



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2017/0071

Decided without a hearing

**Before
CHRIS RYAN
JUDGE
ROGER CREEDON
DAVID WILKINSON
TRIBUNAL MEMBERS**

Between

DANIEL VULLIAMY

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

Subject matter: FOIA Absolute exemptions
- Personal data s.40

Cases: DH v Information Commissioner and Bolton [2016] UKUT 139 (AAC)

Farrand v Information Commissioner and London Fire and Emergency Planning Authority [2014] UKUT 0310 (AAC)

Common Services Agency v Scottish Information Commissioner (HL (Sc)) [2008] 1 WLR 1550

GR-N v Information Commissioner and Nursing and Midwifery Council [2015] UKUT 449

Corporate Officer of the House of Commons v The Information Commissioner, Brooke and others [2008] EWHC 1084

GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

REASONS FOR DECISION

Summary of our decision

1. We have decided that the Appeal against the Information Commissioner's Decision Notice of 28 March 2017 (FS50649626) ("the Decision Notice") should be dismissed. The Information Commissioner was right to conclude that the identity of a former District Councillor, who had been in arrears with council tax payment at a time when he or she had been in office, was exempt from the obligation (under section 1 of the Freedom of Information Act 2000 ("FOIA")) to disclose information when requested to do so. The exemption claimed arose under section 40(2) of FOIA, which protects personal data if its disclosure in response to a FOIA request would breach the data protection principles set out in Schedule 1 to the Data Protection Act 1998 ("DPA")

Background

2. The Appellant's original information request was submitted to East Riding of Yorkshire Council ("the Council") on 5 August 2016. Full details of the request and of the Council's refusal to provide the requested information are set out in paragraphs 4-11 of the Decision Notice and do not need to be repeated here.
3. The Appellant complained to the Information Commissioner on 6 October 2016 about the way in which his request had been handled. The Decision Notice was issued after the Information Commissioner had completed an investigation into that complaint.
4. The Decision Notice acknowledged that guidance on the privacy rights of elected councillors had been provided in the Upper Tribunal case of *DH v Information Commissioner and Bolton* [2016] UKUT 139 (AAC) ("Bolton"). In that case the Upper Tribunal decided that information about non-payment of council tax by a serving councillor should be disclosed. The Information Commissioner distinguished it from the facts of the case under consideration and decided that a former councillor who had fallen into arrears with his or her council tax would have a legitimate expectation that his/her identity would not be disclosed to the public. Disclosure in response to an information request would not therefore be fair. The Decision Notice also recorded

the Information Commissioner's decision that there was no sufficient public interest in knowing the council tax history of a former councillor. On that basis, the Information Commissioner concluded that the Council had been entitled to withhold the name of the former councillor in question in reliance on section 40(2) of the FOIA.

The Appeal to this Tribunal

5. The Appellant's Notice of Appeal against the Decision Notice incorporated Grounds of Appeal in which he accepted that the name of a defaulting former councillor constituted that person's personal data for the purposes of FOIA section 40(2) and that he or she had a legitimate private interest in preserving its confidential status. He also acknowledged, very fairly, that the fact that the councillor was no longer serving "*might possibly tip the balance of privacy versus transparency in favour of his/her right to privacy*". However, he disagreed with the Information Commissioner's conclusion that it did so in this case, arguing:
 - a. That the individual might choose to stand for election to the Council again in the future; and, in any event
 - b. The public was entitled to know whether the former councillor had previously voted on a budgetary matter while in default and/or without declaring that fact - a possible offence by the individual (under section 106 of the Local Government and Finance Act 1992) and a serious failing on the part of the Council.
6. The Appellant opted to have his appeal determined on the papers and without a hearing, as was his right. We are satisfied that this was an appropriate procedure to follow in this case and we have therefore reached our decision based on the parties' written submissions and a small agreed bundle of relevant documents, including the correspondence that passed between the Information Commissioner's office and the parties during the course of the investigation.
7. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner 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, she 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.

The relevant law

8. The relevant part of section 106 of the Local Government Finance Act 1992 is in these terms:

106 Council tax and community charges: restrictions on voting.

"(1) This section applies at any time to a member of a local authority, or a member of a committee of a local authority or of a joint committee of two or more local authorities (including in either case a sub-committee), ... if at that time—

(a) a sum falling within paragraph 1(1)(a) of Schedule 4 to this Act; or

(b) a sum falling within paragraph 1(1)(a), (b), (d) or (ee) of Schedule 4 to the 1988 Act (corresponding provisions with respect to community charges),

has become payable by him and has remained unpaid for at least two months.

(2) Subject to subsection (5) below, if a member ... to whom this section applies is present at a meeting of the authority or committee ... at which any of the following matters is the subject of consideration, namely—

(a) any calculation required by Chapter III, IV or [F4IVA] of Part I of this Act; (b) any recommendation, resolution or other decision which might affect the making of any such calculation; or

(c) the exercise of any functions under Schedules 2 to 4 to this Act or Schedules 2 to 4 to the 1988 Act (corresponding provisions with respect to community charges),

he shall at the meeting and as soon as practicable after its commencement disclose the fact that this section applies to him and shall not vote on any question with respect to the matter.

(2A) ...

(3) If a person fails to comply with subsection (2) above, he shall for each offence be liable on summary conviction to a fine not exceeding level 3 on the standard scale, unless he proves that he did not know—

(a) that this section applied to him at the time of the meeting; or

(b) that the matter in question was the subject of consideration at the meeting.”

9. FOIA section 40(2) provides that personal data is exempt information if its disclosure would contravene any of the data protection principles.
10. 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, namely:

“6(1). 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.

11. There is scope for debate as to the correct approach to adopt to these provisions (see *Farrand v Information Commissioner and London Fire and Emergency Planning Authority* [2014] UKUT 0310 (AAC) at paragraph 20). That is to say whether;
 - a. the Schedule 2 consideration should be considered first, with the general test of fairness/lawfulness then only being considered if the analysis based on paragraph 6(1) points towards disclosure; or
 - b. it is appropriate to consider fairness first, as the Information Commissioner did in this case.
12. Whichever of those two approaches is adopted, the appropriate balance to be achieved between the principles underlying the FOIA and those set out in the DPA

have been said by the House of Lords to be that there is no presumption in favour of the release of personal data under FOIA, that the right of an individual to privacy with respect to the disclosure of personal data should continue to be protected and there is no reason to favour the right to freedom of information over the rights of data subjects (*Common Services Agency v Scottish Information Commissioner* (HL (Sc)) [2008] 1 WLR 1550 ("CSA") at paragraphs 7 and 68).

13. Those principles were applied by the Upper Tribunal in *Bolton*. As both parties rely on the decision to support their opposing points of view, it is appropriate to quote extensively from the decision. On the issue of fairness, the Upper Tribunal Judge said:

"51. I start by reminding myself that the guiding principle under the DPA is "the protection of the fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data" (CSA at [7]). An ordinary member of the public could reasonably expect not to be named in the event of non-payment of council tax and even if he is summoned (subject to any publicity that might arise as a result of being identified at a court hearing). ... , in the case of an ordinary member of the public, the payment or non-payment of council tax is essentially a private matter.

52. Identifying a defaulting councillor would engage all the private issues that would apply to any other person and may, as a result of the councillor's position, lead to a greater intrusion into his private life. It would identify him as a person who has defaulted in his council tax ... More so than an ordinary member of the public, a councillor may be subject to considerable pressure to explain his default and he may feel that revealing the information is the only way in which he is able to do so. In any event, it is possible that probing by the media or other members of the public will bring to light such matters or may lead to harmful speculation which the councillor can only end by explaining the true position. The circumstances touch on some personal matters disclosure of which may cause distress.

53. Despite the above, I conclude that it is not reasonable for a councillor to expect not to be identified where he is summoned for non-payment of council tax. I have already set out the powerful factors as to why a councillor's default in paying council tax is a serious matter of public concern, both as to the ability of the councillor to perform his key functions and in terms of public confidence and accountability. As well as the impact of section 106, non-payment of council tax puts the councillor in conflict with the obligations of his office including to protect the council's resources, to act in accordance with the law, and to act in accordance with the trust which the public has placed in him. In my judgment, a councillor should expect to be scrutinised as to, and accountable for, his actions in so far as they are relevant to his public office.

54. I have explained the factors which show that there is a compelling legitimate interest in the public knowing whether a particular councillor has failed to pay the council tax, at least in circumstances where they have remained in default for over two months with the result that section 106 applies. In most cases this compelling interest will outweigh the councillor's personal privacy. The public interest in knowing the information is central to the proper functioning and transparency of the democratic process. The identification of a defaulting councillor involves an intrusion into his private life, as summarised above, but it is an intrusion that a councillor must be taken to have accepted when taking office.

55. So the question is whether the general position pertaining to councillors is displaced in this case by the councillor's personal mitigating circumstances. Those circumstances might be relevant to expectation, as the First-tier Tribunal thought. The question is whether, as Mr Hopkins put it, in the light of the mitigating circumstances, the councillor deserves the damage or distress that identifying him would cause. It may also be relevant to the balance to be struck between the councillor's interests in privacy and the competing interest in disclosure.

56. There may be exceptional cases in which the personal circumstances of a councillor are so compelling that a councillor should be protected from such exposure. But I do not consider that the personal circumstances of the councillor in this case are sufficiently strong to displace the significant interests in disclosure of his name. I take into account that the councillor may feel compelled to explain his default or that identification of him may lead to exposure of some of his personal circumstances. I accept that there may be some distress to him, and damage to his reputation or standing. I do not consider that the consequences are sufficiently adverse to mean that it would be unfair to disclose his name. ..."

14. The Upper Tribunal Judge then turned to paragraph 6(1) of Schedule 2. First, she decided that the person requesting information (in that case a journalist) had a legitimate interest in seeing it rooted in the interests of transparency, accountability and efficacy of the democratic process. She also decided that disclosure was necessary in order to serve that interest as nothing less intrusive would:

"...achieve the transparency of the Council's processes nor the accountability of the councillor to the public which [the requester] seeks and which I have decided is an important legitimate interest."

15. The Upper Tribunal then concluded:

"Finally, I must consider whether disclosing the councillor's identity is unwarranted by reason of the prejudice to the article 8 rights of the councillor. I have already set out above the ways in which disclosure in this case is likely to interfere with the councillor's rights. The issue substantially overlaps with that of fairness. As explained in the reasons above and in the closed reasons, the prejudice is not unwarranted."

16. There are two preliminary points we should make about the *Bolton* decision. First, the facts of the case are similar, but not identical, to the facts of this Appeal. It is not therefore a binding precedent that we are required to follow. But we are obliged to apply the points of general principle that the Upper Tribunal Judge set out in the course of reaching her decision. Secondly, the person who had made the original information request in *Bolton* was a journalist and the Upper Tribunal Judge suggested (at paragraph 61) that his personal interest in disclosure elided with the public interest in knowing the name of the defaulting councillor. We note, however, that any suggestion that the only "legitimate interest" to be considered was the requester's personal concerns (as stated in the Upper Tribunal decision in *GR-N v Information Commissioner and Nursing and Midwifery Council* [2015] UKUT 449) would be at variance with the approach adopted by the Court of Appeal in *Corporate Officer of the House of Commons v The Information Commissioner, Brooke and others* [2008] EWHC 1084. That case proceeded on the basis that the First-tier Tribunal had been right to

take into account the public interest in the expense claims of Members of Parliament being disclosed and without apparent regard to any private interest that the original requesters had in disclosure.

The parties' arguments

17. We have summarised the Appellant's arguments, as set out in his Grounds of Appeal, in paragraph 5 above. He argued that *Bolton* made no distinction between councillors and former councillors and set out what he said was the "core issue" in his reply submission in these terms:

"Only by knowing the name of the defaulting councillor, whether he or she is still an acting councillor or not, can a member of the public check the decision-making records of the council to ensure that S106 has been complied with by both the councillor and the council's officer. Where a councillor has been allowed to breach the provisions of Section 106, the council officer who has allowed this to happen has a clear incentive to try to hide that fact. [The Information Commissioner] suggests that the balance of convenience between the defaulting councillor's privacy and the public's right to satisfy itself that no offence has been committed lies with the former. Presumably [the Information Commissioner] thinks the same thing regarding the council officer's right to escape the consequences of his or her failure to prevent the S106 offence from taking place. These seem heroic propositions, not compatible with principles of transparency and accountability. That is particularly the case where there is nothing to stop that councillor from standing for election again, regardless of whether or not that is his or her presently declared intention."

18. The Appellant acknowledged that the Council had informed the Information Commissioner during the course of her investigation that the councillor in question had left office in May 2015 and had not committed an offence under section 106 while in office. However, the Appellant argued that he should not have to take the Council's assurance on a matter of such importance but that he, and the public, should be provided with the information to enable them to check the position for themselves.
19. The Information Commissioner's response to the Grounds of Appeal, while acknowledging that *Bolton* did not make a distinction between current and former councillors, stressed the fact that the individual was no longer a public figure at the time of the information request. He or she had by that time become "*an ordinary member of the public*" (as identified in paragraph 51 of *Bolton*, quoted above) and therefore someone who "*could reasonably expect not to be named in the event of non-payment of council tax*". Ordinary members of the public, it was argued, had a reasonable expectation that they would not be exposed to the distress of having their past failure to pay council tax made public. Against that, the legitimate interest in disclosure was less in the case of a former councillor, as compared with a person currently in office, particularly where it seems unlikely that the individual will seek public office again and he or she had not committed an offence while in office. For the same reason, disclosure was not necessary to serve any interest and would be unwarranted for the purposes of paragraph 6(1).

Our decision

20. A private individual's reasonable expectations of privacy were summarised in paragraph 51 of *Bolton* quoted above. We adopt that explanation for the purposes of this decision. The key issue is whether the countervailing factors favouring disclosure in relation to a serving councillor (paragraphs 53 and 54) should apply in the particular circumstances of the individual in this case – a former councillor who had not breached section 106 while previously in office. We remind ourselves that we are not considering the position of former councillors in general. Factors such as the length of time since he or she held office, the circumstances in which he or she ceased to be a councillor and the standards he or she maintained while in office could make a material difference from case to case. However, we are satisfied that, for the purposes of this Appeal, the individual former councillor would reasonably have been entitled to expect that his or her council tax record while in office would remain confidential. It would be unfair for it to be disclosed. We would reach the same conclusion in the context of paragraph 6(1) of Schedule 2. The legitimate interest in disclosure, which was set out with clarity in paragraph 54 of *Bolton*, is greatly reduced in the case of a former councillor with no record of having breached section 106. His or her status as a private citizen at the time of the request increases the right to privacy, such that breach of that right would be unwarranted in the circumstances.
21. The fact that the individual may stand for office again in the future does not lead us to alter the view we have reached. The clear guidance provided by the Upper Tribunal in *Bolton* should ensure that a request for the equivalent information about an individual holding office in future would not face resistance from any council to whom it was addressed. It may be, indeed, that councils will by now have included in their publication schemes information on the payment of council tax by those holding or seeking elected office. We do not therefore need to consider the hypothetical scenario of the former councillor in this case seeking to be elected again in the future. And it would not be appropriate for us to do so.
22. We therefore conclude, on the basis of the particular facts of this case, that the Council was entitled to refuse the Appellant's request for information under section 40(2) and that the Appeal should therefore be dismissed.
23. Our decision is unanimous.

Signed
Chris Ryan
Judge of the First-tier Tribunal
Date: 12 December 2017
Promulgation date : 14 December 2017