



# Tribunals Service

## Information Rights

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

**EA/2010/0089**

**ON APPEAL FROM:**

**Information Commissioner's Decision Notice: FS50189595  
Dated: 25 March 2010**

**Appellant: ALISON INCE**

**Respondent: THE INFORMATION COMMISSIONER**

**Date of hearing: 20 October 2010**

**Date of Decision: 17 November 2010**

**Before**

**Annabel Pilling (Judge)  
Richard Enderby  
and  
Darryl Stephenson**

**Attendances:**

For the Appellant: Alison Ince  
For the Respondent: Mr E. Capewell

**Subject matter:**

FOIA Absolute exemptions – Personal data s.40

**Cases:**

*Johnson v Medical Defence Union* [2006] EWHC 321 (Ch)  
*Blake v Information Commissioner and Wiltshire County Council*  
EA/2009/0026  
*Common Services Agency v Scottish Information Commissioner* [2008] UKHL  
47  
*Corporate Officer of the House of Commons v Information Commissioner,*  
*Brooke and others* (EA/2007/0060) and [2008] EWHC 1084 (Admin)

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

**EA/2010/0089**

**DECISION OF THE FIRST -TIER TRIBUNAL**

The Appeal is allowed in part and the Decision Notice dated 25 March 2010 is substituted by the following notice:

**SUBSTITUTED DECISION NOTICE**

***Dated 17 November 2010***

**Public authority:**

THE DEPARTMENT FOR EMPLOYMENT AND LEARNING

**Address of Public authority:**

39-49 Adelaide Street

Belfast

Northern Ireland

BT1 8FD

**The Substituted Decision**

For the reasons set out in the Tribunal's Decision the substituted decision is that the public authority failed to deal with part of the request for information in accordance with the Freedom of Information Act 2000; the part of the disputed information relating to Derek Martin does not fall within the exemption in

section 40(2) of FOIA and should have been disclosed. The remainder of the disputed information does fall within the exemption in section 40(2) of FOIA and the public authority is entitled to withhold it from disclosure.

## **Action Required**

The Department for Employment and Learning must now disclose to the Requestor the information identified relating to Derek Martin, with the names of other identified persons redacted, to ensure compliance. The authority must do so within 35 calendar days from the date of this Substituted Decision Notice.

Dated this 17 November 2010

Signed

**Annabel Pilling**  
Judge

## **Reasons for Decision**

### **Introduction**

1. This is an Appeal by Ms Alison Ince against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 25 March 2010. The Decision Notice relates to a request for information made by Ms Ince to the Department for Employment and Learning (the 'DEL') under the Freedom of Information Act 2000 (the 'FOIA').
2. The disputed information in this case is personal data as defined in section 1(1) of the Data Protection Act 1998 (the 'DPA') and was withheld under the exemption provided for in section 40(2) of FOIA by virtue of section 40(3)(a)(i) of FOIA, on the basis that disclosure would contravene one of the data protection principles.

### **Background**

3. Between 1992 and 1999 Ms Ince was in employment with a further education establishment in Northern Ireland (the 'Institute'). She was dismissed June 1999. The Institute later conceded liability for unfair dismissal before an Industrial Tribunal in 2006.
4. The Industrial Tribunal heard evidence over the course of 25 days to decide remedy; the main issue was Ms Ince's alleged contributory fault. This was not accepted by the Tribunal to the extent alleged and Mrs Ince was given a substantial award. As part of its effort to determine the extent of any alleged contributory fault, the Industrial Tribunal was asked to consider Ms Ince's allegations of harassment and bullying in the workplace and whether the course of disciplinary action taken against her amounted to a form of victimisation for disclosure she claimed she made about the alleged fraudulent activity of one of her line managers. Having considered the evidence provided over the course of the hearing, the Industrial Tribunal rejected Ms Ince's claim that her treatment by the Institute amounted to victimisation by reason

5. The allegations of fraud concern events in June 1997 and, since being brought to the attention of a number of public bodies in the period 2002-2004, have been investigated by the Financial Audit and Support Team (FAST) of the DEL, and considered twice by the Police Service of Northern Ireland (PSNI). No charges have been brought or are anticipated, no disciplinary action has been taken against any individual and no further investigation has been deemed warranted on current evidence. Ms Ince continues to pursue her allegations of fraud.
6. The disputed information in this case concerns records of interviews with individuals concerning these allegations of fraud.

The request for information

7. By e-mail dated 18 October 2007 Ms Ince made the following request for information to the DEL in respect of her allegations of fraud at the Institute:

*I wish to know the following:*

*1 Who were the four other personnel named by Ms Ince?*

*2 When were they interviewed?*

*3 Where were they interviewed?*

*4 By whom were they interviewed?*

*5 What questions were put to them?*

*6 What answers did they give?*

*7 Was the information gleaned passed on to any other person/organisation? If so, to whom and when?*

*8 What steps, if any, did the Department take to ascertain the accuracy of the information gleaned?*

*I also wish to have a copy of the two evidence packs which were compiled and referred to the Fraud Squad for assessment.*

8. On 12 November 2007 the DEL responded to each of the questions in turn. It answered questions 2, 4, 7 and 8 but in relation to the other questions it indicated that it held the requested information, but withheld it on the basis that it was exempt from disclosure under section 40(2) of FOIA; that is, the information was personal data and its disclosure would breach the first data protection principle set out in the Data Protection Act (the 'DPA'). It considered that the information contained within the two evidence packs had been provided in confidence and therefore fell within the exemption in section 41 of FOIA.
9. Ms Ince was dissatisfied with the response and requested an internal review on 19 November 2007. She argued that DEL had misapplied sections 40 and 41 of FOIA and stated that much of the information was already in the public domain.
10. On 2 January 2008 the DEL responded to the request for an internal review. It provided more detailed reasons as to why it considered that disclosure of this information would breach the first data protection principle and upheld the initial decision that the information requested is exempt through the provisions of section 40(2) of FOIA. It did however provide the two evidence packs with some information redacted.

#### The complaint to the Information Commissioner

11. Ms Ince contacted the Commissioner on 11 January 2008 to complain about the way her request had been handled. In particular she explained that she considered DEL misapplied the exemptions in section 40 and 41 of FOIA in contravention of the Commissioner's

12. The Commissioner then investigated the substantive complaint, receiving additional information from Ms Ince and DEL.
13. During the course of the Commissioner's investigation, DEL released information concerning the location where one of the interviews had been held but maintained that it did not in fact hold any further information for question 3. In respect of question 5, DEL informed Ms Ince that no questions were put to three of the interviewees but the fourth interviewee was invited to comment on two specific areas of investigation. Ms Ince was informed that the information was not held for three of the interviewees but the questions put to one interviewee were withheld relying on section 40(2) of FOIA.
14. The Commissioner issued a Decision Notice on 25 March 2010.
15. The Commissioner upheld the application of section 40(2) of FOIA to the disputed information as it was the personal data of the data subjects within the meaning of section 1(1) of the DPA and that disclosure would breach the first data protection principle (that data should be processed fairly and lawfully). The Commissioner also determined that some of the information is exempt under section 40(1) of FOIA because it is the personal data of Ms Ince and the DPA provides for an alternative route of access.<sup>1</sup>
16. The Commissioner also found a number of procedural breaches of the FOIA, which are not the subject of any appeal.

### The Appeal to the Tribunal

17. Ms Ince appealed to the Tribunal on 6 May 2010.

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<sup>1</sup> However, the Commissioner does not believe that it is likely the DEL could disclose the information pursuant to a subject access request without breaching section 7(4) DPA.

18. The issue raised in the grounds of appeal is whether disclosure of the disputed information would breach the data protection principles.
19. The Appeal has been determined following a hearing on 20 October 2010. Ms Ince appeared via a video-link. The Tribunal was provided with an agreed bundle of documents and written submissions from both Ms Ince and the Commissioner. The Tribunal heard oral submissions from Ms Ince and Mr Capewell, with Ms Ince having the opportunity to reply to Mr Capewell's submissions.
20. In addition, the Tribunal was provided with a Closed bundle of documents. This bundle included the disputed information. This was not made available to Ms Ince, as to disclose it to her would defeat the purpose of this Appeal. For the same reason, the Tribunal held a short Closed session during the hearing in order to ask questions of Mr Capewell on behalf of the Commissioner that related to the content of the disputed information.
21. During the course of Ms Ince's reply to Mr Capewell's submissions, she submitted that Derek Martin, one of the individuals whose personal data had been withheld by DEL, denied that he had been contacted to ascertain whether he consented to that data being disclosed or not, that he did consent to disclosure and that he was present with Ms Ince during this hearing. A statement had been provided in the agreed bundle of documents from Derek Martin but this did not deal with the issue of consent. The Commissioner had indicated that the content of the witness statement was not challenged and Mr Martin was not required to attend to give evidence before the Tribunal. The Tribunal had drawn Ms Ince's attention to the fact that the issue of consent had not been addressed in the statement but she did not seek to submit any additional evidence.
22. It was therefore of no little concern to the Tribunal that such a significant issue had not only been disregarded by Ms Ince but had been brought up only during her reply submissions. In order to deal



23. Mr Martin confirmed that he had given evidence before the Industrial Tribunal and that evidence, save for the naming of other individuals, was the same as was in the disputed information relating to him in this case. He gave his consent for his personal data to be disclosed save for the redaction of the names of those other individuals.

24. Although we may not refer to every document in this Decision, we have considered all the material placed before us.

#### The Powers of the Tribunal

25. The Tribunal's powers in relation to appeals under section 57 of the FOIA are set out in section 58 of the FOIA, as follows:

*(1) If on an appeal under section 57 the Tribunal considers-*

*(a) that the notice against which the appeal is brought is not in accordance with the law, or*

*(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

*the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*

*On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

26. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives and hears evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether FOIA has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.
27. The question of whether the exemption in section 40(2)(a) of FOIA is engaged, is a question of law based upon the analysis of the facts. This is not a case where the Commissioner was required to exercise his discretion.

### The Legal Framework

28. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it holds the information requested, and (b) if so, to have that information communicated to him.
29. The section 1(1)(b) duty of the public authority to provide the information requested will not apply where the information is exempt by virtue of any provision of Part II of FOIA. The exemptions provided for under Part II fall into two classes: absolute exemptions and qualified exemptions. Where the information is subject to a qualified exemption, it will only be 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 (section 2(2)(b)). Section 40(2)(a) of FOIA is an absolute exemption. Information that falls within

30. The issue for determination in this Appeal is whether the disputed information is exempt under section 40(2) of FOIA.

31. The relevant part of section 40(2) of FOIA provides:

*(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 second condition below is satisfied.*

*(3) The first condition is –*

*(a) In a case where the information falls within any of the paragraphs (a) to (d) of the definition of ‘data’ in section 1 (1) of the 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).....*

32. Section 1(1) of the DPA defines “personal data”:

*“..data which relates to a living individual who can be identified-*

*(a) from those data, or*

*(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.”*

33. There is no dispute that the disputed information, held by the DEL as the data controller, constitutes “personal data”.

34. 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).

35. The data protection principles regulate the way in which a “data controller” (in this instance, the DEL) must “process” personal data. The word “process” is defined in section 1(1) of the DPA and includes:

*“disclosure of the information or data by transmission, dissemination or otherwise making available.”*

36. The first data protection principle provides:

*Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –*

- (a) at least one of the conditions in Schedule 2 is met, and*
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.*

37. There are three parts to the first data protection principle:

- (i) whether the processing (here, disclosure) of the information would be ‘fair’;
- (ii) whether the processing would be ‘lawful’; and
- (iii) whether there is at least one relevant condition for processing. (The conditions for processing are set out in Schedule 2 DPA<sup>2</sup>)

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<sup>2</sup> For the processing of sensitive personal data at least one condition from Schedule 3 must also be met. The disputed information in this case is personal data **not** sensitive personal data.

38. So far as the second requirement of the first data protection principle is concerned, the DPA does not specify what is meant by “lawful” processing. We consider that disclosure where that disclosure is prohibited by statute would certainly not be lawful processing. Disclosure of information that would give rise to a civil liability, for example, because it would amount to a breach of confidence, also might not constitute lawful processing. In this Appeal, no party has argued that disclosure of the disputed information would be unlawful.

39. The issues before the Tribunal are therefore-

- (i) whether the processing would be fair;
- (ii) and, if so, is at least one of the relevant conditions for processing in Schedule 2 DPA met.

#### Submissions and analysis

40. There is an inherent tension between the objective of freedom of information and the objective of protecting personal data. It has been observed that section 40(2) of FOIA is a “complex provision”<sup>3</sup>. There is no presumption that openness and transparency of the activities of public authorities should take priority over personal privacy. In the words of Lord Hope of Craighead in *Common Services Agency v Scottish Information Commissioner*<sup>4</sup> (referring to the equivalent provisions in the Freedom of Information (Scotland) Act 2002 (the ‘FOISA’):

*“In my opinion there is no presumption in favour of the release of personal data under the general obligation that FOISA lays down. The references which that Act makes to provisions of DPA 1998 must be understood in the light of the legislative purposes of that Act, which was to implement Council Directive 95/46/EC. The guiding principle is the protection of the fundamental rights and freedoms of persons, and in particular*

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<sup>3</sup> *Blake v Information Commissioner and Wiltshire County Council* EA/2009/0026

<sup>4</sup> [2008] UKHL 47

*their right to privacy with respect to the processing of personal data....”*

### Fair processing

41. Part II of Schedule 1 of the DPA includes matters to be taken into account in interpreting the data protection principles. Paragraphs 1 to 4 of Part II of Schedule 1 provide interpretive guidance as to the requirement to process fairly. Paragraph 1 is concerned with the manner in which the data are obtained, including in particular whether any person from whom the data are obtained is deceived or misled as to the purpose or purposes for which they are to be processed; Paragraphs 2, 3 and 4 set out circumstances in which personal data are either not to be treated as processed fairly or to be treated as processed fairly, and relate to requirements to provide certain information to data subjects. These matters are not exhaustive and the test of fairness is a general one and is not confined to a consideration of whether those requirements have been met. Even where there is compliance with paragraph 2 then the processing may still be unfair on general grounds (*Johnson v Medical Defence Union*<sup>5</sup>) No party directly addressed Part II of Schedule 1, either in submissions or in evidence, but we have taken these matters into account when considering the issue of fairness in this case.

42. Ms Ince, who was unrepresented in this Appeal, disagrees with the weight given by the Commissioner to the arguments in favour of disclosure in respect of four factors and submits that he should have concluded that these factors supported disclosure of the disputed information:

- (i) The information relates to the individual's public rather than private life.

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<sup>5</sup> [2006] EWHC 321 (Ch) paragraph 114 onwards.

- (ii) Any likely harm or distress that might be caused to the individuals by disclosure of the disputed information.
- (iii) The objection of the interviewees.
- (iv) The reasonable expectations of the interviewees.

*The information relates to the individual's public rather than private life.*

43. Ms Ince submits that the disputed information relates to the individual's public and not private lives and suggested that anything that did not relate to public life should be redacted. She submits that the work of public employees should be open to proper scrutiny by the public for whom they work and by whom they are paid.
44. In particular, Ms Ince submits that the nature of the further education sector is such that most staff have roles that are, to a greater or lesser extent, public facing and that some at least of the people she named to DEL as being able to support her allegations of fraud were in relatively senior positions.
45. The Commissioner submits that not all information relating to an employee of a public authority will be public information and that there will be aspects of employment which are private and over which one would expect to have a certain level of confidentiality. In this instance, while it relates indirectly to the professional roles of the individuals, the disputed information does not relate to a public aspect of their employment but amounted to a personally held opinion.
46. In order to avoid revealing personal data, it is not possible to confirm that the four people Ms Ince named to DEL as being able to substantiate her allegations of fraud are the four individuals whose interviews form the disputed information in this case.

47. We agree with Ms Ince that a distinction can be drawn between the information which senior staff should expect to have disclosed about them compared to what information junior staff should expect to have disclosed about them. The rationale for this distinction is that the more senior a member of staff is, the more likely it is that they will be responsible for making influential policy decisions and/or decisions related to the expenditure of significant amounts of public funds.
48. Along with other differently constituted panels of this Tribunal, we consider that when assessing whether processing would be fair, where data subjects carry out public functions, hold elective office or spend public funds, there must be greater scrutiny over their public actions than in respect of their private lives. We therefore disagree with Ms Ince's submission that everything a public employee says or does is public information and that disclosure of it could never be unfair.
49. In this case, the disputed information goes beyond information directly concerning the individual's public role or decision making process and relates to personal views and opinions on the allegations of fraud in 1997 made by Ms Ince. Two of us considered that the disputed information in the case related to the individual's employment but was not information so directly connected with their public role that its disclosure would automatically be fair. One member of the Panel considered that the disputed information was "hybrid" information in that it was impossible to fully separate the public information from the private information. We considered whether it might be possible to redact the disputed information in some way but concluded that it would not be feasible having regard to its contents.
50. We concluded that simply because the information emanates from an employee of a public authority does not automatically make disclosure fair. The Commissioner was right to consider this factor and we consider that he gave it appropriate weight in deciding whether the



*Any likely harm or distress that might be caused to the individuals by disclosure of the disputed information.*

51. Ms Ince submits that the Commissioner's own Guidance makes it clear that the focus should be on harm or distress that might be caused in a personal capacity and that "a risk of embarrassment or public criticism over administrative decisions, or the interests of a public authority itself rather than the individual concerned, should not be taken into account."
52. As a result of the allegations being aired during the Industrial Tribunal case, Ms Ince submits that the nature of the allegations and the names of those she alleged committed the fraud have already been made public. She submits that nothing in the disputed information is therefore likely to cause any further distress to the interviewees and, even if it were likely to do so, it is unlikely to be in a personal capacity.
53. The Commissioner submits that while some of the staff might expect that their *role* would be open to public scrutiny, the disputed information would not provide that scrutiny and that disclosure of the fact they were interviewed in respect of allegations of fraud would cause them distress. He submits that his consideration was not whether the DEL would suffer embarrassment or distress, but the individuals whose personal data would be disclosed.
54. Again, it is not possible for us to confirm that the four people Ms Ince named to DEL as being able to substantiate her allegations of fraud are the four individuals whose interviews form the disputed information in this case nor, save for Derek Martin, whether they are individuals who were named in any capacity during the Industrial Tribunal case in 2006. Ms Ince concedes that the fact the individuals were interviewed by DEL about her allegations of fraud could not have been in the public domain as she was not aware until 2007 that anyone other than Derek Martin

55. What is clear from the papers provided to us in the agreed bundle, is that Ms Ince had approached at least two individuals in advance of the Industrial Tribunal hearing with a view to calling them as witnesses in support of her case and that they declined, with one indicating that any further approach by Ms Ince would lead to her seeking legal advice. We have seen letters written by Ms Ince of an inflammatory nature that must have caused distress to the recipients, likening a reluctance to give evidence of the injustice suffered by Ms Ince at the Institute to the behaviour of those who did not speak out against the injustice caused to Jews being sent to the gas chamber.
56. We agree with the Commissioner's conclusion that disclosure of the disputed information would be likely to cause distress to the individuals, save for Mr Martin who gave evidence to the contrary before us.
57. We consider that there is a real likelihood of harm or distress being caused by Ms Ince specifically. We have reached this conclusion in light of what we consider to be Ms Ince's disproportionate actions in pursuing her aims in the past by attempting to secure support at the Industrial Tribunal hearing and also in light of her indication before us that she intended to pursue private prosecutions against these individuals and needs these interviews to challenge the evidence that they might give at some future date.
58. We also consider that there is a real likelihood of harm or distress being caused by disclosure generally. In late 2005 or early 2006 these individuals were asked questions or asked to comment in relation to an alleged fraud committed in June 1997. There have been a number of investigations by proper authorities into the allegation of fraud made by

The objection of the interviewees.

59. Ms Ince concedes that the objection of the interviewees is a relevant consideration but submits that the Commissioner attached too much significance to this factor in deciding whether disclosure would be fair. She submits that given her other arguments, the other circumstances of the case create a sufficiently compelling argument for disclosure to outweigh the interviewees' objections.

60. The Commissioner submits that the objection of the individuals concerned was only one factor taken into consideration and that when considering whether disclosure would breach the first data protection principle he took into account the circumstances of the case, in particular the following factors:

- (i) they have confirmed they do not wish their identity to be known;
- (ii) they were provided with an assurance of confidentiality;
- (iii) they had a reasonable expectation that the information would be kept confidential, other than as part of the fraud investigation (e.g. including an investigation by the police);
- (iv) it is likely that the disclosure of the information would cause distress to those concerned;
- (v) if the withheld information were to be disclosed it would have the effect of seriously undermining confidence for staff involved in future investigations.

61. We consider that the Commissioner did not give disproportionate weight to the objections of the individuals concerned when deciding whether disclosure would be fair but that it was one of the factors he took into account.

62. Save for Derek Martin who no longer objects to disclosure, we are satisfied that there is no evidence to suggest that the objections of the individuals concerned has altered. Three of the four interviewees were asked if they would consent to the disputed information being disclosed pursuant to a request made under FOIA. None asked gave their consent and expressed the expectation that their names and information provided by them would be kept confidential. The fourth individual could not be contacted but we do not consider that we can infer no objection, rather, because this is but one of the factors we must take into consideration, we infer that the individual's wishes remained as indicated previously.

*The reasonable expectations of the interviewees*

63. Ms Ince again concedes that the reasonable expectations of the individual as to whether his or her information would be disclosed is a relevant consideration. She submits that DEL should not have given and did not have the authority to give any assurance that the information provided by the individuals would be kept confidential, as the subject matter related to alleged fraud, the alleged commission of a criminal offence.

64. The Commissioner submits that the individuals were interviewed for the *"...sole purpose of investigating allegations of fraud with an explicit assurance that any information would be treated confidentially."* He also relies on the witness statement of Derek Martin who stated that Ms Ince herself had obtained a *"guarantee that neither my identity nor my testimony would be revealed to anyone."*

65. He submits that he properly took these factors into account when considering the expectation of the interviewees and that there was clearly an expectation that the information was provided to DEL in confidence.

66. The Commissioner urges us to remember that the allegations of fraud are mere allegations and remain so until proven. He submits that this would therefore be a factor in favour of keeping the disputed information, obtained during the investigation of these allegations, confidential.

67. We agree with the Commissioner's submissions. We are satisfied on the evidence we have seen, including the disputed information itself, that the individuals held the reasonable expectation that the information would be kept confidential. Whether DEL should have given the assurance of confidentiality is irrelevant; what is relevant is the fact that it was given and that the individuals relied upon that assurance.

68. Additionally, we were concerned that there is no evidence that the disputed information accurately reflects what was said by the individual or whether it is accepted by the individual as the disputed information is in the form of a document apparently transcribed by a third party and contains no signature by any of the individuals to that effect.

*Additional factors to be considered in deciding whether the processing would be fair*

69. Ms Ince also submits that there are common law public interest considerations that should have been considered by DEL and by the Commissioner. In particular she submits that:

- a) there is a legitimate public interest in disclosure because there is a heightened public interest in openness regarding DEL's failure to address allegations of fraud within the further education sector robustly; and

- b) there is an argument for disclosure that would be capable of reversing the normal presumption in favour of withholding information “if it would highlight any misconduct, wrongdoing or risk to the public.”

70. The Commissioner concedes that there is a legitimate public interest in general terms of pursuing allegations of fraud committed by public authorities. However, he submits that the disputed information in this case would not assist in that aim; there have been a number of investigations through the proper channels by established bodies, including the matter being passed to the police on two occasions.

71. While we agree that the fact of fraud within the further education sector in Northern Ireland had led to a heightened public interest, we are not satisfied that the disputed information in this case contains information of the sort that is relevant to that public interest. Ms Ince argues that the disputed information would show that DEL did not conduct a rigorous and effective investigation into the fraud but we must consider that argument in light of the subsequent, and repeated, investigations by other appropriate bodies on the evidence presented and allegations made by Ms Ince. We echo the comments made by the Industrial Tribunal that this Tribunal is also not the appropriate vehicle to review or second guess the findings of the departmental and police investigations into allegations of fraud.

### Our Findings

72. In deciding whether the processing is fair, we have considered all the factors addressed in detail above. We consider that the legitimate interests of the public are a relevant consideration in the consideration of whether the processing is fair, and, if we concluded that processing would be fair, also would be relevant in deciding whether condition 6 of Schedule 2 is met.

73. We agree with the findings of previous Tribunals that there is a distinction to be drawn between personal data relating to an individual's public and his private life. This is a proper consideration to take into account when making the generalised assessment of fairness that is required under the first data protection principle. But we also agree with the comments made in the *Baker* case that *"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. This principle still applies even where a few aspects of their private lives are intertwined with their public lives but where the vast majority of processing of personal data relates to the data subject's public life."*

74. Taking all the relevant factors into account as set out above, we conclude that the disclosure of the disputed information, save for the disputed information relating to Derek Martin, would not be fair. Therefore, disclosure would breach the first data protection principle and the exemption in section 40(2) of FOIA is engaged in respect of the disputed information relating to the individuals other than Derek Martin.

75. In light of Mr Martin's evidence to us, we consider that he would not suffer any distress if the disputed information relating to him were to be disclosed, he does not object to disclosure and he no longer has an expectation that the information would be kept confidential. We are therefore satisfied that disclosure of his personal data would be fair.

76. Having reached that conclusion, we must go on to consider whether, in respect of his personal data, at least one of the relevant conditions for processing in Schedule 2 DPA is met.

77. Condition 1 of Schedule 2 DPA provides as follows:

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

78. We are satisfied on the evidence we heard from Mr Martin that he has given his consent to the processing (the disclosure) of his personal data and we find that a relevant condition is met.

79. In respect of Derek Martin's personal data therefore, disclosure would not breach the first data protection principle and the exemption in section 40(2) of FOIA is not engaged.

### Conclusion and remedy

80. For the reasons given above, the exemption in section 40(2) of FOIA is engaged and the DEL entitled to withhold the disputed information for three of the individuals.

81. The exemption in section 40(2) of FOIA is not engaged and the DEL not entitled to withhold the disputed information relating to Derek Martin. The Department for Employment and Learning must now disclose to Ms Ince the information identified relating to Derek Martin, with the names of other identified persons redacted, to ensure compliance.

82. Our decision is unanimous.

83. An appeal against this decision may be submitted to the Upper Tribunal. A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal within 28 days of the receipt of this decision. Such an application must identify the error or errors of law in the decision and state the result the party is seeking. Relevant forms and guidance for making an application can be found on the Tribunal's website at [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk).



Signed

Annabel Pilling

Judge

Date: 17 November 2010