



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

**Case No. EA/2013/0168**

**ON APPEAL FROM:**

Information Commissioner's  
Decision Notice No: FS50490413  
Dated: 15 July 2013

**Appellant: Steven Hepple**

**First Respondent: Information Commissioner**

**Second Respondent: Durham County Council**

**Heard at: Peterlee, Co Durham**

**Date of hearing: 7 February 2014**

**Date of decision: 26 February 2014**

**Before  
CHRIS RYAN  
(Judge)  
and  
JEAN NELSON  
JOHN RANDALL**

**Attendances:**

For the Appellant: Michael Cahill

For the Second Respondent: Clare Burrows

The First Respondent did not attend and was not represented.

Subject matter:      Personal data s.40  
                              Health and safety s.38  
                              Law enforcement s.31  
                              Public interest test s.2

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## **DECISION OF THE FIRST-TIER TRIBUNAL**

The appeal is dismissed

### **REASONS FOR DECISION**

#### Introduction

1. On 16 November 2012 the Appellant made a request to Durham County Council (“the Council”) for a copy of the investigation report (“the Report”) on a particular pupil referral unit (referred to here as “the PRU”). The request was a request for information under section 1 of the Freedom of Information Act 2000 (“FOIA”). This imposes on the public authorities to whom it applies an obligation to disclose requested information unless certain conditions apply or the information falls within one of a number of exemptions set out in FOIA. Each exemption is categorised as either an absolute exemption or a qualified exemption. If an absolute exemption is found to be engaged then the information covered by it may not be disclosed. However, if a qualified exemption is found to be engaged then disclosure will still be required unless, pursuant to FOIA section 2(2)(b):

*“in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information”*

2. The Report had been prepared earlier in the same month as the request was made by independent investigators brought in following complaints about the way the PRU had operated and the suspension of 13 of the 60 staff employed there. A copy has been disclosed to us (on a confidential basis, so as not to prejudice the outcome of the appeal). It is headed "Appendix 1" and entitled "Executive summary for Investigation into allegations at [the PRU]". In the course of the hearing of the appeal it was explained to us by those representing the Council that, despite the impression given by its title, it did constitute the entirety of the information held by the Council and falling within the scope of the information request. We were told by the Council's solicitor, on instructions, that it had been appended to a series of dossiers, each one relating to the complaint made against a suspended member of staff and containing all the statements and other evidence assembled in support of proposed disciplinary proceedings against that individual. We were assured that the individual dossiers contained no judgment or assessment in respect of either an individual or the PRU as a whole and that, accordingly, the only relevant document was the Report, which drew together a number of overall findings arising from the other material and made certain recommendations for the future.
3. The information request was refused by the Council on the basis that the Report was exempt information. As the matter comes before us (following an internal review by the Council and a Decision Notice issued by the IC, both of which supported the Council's decision) the grounds for claiming exemption were that the Report was exempt under each of FOIA sections 31 (prejudice to law enforcement), 38 (danger to health and safety of a third party) and 40(2) (personal data of a third party). The decision notice issued by the Information Commissioner dealt only with section 40(2), because, having decided that the requested information was exempt under that section, the Information Commissioner felt that it was not necessary to consider whether it was also exempt under any other provision. We will deal, first, with a preliminary issue as to whether we should make our determination against the facts existing at the date when the Council refused the request for information or at the current time. We will then deal with each of the claimed exemptions in turn.

The time by reference to which we should make our decision

4. This Tribunal derives its jurisdiction from FOIA section 57 which provides that where "a decision notice" has been served by the ICO both the person who originally requested information and the public authority to which the request was directed have a right to appeal. The scope of the jurisdiction of this Tribunal is governed by FOIA section

58. Under that section we are required to consider whether such a decision notice is in accordance with the law. We may also consider whether, to the extent that the decision notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based.

5. This Tribunal's powers are therefore very clearly limited to reviewing the decision notice in question. FOIA section 50(3) defines the phrase "decision notice" as the notice given by the Information Commissioner of the decision he has made following receipt of an application (under FOIA section 50(1)) "for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of" the relevant provisions of the FOIA.
6. Counsel for the Appellant did not dispute that there was clear statutory provision as to the scope of our jurisdiction. However, he pointed out a number of disadvantages arising if circumstances have changed since the date when the original request was made. He argued that in this case a refusal to disclose, which may have been justified at the time when the request had been made, would not be justified today. The result, he said, was that considerable costs were likely to be incurred by each of the Appellant, the Council and the public purse, and that this could be avoided if this Tribunal directed that disclosure should be made either now or at some defined future time. If the Tribunal did not adopt that approach, he argued, it might be necessary for the Appellant to make a fresh request, possibly leading to another refusal, complaint to the Information Commissioner and appeal to this Tribunal. The Council's case was that our jurisdiction is limited to a review of whether the Information Commissioner had been right to conclude that the Council had been entitled to refuse disclose the requested information at the time that it did.
7. We have sympathy with the Appellant on this point, particularly in light of the particular change in circumstances arising in this case. However, we are bound by the strict limit placed by the FOIA on the issues we may consider. Our role is limited to reviewing the Decision Notice, which itself records the Information Commissioner's determination as to whether or not the Council dealt with the information request in accordance with the FOIA. We proceed, therefore, to consider each of the claimed exemptions against the facts that existed at the time when the Council refused the information request.

## First claimed exemption - Section 31

8. FOIA Section 31 reads, in material part:

*“(1) Information....is exempt information if its disclosure under this Act would, or would be likely to, prejudice –*

*...*

*(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),*

*...*

*(2)The purposes referred to in subsection (1)(g)...are-*

*(a)...*

*(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper...”*

9. Section 31 creates a qualified exemption. If we find that it is engaged we must still order disclosure unless the public interest in maintaining the exemption outweighs the public interest in disclosure (FOIA section 2(2)(b)).

10. The Council relied upon the fact that, at the time of the information request, disciplinary proceedings were pending against each of the suspended members of staff. We were told by the Council's solicitor, again on instructions, that the disciplinary proceedings have two stages, first an assessment by officers of the Council and, secondly, an appeal to a panel of elected members of the Council. Both stages are confidential and the findings are not published. That confidentiality would be lost, the Council argued, if the Report had been made publicly available at the time and this would prejudice the disciplinary process.

11. The Appellant argued that disclosure would not (and certainly should not) prejudice the disciplinary hearing, even if it led to press comment and speculation before the hearing took place. He drew attention to the fact that many courts and tribunals have to conduct hearings in circumstances where some of the facts have previously been disclosed and attracted media comment. Those conducting the Council's disciplinary hearings should have the objectivity and strength of character to disregard anything other than the evidence presented to them.

12. Counsel for the Appellant invited us to consider the application of the exemption by reference to the following possibilities:

- (i) The Council had published the whole of the Report at the relevant time;
- (ii) The Council redacted the Report so that none of those facing disciplinary processes could be identified; and
- (iii) The Council had agreed at the time to publish just a summary or overview of the Report.

13. We are satisfied, having read the Report in full, that disclosure in full would have given rise to a perception of unfairness and pre-judgement that would have prejudiced the disciplinary proceedings. Those deciding the complaint might have avoided being prejudiced but the perception of a disinterested third party would have been that the staff member's right to a fair hearing had been undermined, particularly if publication had attracted media comment.

14. We are also satisfied, for reasons expanded upon in the confidential annex to this decision, that redaction or release of a summary only, would not have avoided the prejudice.

15. We conclude, therefore, that the exemption is engaged. We also conclude that avoiding prejudice or the appearance of prejudice, in the disciplinary processes gives rise to a strong public interest in favour of maintaining the exemption. Despite the public interest in the effective provision of education (including pupil referral units) and in the transparency of any investigation into poor performance, the public interest in protecting the disciplinary procedures outweighed the public interest in disclosure at the time when the information request was refused.

16. The Appellant's counsel did, of course, seek to persuade us that, as the disciplinary proceedings have now been completed, the force of the Council's arguments are significantly reduced, if not eradicated. The Council did not accept that all proceedings in relation to, or arising out of, the disciplinary proceedings were at an end but, for the reasons set out earlier, we are not able to take into account the changed circumstances since the date when the information request was refused.

#### Second claimed exemption - Section 40(2)

17. FOIA section 40(2) provides that information is exempt information if it constitutes personal data of a third party the disclosure of which would contravene any of the data protection principles.

18. Personal data is itself defined in section 1 of the Data Protection Act 1998 (“DPA”) which provides:

*“personal data’ means data which relate 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”*

19. The data protection principles are set out in Part 1 of Schedule 1 to the DPA. The only one having application to the facts of this Appeal is the first data protection principle. It reads:

*“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 ...”*

Schedule 2 then sets out a number of conditions, but only one is relevant to the facts of this case. It is found in paragraph 6(1) and reads:

*“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.”*

The term “processing” has a wide meaning (DPA section 1(1)) and includes disclosure.

20. A broad concept of protecting, from unfair or unjustified disclosure, the individuals whose personal data has been requested is a thread that runs through the data protection principles, including the determination of what is “necessary” for the purpose of identifying a legitimate interest. In order to qualify as being “necessary” there must be a pressing social need for it - *Corporate Officer of the House of Commons v Information Commissioner and others* [2008] EWHC 1084 (Admin).

21. In determining whether or not disclosure of the names would be contrary to the data protection principles we have to consider:

- i. whether disclosure at the time of the information request would have been necessary for a relevant legitimate purpose; without resulting in
- ii. an unwarranted interference with the rights and freedoms or legitimate interests of the suspended staff.

And, if our conclusion on those points would lead to a direction that the information should be disclosed, we have also to consider:

- iii. whether disclosure would nevertheless have been unfair or unlawful for any other reason.

22. In respect to the issue of fair and lawful processing under (iii) above we have to bear in mind guidance provided in paragraph 1(1) of Part II of Schedule 1 to the DPA, which provides:

*“In determining for the purposes of the [first data protection principle] whether personal data are processed fairly, regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed.”*

23. The Decision Notice recorded the Information Commissioner’s conclusion that the whole of the Report constituted the personal data of all PRU staff members who had been suspended, because they could be identified as a result of other information about them already held by other individuals, such as pupils and other members of staff. The Information Commissioner maintained that position in his Response to the Appellant’s Grounds of Appeal. The Council supported the Information Commissioner’s argument but also argued, in the alternative, that certain identified parts of the Report identified individuals even if the entirety of it could not be held to do so.

24. The Appellant has not, of course, seen the Report and his counsel accordingly invited us to review it and form our own view as to whether the Information Commissioner’s conclusion was right. We are satisfied that it was in respect of at least one of the suspended staff members.

25. The Information Commissioner acknowledged that there was a legitimate interest in disclosure on the part of the public due to the importance of problems at the PRU being identified, and steps taken by the Council to rectify them in response to the investigators’ recommendations. However he argued in his Response that, on the particular facts of this case, disclosure would nevertheless constitute an unwarranted interference in the privacy rights of the suspended staff members. It would be contrary to their reasonable expectation that, until the confidential disciplinary processes had been completed, the Report would remain private. The Council adopted those arguments. The Appellant challenged them. He argued, first, that the expectations of staff should be assessed on an individual basis, with those recorded in the Report as having been guilty of serious misconduct having significantly less entitlement to privacy than those who had no finding of culpability against them or only minor criticism. We would add that the same requirement for a differential approach may arise from the relative seniority of one staff member over another.

26. The Appellant also argued that the fact that his self-avowed purpose in securing disclosure was to obtain information that might assist him in a



civil claim against anyone found to have behaved improperly (or to bring a private prosecution against them) should not be regarded as a factor in favour of maintaining the exemption. If disclosure would reveal misconduct so severe that it would justify the pursuit of such proceedings, this was a powerful argument in favour of disclosure.

27. Our examination of the Report satisfies us that, given the nature of its focus (as particularised in the confidential annex to this decision) its disclosure would amount to an unwarranted interference in staff members' privacy rights so long as they continued to be subject to disciplinary proceedings. This factor should prevail, notwithstanding the public interest in disclosure which we have identified.

28. It is, of course, quite conceivable that, once disciplinary proceedings and any dependant complaints or appeals have concluded, the public interest in the performance of the more senior levels of management at the PRU, and possibly other levels of staff also, might cause the balance to tip in favour of disclosure. However, for the reasons given, it would be inappropriate to make any decision on the point at this stage.

29. We have made our decision under this exemption by reference to each of the levels of disclosure proposed by the Appellant's counsel. We conclude, for the reasons given in respect of the section 31 exemption (paragraph 14 above) that disclosure of either a redacted version of the Report, or a summary of it, would have the same effect as disclosure of the entire document.

### Third claimed exemption - Section 38

30. FOIA section 38(1) reads:

*"Information is exempt information if its disclosure under this Act would, or would be likely to-*  
*(a) endanger the physical or mental health of an individual, or*  
*(b) endanger the safety of any individual."*

31. Although both the Council and the Appellant accepted that we are not bound by the decisions made in previous appeals to this Tribunal, they both invited us to follow the approach to section 38 set out in two previous decisions<sup>1</sup>. Our approach, influenced, but not dictated, by that case law has been as follows:

- a. We should identify a specific risk to the mental health of at least one individual;
- b. The direct effect on mental health should extend beyond mere stress and worry and be real and not insignificant;

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<sup>1</sup> Hogan and Oxford City Council v Information Commissioner (EA/2005/0026) and PETA v Information Commissioner and University of Oxford (EA/2009/006)

- c. There should be a causal relationship between the potential disclosure and the endangerment; and
- d. To the extent that the individual may have had a pre-existing condition the impact of disclosure should be to increase the risk of endangerment to a material degree.

32. In this instance the Appellant was, again, required to make his case without sight of all relevant information. This was because the Council made a submission in its Response, which identified the particular harm which it feared might result from disclosure and the Registrar of this Tribunal (correctly in our view) directed that certain redactions should be made to the document before it was served on the Appellant.

33. The Appellant stressed that we should ensure that our review of the unredacted submission took account of the need to ensure that the Council had identified a likely effect of disclosure going beyond mere stress and worry; it had to amount to endangerment to the relevant individual's mental health. His counsel described this as a high hurdle and invited us, also, to distinguish any pre-existing condition and to take into account just the degree of increased risk to any pre-existing condition resulting from disclosure of the Report (or any redacted version or summary), as opposed to any other event arising out of the individual's connection with the PRU.

34. We believe that the Appellant's suggested approach is the correct one for us to adopt. We remind ourselves that we should consider the claimed exemption in the circumstances existing at the time when the request was refused and the suspended employees were still awaiting the outcome of disciplinary proceedings against them. Viewing the submissions made by the Council (and accepting what was said, even though it was not incorporated in a witness statement from a witness of fact) we believe that the Council has made out its case that the exemption was engaged at the time the request was made i.e. with disciplinary proceedings still pending there would be a real risk of disclosure, on its own, exacerbating a pre-existing condition to the stage where real psychological harm was likely to ensue.

35. It is right that we mention at this stage that in December 2013, some weeks before the Appeal hearing took place, the Council drew our attention to three text messages sent by the Appellant to an individual involved in the Council's handling of the Report and the preparation of this appeal. The messages indicated that the Appellant had become aware of the home addresses of at least one member of the PRU's staff and was anxious that his possession of that information should be known. The transmission of those messages led to the Police visiting the Appellant and delivering to him a formal notice under the Protection from Harassment Act 1997.

36. The Council invited us to take the evidence of these events into consideration in respect of the section 38 exemption claim. We have

stressed the need to consider the circumstances existing at the date when the information request was refused. However, that does not preclude us from taking into consideration evidence about the possible use to which the Appellant might have put the information at the time, had it been disclosed to him. The fact that the evidence came to light much later, does not alter the fact that it discloses an attitude of mind likely to exist at that earlier stage, as well as at the stage when the texts were transmitted. We also bear in mind that it is frequently said that an information request should be considered without reference to the motive of the person making the request. That certainly ensures that focus is maintained on the fact that disclosure to a single requester is, effectively, disclosure to the world. But assessing an information request on this "motive blind" basis ought not to prevent us from considering the potential risk to safety posed by the requester him/herself.

37. In this case we drew the clear impression that the texts had been transmitted with the purpose of menacing those whose addresses the Appellant had acquired. We are satisfied that they disclose an attitude of mind that justifies our concluding that disclosure would have created a risk to the safety of those mentioned in the text messages. During the course of the hearing the Appellant, through his Counsel, offered a very full apology for what he had done. We nevertheless conclude that the exemption was engaged on this ground also.

38. As FOIA section 38 is a qualified exemption we have to consider the public interest balance under FOIA section 2(2)(b). In favour of disclosure is the public interest in the effective operation of an educational unit providing an important service to children suffering learning and behavioural problems, and the effective performance of those charged with its leadership. Against disclosure is the public interest in safeguarding the mental health of those identifiable from the withheld information. Although it may well be that at some stage the importance of the subject matter of the Report will justify its publication (in full or in part), despite the perceived risk to health, we do not think that stage had been reached at the time when the Council decided to refuse the request for information.

## Conclusion

39. We have found that each of the exemptions relied on by the Council was engaged and that, in respect of the two qualified exemptions, the public interest in maintaining them outweighed, in each case, the public interest in disclosure. The Information Commissioner was therefore right to have concluded that the Council had been justified in refusing disclosure of the requested information (even though he reached his

conclusion on the basis of only one of the available exemptions) and we accordingly reject the Appeal.

40. Our decision is unanimous

Chris Ryan

Judge  
26 February 2014