



**IN THE FIRST-TIER TRIBUNAL**

**Case No. Appeal No. EA/2013/0044**

**GENERAL REGULATORY CHAMBER INFORMATION RIGHTS**

**ON APPEAL FROM Information Commissioner's Decision Notice FS50465822**

**Dated 13<sup>th</sup> February 2013**

**BETWEEN**

**Mr Nick Innes**

**Appellant**

**And**

**The Information Commissioner**

**Respondent**

Determined at an oral hearing at Field House 17<sup>th</sup> March 2015 and thereafter on the papers

Date of Decision 7<sup>TH</sup> September 2015

BEFORE

Fiona Henderson (Judge)

Anne Chafer

And

Gareth Jones

**Representation**

The Appellant represented himself,

The Commissioner chose not to be represented.

**Subject matter:** s40(2) FOIA – personal data

**Case Law:** *Evans A-G [2015] UKSC 21 paras 72-3*

**Decision: The Appeal is Refused**

## REASONS FOR DECISION

### Introduction

1. Parents and staff at the primary school which was the subject of the information request were notified in May 2012 that the headteacher was absent for personal reasons, it was not known when and if he would return. The headteacher's position was filled by another senior member of staff on an interim basis until the headteacher resigned on 13/02/14. This was a school which had been rated as "outstanding" by Ofsted in 2010 but by the next inspection in 2013 was rated as "*Inadequate - This is a school that requires special measures*". The Governing Body ceased to exist in January 2014 and was replaced by an Interim Executive Board. As at the date of the Tribunal hearing no further information had been provided to the public by the school to explain the 8 month absence of the headteacher during which time the role was being managed on an interim basis.

### Information Request

2. The Appellant wrote to the school on 11<sup>th</sup> July 2012 asking for<sup>1</sup> information including:
  - ii. The reason for the [headteacher's] departure
  - iii. The details and outcome of any disciplinary proceedings which were ongoing or completed against [the headteacher] in the period leading up to [the headteacher's] departure.
  - iv. Copies of all communications concerning this departure to pupils/parents/members of staff / Governing body and external organisations e.g. the LEA, both before departure took place and since.

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<sup>1</sup> The information requests are only repeated insofar as they remain to be determined before the Tribunal

3. The school responded on 13<sup>th</sup> July 2012 stating that the headteacher was absent for personal reasons and again on 16<sup>th</sup> July (after it had been made plain by the Appellant that this was a FOIA request). The school provided copy correspondence in the public domain in respect of request 4 and s40(2) FOIA was relied upon in relation to the remainder of the information, including the Appellant's request on 13<sup>th</sup> July for the school to expand upon what was meant by "personal reasons".
4. On 17<sup>th</sup> July 2012 the Appellant asked for:
  - vi. The school complaints log for the last two academic years 2010 to 2011 and 2011 to 2012.
  - vii. The details and outcome of any complaints procedures which were ongoing or completed against [the headteacher] in the lead up to his departure/absence.
5. The school explained that they did not maintain a complaints log at the relevant date. All contact with parents which included correspondence, recorded comments and complaints were held together in a filing cabinet. The Appellant clarified request six on 24<sup>th</sup> July 2012 in light of this information:

*"this would be all complaints, but limited to recorded comments related to [the headteacher]. We can then evaluate which specific complaints or recorded comments are of particular interest ... If it would be more convenient for you just provide the information in full."*

The school relied upon s40(2) FOIA in relation to these requests. The decisions in relation to all the information requests were upheld on internal review dated 10<sup>th</sup> September 2012.

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

6. The Appellant complained to the Commissioner who conducted an investigation. The Commissioner was not provided with a copy of the withheld information but instead relied upon a closed letter from the school concerned which set out more details. The Commissioner upheld the refusal to provide the information pursuant to s40(2) FOIA on the grounds that disclosure would be unfair.

#### **The Appeal**

7. The Appellant appealed on 8<sup>th</sup> March 2013 on the grounds that:
- i. If the reason was genuinely personal and not professional the Commissioner should have said so explicitly.
  - ii. The Commissioner has got the assessment of fairness wrong in that his decision contradicts his own guidance and he has given insufficient regard to:
    - a) whether the information was private or work related,
    - b) the seniority of the data subject,
    - c) the nature of any allegation.
  - iii. The Commissioner had misunderstood the scope of request vi) which was not limited to complaints about the headteacher.
  - iv. The Commissioner has not considered the requests relating to the reasons for the headteacher's absence separately from requests relating to all complaints.
8. The Appellant's original appeal was allowed in part by the First Tier Tribunal<sup>2</sup> but refused in relation to requests 2,3,4,6 and 7. The Appellant appealed to the Upper Tribunal<sup>3</sup> arguing that the First Tier Tribunal had not provided sufficient reasons to explain why his arguments relating to these requests were rejected. The Upper Tribunal allowed the appeal on 20<sup>th</sup> November 2014, the First Tier Tribunal's Decision was set aside and the case remitted for reconsideration under s12(2) (b)(ii) of the Tribunals, Courts and Enforcement Act 2007. This Tribunal constitutes a complete rehearing of the case.
9. The case was listed for an oral hearing on 17<sup>th</sup> March 2015 when following oral submissions from Mr Innes, the Tribunal adjourned the case for the Commissioner to obtain a copy of the withheld information as set out in requests 2-4 and 7 and amended request 6, from the school. Having made his submissions orally on 17<sup>th</sup>

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<sup>2</sup> Dated 12.8.13 - The Tribunal ordered disclosure in relation to request 8 namely whether the named individual was being paid during their absence.

<sup>3</sup> GIA/4241/2013

March and had the opportunity to make further submissions in writing, Mr Innes consented to the Tribunal reconsidering the appeal on the papers following the adjournment.

### Scope

10. The Commissioner and school appeared to have understood Mr Innes' request 6 to be limited to complaints (if any) relating to the headteacher. The Appellant confirmed at the oral hearing that request 6 is freestanding and is not dependent upon any answers given to the other requests. It is not limited to complaints against the headteacher but is a request for copies of all complaints within the specified time frame, however, the Appellant would be content to receive a summary of the complaints so long as any recorded comments related to the headteacher were provided in full. He clarified that what he meant by this is any involvement of the headteacher even in an administrative capacity.
11. The Tribunal is satisfied that the request must be read objectively and that the phrasing of the request is clearly for "all complaints" and as such not limited to the headteacher. The Tribunal accepts that the objective meaning of the request as set out in the letter of 24<sup>th</sup> July 2012 is that whilst the complaints can be provided in summary form, any involvement of the headteacher should be detailed in full.
12. The Appellant accepted that requests 6 and 7 overlapped. His intention was that request 7 might reveal a separate set of information not held in a log or the filing cabinet that housed the information in request 6. Although the Tribunal directed "*a copy of the withheld information as set out in requests 2-4 and 7 and amended request 6*" be provided, the information provided to the Tribunal following the adjournment remains incomplete e.g. a schedule of material in response to request 6 rather than the source documents. The Tribunal has not been provided with any further correspondence pursuant to request 4 but is satisfied from the nature of the request that any material that has been withheld that would fall within this category has been withheld because it reveals the information sought in the other requests i.e. the reason for absence. The Tribunal has had regard to the material before it and is satisfied that it has sufficient detail to enable it to determine the case. Having had

regard to the overriding objective, as set out in rule 2 *The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009* it is satisfied that it is not necessary, proportionate or in the interests of justice to adjourn for further information.

13. We are satisfied that the relevant date for evaluating the balance of fairness and applicability of the data protection principles is from around the time that the primary decision was made *Evans A-G [2015] UKSC 21 paras 72-3*. Similarly the Tribunal has not looked at material relating to the eventual departure of the headteacher who is no longer in post and a successor has been appointed, as it arose after the relevant date.

### **Evidence**

14. The Tribunal is in receipt of an open bundle of 132 pages and the closed material that was before the Commissioner. Following the adjournment the applicable complaints and disciplinary policy have been disclosed and the Tribunal is also in receipt of additional closed material including a schedule of documents pertaining to request 6 and further detail relating to the outstanding withheld information which have remained closed pursuant to rule 14.
15. In relation to request 6 all contact with parents which includes correspondence, recorded comments and complaints are held together in a filing cabinet.<sup>4</sup> When the school attempted to assemble what they thought to be complaints, they “*discovered a collection of random pieces of paper which have few if any details, rarely a date, rarely what the exact issue is and never any indication of what action was taken*”<sup>5</sup>. The school have created a document listing all documents found in the drawer, where undated they appear in the order in which they were placed in the cabinet. Most notes are about issues between children.

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<sup>4</sup> P37 OB

<sup>5</sup> Adjournment evidence from the school. The Tribunal has a synopsis of the documents and is able to make its own evaluation of the contents and observes that on occasions an outcome is apparent from the contents of the schedule.

16. The Tribunal observes that the majority of the documents on the schedule are not in scope as it contains correspondence and recorded comments. Nevertheless the Tribunal is satisfied that the terms of the Appellant's request are sufficiently wide that complaint would encompass any complaints about<sup>6</sup>:

- i) staff from pupils or parents,
- ii) pupils by staff, other pupils or other parents,
- iii) the school, pupils, parents or staff from the wider community.

#### **Data Protection**

17. The Upper Tribunal held that the Appellant was entitled to know why the Tribunal had rejected the submissions made by the Appellant that the Commissioner's conclusions were erroneous and how any issues of law or fact were resolved, for this reason the case was remitted for a rehearing. This Tribunal must tread the line between addressing the arguments raised by both parties whilst not disclosing the withheld information in the open decision. The discussion below is not an indication of the contents of the withheld material, that is done in the closed schedule with direct reference to the withheld material, but it is intended to discuss the principles and the factors applicable to the arguments raised by the parties.

18. S 40 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 the second condition below is satisfied.*

*(3) The first condition is—*

*(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—*

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<sup>6</sup> The below indication of scope should not be taken to indicate the contents of the schedule.

*(i) any of the data protection principles, ...*

19. Personal data has the same meaning as in section 1(1) of the Data Protection Act (DPA) and 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,*

*and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;*

20. Having had regard to the redacted material which has been withheld on the grounds of personal data, we are satisfied that this is the personal data of those named within it. In light of the blanket request for complaints in request 6 we make the following general observations relating to personal data relating to complaints: namely that any record of complaints could be expected to be the personal data of those complained about, those complaining and any witnesses. It is about them, has biographical significance for them and is used to make decisions about them and it has them as their main focus. In relation to any interviewed or complaining, it would contain their views and opinions. The contemporaneous timeframe means we are satisfied on balance that any individuals would still be living and can be identified from the withheld material.

21. The Commissioner considered whether disclosure to the world at large would breach any of the data protection principles. The first data protection principle states that “*personal data shall be processed fairly and lawfully*” and that at least one of the conditions of schedule 2 should be met and in the case of sensitive personal data<sup>7</sup> a condition of schedule 3.

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<sup>7</sup> S2 DPA defines sensitive personal data as

(a) the racial or ethnic origin of the data subject,

(b) his political opinions,

(c) his religious beliefs or other beliefs of a similar nature,



22. The DPA further provides that:

*1(1) In determining for the purposes of the first 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.*

The Tribunal has assessed fairness and lawfulness as set out below.

#### Public/Private facing role

23. The Appellant has asked for the reason that the headteacher was absent<sup>8</sup>. He believes that the reason relates to allegations of misconduct in his role as headteacher which he argues is part of the data subject's professional life. He explains that he would expect "personal reasons" to be related to non work matters. Examples he gave were ill health and bereavement. He told the Tribunal that he would not expect to be given details relating to the named individual's health or domestic situation, but that he would expect more details if it related to his professional role.

24. The Tribunal agrees that it is material whether the reason given relates to the named individual's private or public role as this informs both the expectation of the data subject and also the legitimate interests of those requesting the information. The Tribunal takes into consideration that disclosure of private matters may impact others beyond the primary data subject (illustrative examples used during the hearing included bereavement, divorce or ill health of a family member). In relation to the public role, if an allegation of misconduct is made, disclosure may infringe the

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(d) whether he is a member of a trade union (within the meaning of the [M1](#) Trade Union and Labour Relations (Consolidation) Act 1992),

(e) his physical or mental health or condition,

(f) his sexual life,

(g) the commission or alleged commission by him of any offence, or

(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

<sup>8</sup> Request 2

personal data rights of any complainant. A more rigorous regime applies in relation to sensitive personal data which can encompass both personal and professional reasons (e.g. health and the impact of health upon the performance of the role or an allegation of suspected criminal activity either in the private life or the public role). In cases involving sensitive personal data in addition to a schedule 2 reason the Tribunal would need to be satisfied that a schedule 3 reason applied. The Tribunal also is alert to the possibility that there can be more than one reason for absence.

Is the disclosed information misleading?

25. The Appellant criticizes the Commissioner's decision for lack of clarity when addressing this point at paragraph 16 of the decision notice where he states:
- “it is reasonable to say that the circumstances which lead to an employee being absent from their post for some time is likely to relate to that individual's private life as much as their professional or public life”* in concluding that disclosure would be likely to result in an invasion of the named individual's privacy.
26. The Tribunal understands the Commissioner to be acknowledging that even work related reasons for absence from school would be expected to have personal ramifications and consequences for the individual concerned and their family. The Commissioner and Tribunal must be wary of providing further pieces of a jigsaw which would point to the withheld information, in this respect the Tribunal is satisfied that the Commissioner's comment is akin to a “neither confirm nor deny response”.
27. The Appellant argued that if the reason for the absence related to a disciplinary investigation, that was a professional reason and should be stated explicitly to correct a misleading impression created by the school through their use of the explanation that the absence was for “personal reasons”. The Tribunal agrees that if a reason has been given which is not accurate, this is a factor to take into consideration when assessing fairness. The Tribunal is satisfied that it is not appropriate to indicate in the open decision whether the reasons for absence were personal or professional or both and as such whether the school did create a misleading impression or not. In

assessing whether a misleading impression had been created and in assessing fairness the factors that the Tribunal would take into consideration are:

- a. Whether there is more than one reason for the absence,
- b. What the likely personal consequences would be arising from the absence (even if the original absence related to the public role),
- c. The circumstances in which a misleading reason came to be given,
- d. The extent to which (if any) the data subject was responsible for or had any control over the wording of any explanation given,
- e. The consequences of rectifying any misstatement including what could be deduced from any additional information given.
- f. Whether any third parties would be likely to be affected.

#### The Expectation of the data subject

28. In assessing fairness, the Tribunal has considered whether disclosure would be within the data subjects' reasonable expectations. The Tribunal accepts that the headteacher is a very senior member of staff with a public facing role and that he would expect to be accountable for his actions, he should expect scrutiny of his professional life and should expect to provide some transparency in relation to his personal life where it impacts the running of the school.

29. The Appellant relies upon the Commissioner's guidance that the exemption should not be used as a means of sparing officials embarrassment over poor administrative decisions<sup>9</sup>. Where information requested is about the people acting in a work or official capacity then it will normally be right to disclose.<sup>10</sup> The more senior a person is, the less likely it will be that to disclose information about him or her acting in an official capacity would be unfair<sup>11</sup>. He argues that the Commissioner should have followed this guidance and has not.

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<sup>9</sup> Freedom of Information Act Awareness Guidance No. 1; Personal Information.

<sup>10</sup> Freedom of Information Act Awareness Guidance No. 1; Personal Information.

<sup>11</sup> Freedom of Information Act Awareness Guidance No. 1; Personal Information.

30. Fairness is a judgment and depends on the facts of each case. The Tribunal is not bound by the guidance which, by its nature, is not meant to be rigidly applied but to be of assistance in determining where the balance of fairness lies. The Tribunal must take into consideration the wider implications of disclosure including any prejudice that would arise from disclosure either to the primary data subject or another. It must also consider ways in which scrutiny and transparency can be achieved and consider if there is a way that is more fair than through disclosure of the withheld information:

- Financial accountability<sup>12</sup> is provided for by audit considerations.
- Scrutiny by their employers of staff conduct and competence is achieved by any internal or external investigation and associated disciplinary proceedings.
- In certain circumstances public transparency is achieved through the publication of the conclusions of an investigation e.g. if criminal proceedings are brought.
- Often other measures for improvement of performance are made public albeit without necessarily there being an acknowledged link to the initiating allegation.

31. In relation to request 6, the Tribunal observes that these arguments diminish the less senior a member of staff is. In relation to parents and the wider community, they would have little expectation of being subjected to public scrutiny or held publicly accountable, being service users rather than public employees. The Tribunal reminds itself that the school is a primary school and that the law protects the privacy of children fiercely (e.g. as victims, witnesses and perpetrators in relation to Criminal proceedings).

**The nature of any allegation made:**

32. The Appellant argues that in cases where an allegation is made, the nature of any allegation is material to the assessment of fairness. He relies upon the Commissioner's guidance which states that arguments in favour of disclosure are stronger where a disciplinary measure is being taken against a senior member of staff over a serious allegation of impropriety or criminality. This is particularly the case where an external agency is involved in an investigation. Arguments in favour of

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<sup>12</sup> At the date of the request this was a paid absence

disclosure are weaker where the information is about an internal disciplinary procedure concerning a relatively minor matter”.<sup>13</sup>

33. Whilst the Tribunal accepts as a point of general principle that it may often be the case that the arguments of fairness in disclosure are greater in relation to serious allegations of impropriety or criminality, the Tribunal must have regard to anyone else who would be affected by disclosure such as a complainant or a witness. The Tribunal takes into consideration the distress caused by self identification (a complainant who reads about “their” case and is distressed by the way it is portrayed, or because they fear public identification). Additionally the Tribunal must consider the “mosaic effect” whereby 2 pieces of seemingly innocuous information are linked to identify an individual and gives the theoretical example of a child who is absent from school for a week who is identified as having been suspended because a parent has written to complain about the way in which the suspension was handled.
34. The Tribunal also takes into consideration the stage which any complaint has reached. Where an investigation is not complete, the facts are not yet established, the complainant and person complained of, may not yet have had the opportunity to make their case. The complaint may turn out to be unfounded, malicious or mistaken. The Appellant argued that often complaints were “an open secret” in a small organization such as a primary school. However, disclosure at this stage has the effect of elevating gossip to the status of fact, and of spreading the information further afield. The Tribunal is satisfied that the risk of unfounded reputational damage is a significant factor in assessing fairness. The Tribunal considers this significant in terms of accountability in that a data subject should only be held accountable for what they have done, not what they have not done. The Tribunal is satisfied that the more senior the position and the more serious the allegation, the greater the reputational damage should the allegation prove to be unfounded.

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<sup>13</sup> ICO Data Protection Technical Guidance: Freedom of Information Access to information about public authorities’ employees

35. Additionally a relevant consideration would be the need for a “safe space” in which to conduct any investigation or disciplinary action and a relevant factor in assessing fairness would be the extent to which disclosure would jeopardize any investigation or disciplinary process.

36. Request 6 is a request for all complaints. We are satisfied that a relevant data subject would have expected information relating to complaints, disciplinary procedures and investigations to be treated confidentially and have had a very limited circulation within the school let alone the public. This expectation would have been informed by the School Complaints policy:

- Which specifies that the complaint/investigation will be kept confidential<sup>14</sup>.
- Which states that details of the investigation or of any disciplinary procedures will not be released even to the complainant.<sup>15</sup>
- This applies to the headteacher as well as more junior staff<sup>16</sup>.

37. The Tribunal is also satisfied that the expectation of parents and pupils was also that their confidentiality would be maintained as provided for in the statement of intent as set out in the Model paragraph for inclusion in the school prospectus.

38. The Appellant’s case is that the personal impact on the data subject is not the only driver and consideration must be given to the interests of the pupils and parents within the school, other staff and the wider public. We agree that it is necessary to consider the legitimate interests of these groups in assessing the balance of fairness.

39. The Appellant argues that it is unreasonable for staff to rely upon the blanket confidentiality referred to in the school policies, as prolonged absence of such a senior member of staff in a school where standards are slipping is of huge concern to the parents of the school and explanations could be reasonably expected. The Tribunal accepts that the blanket confidentiality is not determinative in itself although

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<sup>14</sup> Paragraph 14

<sup>15</sup> Paragraph 14

<sup>16</sup> Page 7 repeated in relation to complaints against headteachers

expectation is a factor that the Tribunal is required to take into consideration, it has set out the contextual and other factors that it takes into consideration.

40. It has now been disclosed that the headteacher was being paid in his absence at the date of the information request. The Appellant argues that the reasonableness of payment requires scrutiny to ensure that resources are being used appropriately. Disclosure of the disputed information would shed light upon the way that the governing body is overseeing the management of the school both in terms of managing the prolonged absence of a senior staff member and any other complaints within the school. The Tribunal takes into consideration that many of those arguments can be made without the need for the reason for the absence, as the fact of the absence, its duration as time passes, the arrangements to cover the role and the fact that it is paid are all in the public domain. Disclosure is not the only method of scrutinising how complaints are managed. The Tribunal observes that those who make complaints or who are subject to complaints are in a position to take the matter further if they feel that their complaints are not being handled appropriately (e.g. to the Governors, LEAs, Unions etc.)

41. The Appellant argues that disclosure of information relating to complaints would act as a deterrent against poor or wrongful performance if teachers knew that their colleagues would not protect them from the consequences of their actions. The Tribunal does not consider this a significant argument in favour of disclosure, since there is an established disciplinary procedure at the school in the event of wrongdoing which is not impacted by disclosure to the world at large. The Appellant argues that even if the information disclosed related to complaints which had been investigated and found to be baseless that might reveal a pattern which would shed light on the way the governing body was managing the school. The Tribunal considers this argument to be speculative as on its face it is based upon the chance that something might arise out of disclosure, as set out above the individuals involved in the complaints are all in a position to escalate the matter beyond the school and the governing body if they wish. We would consider it to be significantly outweighed by the reputational damage associated with unfounded allegations.

42. The Tribunal has considered all the matters as set out above insofar as they are relevant to the withheld material, and it is satisfied that on the facts of this case, the balance lies in favour of protecting the rights and freedoms of the data subjects, consequently it would not be fair to disclose the withheld information.

#### Redaction

43. The Tribunal has considered whether some disclosure could be made in redacted form e.g. redaction of the names and job title of the individuals. In particular this might shed light on the role of the governors and reveal any patterns. In relation to requests 2,3,4 and 7 the requests relate to the headteacher, redactions would not disguise that fact. In relation to any information falling within request 6 (which could by the terms of the request include the headteacher as well as others) we take into consideration *Edem v The Information Commissioner and Another [2014] EWCA Civ 92* which requires us to consider context. Having had regard to the contents of the withheld material we are satisfied that the identity of the individuals would be apparent to a knowledgeable member of the public. The Tribunal has taken into consideration self identification, and the identification by peers as well as the mosaic effect of being able to piece together bits of information. The school is small (approximately 440 pupils) and we are not satisfied that the summary could be redacted to avoid unfair disclosure of personal data. Even disclosure that revealed patterns (the Tribunal gives the theoretical example of complaints about exam grades) in such a small organisation would be likely to point to the individuals concerned. Consequently we are satisfied that even if so redacted, disclosure would breach the data protection principles for the same reasons set out above.

44. In light of our findings that disclosure would be unfair we have not gone on to consider the conditions of Schedule 2 or Schedule 3 of DPA.

#### Conclusion

45. For the reasons set out above (and in the closed schedule) we refuse the appeal and uphold the decision notice. Our decision is unanimous.



Dated this 7th day of September 2015

Fiona Henderson

Tribunal Judge

Promulgated 8th September 2015