunal. Second, it is asserted by the Appellant that the Commissioner has in some way failed in the discharge of his duties and responsibilities by failing to interview him, i.e. the Appellant. The Tribunal agrees yet again with the Commissioner that no failure of the type alleged or in any other way can be attributed to the Commissioner's actions in investigating the complaint by the Appellant.
45. Thirdly, issue is taken with the Commissioner's finding that Mrs Sage had not consented to disclosure. This matter has again been referred to above in connection with the evidence in this appeal. In the light of Mrs Sage's evidence, the unredacted part of which has been abbreviated above, it appears unquestionable to the Tribunal that Mrs Sage did not consent, and continues not to consent, to disclosure. Even if the finding of the Commissioner in his Decision Notice to that effect was at any time no more than an assumption, it is now entirely borne out by what Mrs Sage has since stated in express terms. In any event, the Commissioner's assumption was fully warranted from the confidentiality agreement which was in place at the time of the settlement with the Council. There is no evidence before the Tribunal that any such agreement has in some way since lapsed or become invalid.

46. Furthermore, the Tribunal is impressed by a further contention made by the Commissioner in this respect. The first data protection principle set out in Schedule 1 to the DPA is to the effect that personal data “shall be processed fairly and lawfully”. In particular, at least one of the conditions in Schedule 2 of the DPA must be met. The first such condition is consent on the part of the data subject. Here, Mrs Sage has not consented in any way whatsoever. Condition 6, however, provides that publication is, or must be, “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.”
47. Even assuming the balance to be struck in accordance with the above provision militated in favour of disclosure, principally on the ground of Mrs Sage’s alleged consent, Condition 1 stipulates that the processing must be “lawful”. The Tribunal has been acquainted with materials which verify the existence of this confidentiality agreement. The fact that arrangements were specifically put in place at the time of the settlement agreement points unequivocally to the Council being in breach of contract were disclosure to take place. Any such disclosure would constitute unlawful processing, and thus a breach of the first data protection principle. It follows that the disputed information would remain absolutely exempt from disclosure under section 40(2) on that ground alone.
48. Finally, the Appellant, for the sake of completeness, might be said to seek to rely on section 15 of the ACA 1998 to justify disclosure, although as indicated above, the Tribunal is not convinced that this constitutes a formal ground of the appeal before it. Nonetheless, the Tribunal finds that there is nothing to impeach the Commissioner’s finding in turn based on information imparted to him by the Council that the relevant bank statements were not made publicly available. The Tribunal notes that in an unredacted statement put before the Tribunal by Mrs Sage, she stated that it had been her former practice to include bank statements in the public accounts

available for inspection. However, the Tribunal entirely accepts the Commissioner's contention that there has never been any legal obligation, either under ACA 1998, or otherwise to publish such information. Furthermore, the Tribunal having been referred to the ACA 1998 and in particular section 15, observes that section 15(3) expressly states that personal data must not be made available for inspection nor disclosed in answer to any question.

Ground 3: Waugh

49. As for the third ground referred to above, the precise basis or bases for this ground remain, in the Tribunal's considered view, unclear. First reference is made to the *Waugh* case, a 2008 decision of this Tribunal. The Tribunal has carefully re-read the decision. Disclosure of the severance payment in question in the *Waugh* decision was not an issue before the Tribunal in that case, as the figure had already been disclosed. Indeed, both parties recognised that the figure would be made public. The circumstances in that decision are therefore quite distinct. For one thing, in the *Waugh* Decision Notice, the Commissioner determined that the individual in question would have had a reasonable expectation that details of the payment would appear in the relevant annual accounts. Moreover, the Commissioner found in the relevant Decision Notice that that expectation was acknowledged by the public authority. Those features of themselves serve to distinguish the facts in the *Waugh* decision from those which are in issue here.

Section 40(2)

50. Reverting to what has been said above at paragraph 30 and on the assumption that the said ground of appeal raises the same matters, the Tribunal now turns to the apparent issue which the Appellant takes with the applicability of section 40(2) but the Tribunal finds it impossible to fault the terms of the Decision Notice on this score. To this extent the Tribunal repeats what is said above at paras 46 to 47.

51. In any event, it is well established in the case law of this Tribunal that personal data will be exempt from disclosure under section 40(2) of FOIA if such disclosure would breach a data protection principle. The most relevant, and indeed only, such principle in question here is the first principle which reflects three elements, namely that the disclosure should be fair, lawful and should have at least one of the conditions set out in Schedule 1 to the Data Protection Act 1998. The only relevant such condition is condition 6. The Tribunal takes the view that disclosure here can be said to be neither fair nor lawful on the simple ground based on the absence of consent and the content of the confidentiality agreement entered into by Mrs Sage.
52. In any event it is equally well established in the case of this Tribunal that condition 6 embodies the three-fold test. First, there must be shown to be a legitimate public interest in disclosure: second, such disclosure must be necessary to promote that public interest and thirdly, the said disclosure must not have caused or might not cause unwarranted interference with the interests of the individual. These matters were not explored before the Tribunal. In any event, it is not necessary to do so given the view the Tribunal has reached with regard to the first data protection principle.

Conclusion

53. For all the above reasons the Tribunal dismisses this appeal and upholds the findings of the Commissioner in his Decision Notice.

Signed

David Marks QC

Judge

Date 15 June 2010