IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2018/0200

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50730664
Dated: 14 August 2018

Appellant:	**Conal Timoney**
Respondent:	**The Information Commissioner**
Date of hearing:	**13 March at Field House, London**
Date of decision:	**25 March 2019**

Before

Anisa Dhanji
Judge

and

Suzanne Cosgrave
Pieter de Waal

Panel Members

Subject matter

FOIA section 40(2) - whether disclosure of personal data would breach the first data protection principle.

IN THE FIRST-TIER TRIBUNAL
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DECISION

The appeal is dismissed.

Signed

Anisa Dhanji

Judge

IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

REASONS FOR DECISION

Introduction

1. This is an appeal by Mr Conal Timoney (the "Appellant"), against a Decision Notice ("DN"), issued by the Information Commissioner (the "Commissioner"), on 14 August 2018.

2. It concerns a request made by the Appellant to Surrey County Council (the "Council"), under the Freedom of Information Act 2000 ("FOIA").

[redacted] The request was for information about complaints relating to child safety issues at [redacted] (the "School"), [redacted]

4. The Appellant [redacted] He wanted to know what [redacted] complaints of a safeguarding nature had been received by the Council about the School, and what the Council had done about it.

5. The Council refused the Request, citing various exemptions in FOIA.

6. The School is not publicly funded, and is not itself subject to FOIA.

The Request

7. The Appellant's request (the "Request"), was made on 16 December 2017, on the following terms:

   All information that Surrey County Council holds on [redacted] Please include all information not previously published including, but not limited to, all emails sent or received, all complaints from parents and all child safety issues raised. This request is for the period 1st January 2014 to 15th December 2017.

   Please note: included in the request are all emails, documentation and correspondence of all staff and all persons acting for the Surrey County Council whether this information is held on private servers and email accounts or on Surrey County Council servers and email accounts.

   It is accepted that the Surrey County Council can block out names that may identify children or parents but the complaints themselves should still be included.

8. The Council replied on 23 January 2018 stating that it held no information within the scope of the Request. The Appellant requested an internal review. The Council responded on 12 March 2018. It acknowledged that its response was in breach of section 10(1), having been made more than 20 days after

the Request. It also said that in fact, it did hold some information within the scope of the Request, but that the information (the "disputed information"), was exempt from disclosure under FOIA section 21 (information accessible by other means), section 40(1) (personal data of the Appellant), and section 40(2) (third party personal data).

9. In relation to section 40(2) in particular, the Council said that:

> *... given the low number of incidents recorded in respect of the School (less than five) and given that one of those was the incident of which Mr Timoney was already aware, the Council would not have been able to sufficiently anonymise the information and the individuals concerned would be identifiable. The information held would therefore constitute the personal information of the requester of third parties.*

Complaint to the Commissioner

10. The Appellant complained to the Commissioner on 7 March and again on 13 March 2018, following the internal review. The Appellant's complaints related only to section 40(2), in respect of which he said:

> *I ask that Surrey County Council black out names and addresses but leave the substance so that the Freedom of Information Act is respected as much as individual privacy. I respectfully remind the Council that privacy should never be used to hide wrong doing or the failure of the Council to handle child safety issues.*

11. The Commissioner sought information from the Council about its procedures for dealing with complaints relating to child protection in private schools such as the School, and the number and details of such complaints it had received regarding the School. The Council informed the Commissioner that it had received only two complaints, one that was already known to the Appellant [redacted] and one other in respect of which it was relying on the section 40(2) exemption. The Council showed the Commissioner the disputed information, and maintained that it would not be possible to anonymise the information sufficiently to prevent the third parties in issue being identifiable from the information.

12. On 28 June 2018, following the Commissioner's investigations, the Council informed the Appellant that in fact, the only complaint received involving the School and coming within the scope of the Request, consisted of a single e mail chain. This could not be disclosed "*due to it being the personal data of a third party who could be identifiable because of information already in the public domain.*" We have understood this to be a reference to information about the incident giving rise to the complaint being in the public domain through reports in the national press.

13. The Appellant was not satisfied with the Council's position, and accordingly, the Commissioner proceeded to issue a DN. She found, *inter alia,* that the disputed information was personal data, and was exempt from disclosure under section 40(2) of FOIA. The Commissioner also found that the Council had breached the time limit for responding as set out in section 10(1).

Appeal to the Tribunal

14. The Appellant has appealed against the DN under section 50 of FOIA.

15. The scope of the Tribunal's jurisdiction in dealing with an appeal from a DN is set out in section 58(1) of FOIA. If the Tribunal considers that the DN is not in accordance with the law, or to the extent that it involved an exercise of discretion by the Commissioner, she ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.

16. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the Decision Notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, as in this case, the Tribunal will often receive evidence that was not before the Commissioner.

17. The parties have lodged an agreed open bundle. In addition, we have been supplied with a closed bundle which includes the disputed information.

18. The Council has not been joined as a party, although we have considered its responses to the Commissioner's investigations.

19. The parties have requested that this appeal be determined on the papers without an oral hearing. Having regard to the nature of the issues raised, and the nature of the evidence, we are satisfied that the appeal can properly be determined without an oral hearing.

Disputed Information

20. We will begin by describing the disputed information. In line with the Supreme Court's decision in **Bank Mellat v Her Majesty's Treasury [2013] UKSC 38**, we will try to say as much as we reasonably can about that information, without undermining the purpose of this appeal. We have also kept in mind the Court of Appeal's guidance in **Browning v Information Commissioner and the Department for Business, Innovation and Skills [2014] EWCA Civ 1050**, as regards closed material generally.

21. The Tribunal has received a closed bundle comprising some 40 pages, including some duplicate copies. Some pages were removed by the Registrar pursuant to Case Management Directions dated 23 November 2018, on the basis that they were not relevant for the purpose of determining the appeal. Most of the closed bundle comprises information about the Appellant's own complaint [redacted] and communications between the Council and Commissioner during the course of the Commissioner's investigation of the Council's response to the Request. Redacted versions of these communications are at pages 73 to 77 and 80 of the open bundle.

22. The disputed information comprises, as the Council had already informed the Appellant, a single e mail chain relating to an incident concerning [redacted] while that child was a pupil at the School. More specifically, the disputed information comprises two pages containing two short internal e mails by the

Council's staff. These e mails briefly describe the incident in issue, the steps the Council took, and its assessment of whether further steps were needed.

23. It is unclear how the incident was brought to the Council's attention. If this was in writing, that communication is not in the closed bundle, and has not been referred to. We have considered whether to direct clarification to be provided about this, but have concluded that this would not be proportionate. If any such communication exists, it would fall to be treated in the same way as the disputed information before us. Also, it would not address the Appellant's concern about how the Council dealt with the complaint.

Statutory Framework

24. Under section 1 of FOIA, any person who makes a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with it.

25. The duty on a public authority to provide the information requested does not arise if the information is exempt under Part II of FOIA. Personal data is exempt subject to certain exceptions.

26. *"Personal data"* is defined in section 1 of the Data Protection Act 1998 ("DPA 1998") which has since been replaced but was in force at the time the Request was made. It provides that:

> *"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,*
>
> *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.*

27. A specific sub-category of personal data that is relevant here is *"sensitive personal data"* which, in so far as is relevant, is defined in section 2(e) of DPA 1998, as meaning personal data consisting of information as to a person's *"physical or mental health or condition"*.

28. The exemption from disclosure of personal data is contained in section 40(2) of FOIA, which, it is fair to say, is not the easiest of provisions to unpick. In so far as is relevant, it provides as follows:

> *(2) Any information to which a request for information relates is also exempt information if*
>
> *it constitutes personal data which do not fall within subsection (1), and*
>
> *either the first or the second condition below is satisfied.*

(3) The first condition is

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

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

29. Essentially, personal data of third parties is exempt if disclosure would breach any of the data protection principles set out in Part 1 of Schedule 1 of DPA 1998. The exemption is absolute.

30. The data protection principles are set out in the Schedules to DPA 1998. The first question is whether disclosure of the disputed information would breach any of the data protection principles. Only the first data protection principle is relevant here. This provides that personal data shall be processed fairly and lawfully, and in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met. In the case of sensitive personal data, at least one of the conditions in Schedule 3 must also be met.

31. Would disclosure of the disputed information be fair and lawful? Would any of the conditions in Schedule 2 and 3 be satisfied? These are independent questions, but they can be addressed in either order.

32. On the facts of this case, the only relevant condition in Schedule 2 is condition 6(1). The condition is that:

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.

33. Essentially, compliance with condition 6(1) involves 3 questions:

- Is the requester pursuing a legitimate interest?
- Is the disclosure necessary for the purposes of those interests?
- Is the disclosure unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects?

34. Even if condition 6(1) is met, because the disputed information comprises sensitive personal data, at least one condition in Schedule 3 must also be satisfied. Only conditions 1 and 5 are potentially relevant. These conditions are that:

> *The data subject has given his explicit consent to the processing;*
>
> *The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.*

<u>The Parties' Position</u>

<u>The DN</u>

35. The Commissioner's position is set out primarily in the DN, and in her Response to the Appellant's grounds of appeal.

36. The Commissioner says first, that the disputed information comprises personal data. It describes an incident at the School and names the individuals involved, and therefore relates to identifiable living persons. Even with anonymisation as proposed by the Appellant, the disputed information would still be personal data. The incident in question is well-known within the School community, and it would not be possible to give sufficient detail to satisfy the Request, without third parties being identifiable.

37. Although this was not a point taken by the Council, the Commissioner also considered (as she was entitled to do), that the disputed information is sensitive personal data under section 2 of DPA 1998, because it relates to a person's "physical or mental health or condition".

38. The DN goes on to say that the Council can only disclose the disputed information if doing so does not breach any of the data protection principles. The disclosure would have to be fair, lawful and satisfy a condition in each of Schedules 2 and 3 of DPA 1998.

39. Disclosure would not be fair because:

    - people have a strong general expectation of privacy in relation to safeguarding matters and would expect the Council to respect their confidentiality; and

    - given the sensitive nature of the disputed information, disclosure is likely to cause damage or distress to the third parties identified.

40. While a compelling public interest may nonetheless make it fair to disclose the disputed information, the Commissioner considered that there was no sufficiently compelling public interest in this case to justify disclosure of the disputed information.

41. There were no Schedule 2 or 3 conditions present.

<u>The Appellant's Grounds of Appeal</u>

42. The Appellant does not appear to challenge the Commissioner's findings that the disputed information is personal data, and indeed that it is sensitive personal data. His arguments are focused on the nature and weight of the public interest in disclosure which he says is at stake.

43. He says that there is an important public interest in knowing if the School is safe, and whether the Council acted appropriately in response to complaints concerning chid safety.

44. He considers that in assessing the public interest, the Commissioner was incorrect to find that the evidence does not point to there being a particular problem of child safety at the School. The Appellant further considers that the Commissioner is unqualified to assess the public interest in child safety.

45. The Appellant also takes issue with the Commissioner's suggestion that the he ask the person who made the report to the Council to use a subject access request, in order to obtain the disputed information and then to pass it on to him.

The Commissioner's Response

46. The Commissioner's Response is largely a restatement of the points made in the DN, with some additional points or emphasis in response to the grounds of appeal.

47. In brief, the Commissioner says that it would be unfair to the people who are identified (or identifiable, despite redaction), for the disputed information to be released. It relates to a child protection issue, which is inherently sensitive, and about which people would have strong expectations of privacy. Also, the disputed information was provided to the Council on the understanding that it would be handled confidentially.

48. The Commissioner stresses the potential for damage and distress to the relevant individuals. The disputed information is sensitive and personal, and as disclosure under FOIA is to the public at large, it would inevitably cause distress to the data subjects for this information to be disclosed as they would then no longer have any control over who knew the details of the incident, and how much information to reveal.

49. As to the Appellant's contention that there is sufficient public interest in the disputed information to justify disclosure, the Commissioner says that the Appellant has misunderstood the balancing exercise between the rights of the data subject and the public interest in disclosure. The existence of a public interest is not, by itself, enough to justify disclosure. The default position is against disclosure; it is only allowable if the public interest in disclosure is sufficient to outweigh the expectations of the data subject and the harm caused to them from disclosure.

50. Also, the Commissioner says that disclosure in this case would not significantly advance the public interest, because there is nothing particularly concerning in the disputed information. On the other hand, given the harm to the data subject, this is a clear case in which disclosure would be unfair.

51. The Commissioner says that had there been greater safeguarding concerns about the School, disclosure may have advanced the public interest to a greater degree, and could have outweighed the interests against disclosure. In the present case, however, any advancement of the interest from disclosure of the disputed information would be minimal.

52. Even if it would be fair to disclose the information, it would not be lawful to do so because none of the conditions under Schedules 2 and 3 are present in this case. The only potentially relevant Schedule 2 condition is 6(1), and it would not be satisfied because disclosure would not be necessary in order to allow a third party to pursue a legitimate interest. The information does not contain much that would advance the interest of ensuring that there is adequate safeguarding oversight, and in any event, that interest can be advanced without needing to disclose the disputed information. The procedures followed by the Council are publicly available online, there are statutory obligations to report issues to police and other authorities, and there are oversight mechanisms in place. Any third party can analyse and assess these without needing access to the sensitive personal data contained in the disputed information. There is also no lawful basis for disclosure under Schedule 3.

53. In response to the Appellant's criticism of the Commissioner's suggestion that he could access the disputed information by asking the data subject to make a subject access request, the Commissioner says this was offered as incidental advice and explanation. It was not part of the analysis as to whether the information was disclosable under FOIA.

Findings

54. The Commissioner's analysis, in terms of the steps she went through (as summarised above), are clearly correct, based on the statutory provisions, as well as the relevant case law.

55. It is equally clear that the disputed information comprises not just personal data, but sensitive personal data, for the reasons the Commissioner has given.

56. To the extent the Appellant maintains that the personal data elements can be redacted, we agree with the Commissioner that the disputed information cannot be sufficiently anonymised. The fact that it was a single complaint, that it was reported in the press, and that those in the School community would likely know about the nature and date(s) of the incident, means that the third party or parties whose data is in issue, would be clearly identifiable.

57. The question then is whether disclosure of this personal data would breach any of the data protection principles. Only the first data protection principle is relevant. As already noted, it provides that personal data shall be processed fairly and lawfully, and in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met. In the case of sensitive personal data, one of the conditions in Schedule 3 must also be met.

58. A short answer to the appeal is that since it is clearly the case that no Schedule 3 condition has been met (and indeed the Appellant has not argued otherwise), the appeal must fail.

59. However, in fairness to the Appellant, we will address the issues in the same order as the Commissioner did.

60. The key issues that arises from the first data protection principle, and condition 6(1), is whether disclosure would be fair and lawful. If so, is disclosure necessary for the purposes of a legitimate interest that is being pursued, and is it unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects? The first and last of these considerations are closely related.

61. Would disclosure of this personal data be fair? When assessing fairness, the interests of the data subject as well as the data user, and where relevant, the interests of the wider public, must be taken into account in a balancing exercise. This wide approach to fairness is endorsed by the observations of Arden LJ in **Johnson v Medical Defence Union [2007] EWCA Civ 262** at paragraph 141:

> *"Recital (28) [of Directive 95/46] states that "any processing of personal data must be lawful and fair to the individuals concerned". I do not consider that this excludes from consideration the interests of the data user. Indeed the very word "fairness" suggests a balancing of interests. In this case the interests to be taken into account would be those of the data subject and the data user, and perhaps, in an appropriate case, any other data subject affected by the operation in question."*

Although that case concerned the provisions of the Freedom of Information (Scotland) Act 2002, the principles apply equally in relation to FOIA.

51. As to whether disclosure is necessary for the purposes of a legitimate interest, "necessary", in this context, has been held to reflect the meaning attributed to it by the European Court of Human Rights when justifying an interference with a recognised right, namely that there should be a pressing social need and that interference must be both proportionate as to the means, and fairly balanced as to ends. See **Corporate Officer of the House of Commons**. In **Farrand v Information Commissioner and the London Fire and Emergency Planning Authority [2014] UKUT 0310 (AAC)**, the Upper Tribunal stressed that "necessary" does not mean essential or indispensable. That is too strict a test. Rather, the word connotes a degree of importance or urgency that is lower than absolute necessity, but greater than a mere desire or wish.

62. What the Appellant particularly disputes, is the conclusion the Commissioner reached on the question of whether disclosure would be fair, and whether it is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects. Indeed, the key issue arising from the Appellant's grounds of appeal is whether the Commissioner gave proper weight to the competing interests.

63. The two competing interests are, of course, the interests of the data subject on the one hand, and the public interest in disclosure based on child safety concerns, on the other.

64. In our view, the Commissioner's conclusion was correct, but there are two aspects about the nature of the balancing exercise that need further explanation.

65. First, although the assessment of the competing interests in the context of section 40(2), is referred to as a balancing exercise, in fact, one does not start with the scales evenly balanced. The continued primacy of the DPA, notwithstanding freedom of information legislation, and the high degree of protection it affords data subjects, has been strongly emphasised by Lord Hope in **Common Services Agency v Scottish Information Commissioner [2008] 1 WLR 1550** where he states (at para 7):

> *"In my opinion there is no presumption in favour of the release of personal data under the general obligation that [FOIA] lays down. The references which that Act makes to provisions of DPA 1998 must be understood in the light of the legislative purpose of that Act .... The guiding principle 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."*

66. The following passage in **Corporate Officer of the House of Commons v IC and Norman Baker MP [2011] 1 Info LR 935** at para 28, offers further guidance about the exercise to be undertaken:

> *"If A makes a request under FOIA for personal data about B, and the disclosure of that personal data would breach any of the data protection principles, then the information is exempt from disclosure under the Act: this follows from section 40(2) read in conjunction with section 40(3)(a)(i), or (when applicable) section 40(3)(b) which does not apply in these appeals. This is an absolute exemption - section 2(3)(f)(ii) FOIA. Hence the Tribunal is not required to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure under section 2(2). However... the application of the data protection principles does involve striking a balance between competing interests, similar to (though not identical with) the balancing exercise that must be carried out in applying the public interest test where a qualified exemption is being considered."*

67. Second, the "balancing" exercise must be undertaken based on the particular information in issue, and the particular public interest factors that arise based on that information. It is not an exercise based simply on a generic categorisation (so for example, personal data versus child safety), as the Appellant has positioned it. This does not mean that generic factors are not relevant, but they must be borne out by the particular information in issue.

68. We return now to the facts of the present case. The disputed information comprises the sensitive personal data of a child, concerning an incident while the child was a pupil at the School. In our view, there can be no doubt that there would have been an expectation that the Council would treat such information as confidential.

69. For disclosure of this information to be fair, there would have to be a weighty and compelling interest in favour of disclosure so as to make it necessary.

The Appellant argues that there is an important public interest in knowing if the School is safe, and whether the Council acted appropriately in response to complaints concerning child safety.

70. However, the disputed information relates to a single complaint concerning a single incident. In our view, this, taken together with the nature of the incident, means that the Commissioner was entirely correct to find that the evidence does not point to there being a particular problem of child safety at the School. This is not a case where, for example, there are witness statements from others in the School community expressing their concerns, nor evidence from parents who may have withdrawn their children from the School because of such concerns.

71. The Appellant contends that the Commissioner is not qualified to assess the public interest in child safety at the School. That argument is misconceived. The Commissioner is expected to make her decisions on the basis of evidence, not extraneous expertise. That is also true of the Tribunal.

72. Based on the evidence before us, we find that disclosure would not be fair. Having reached this finding we need go no further, but if we did, Schedule 2 condition 6(1) would lead us to the same conclusion. Disclosure is not necessary for the purposes of a legitimate interest that is being pursued. The Appellant's position is that there is a problem of child safety at the School but the evidence before us does not support that position. Also, none of the conditions in Schedule 3 is met.

73. We make no observations about whether the Council is notified of all safeguarding concerns at privately funded schools. Our finding is simply that the evidence that has been placed before us does not support disclosure of the personal data in issue here. Different evidence may of course have led to different findings.

Decision

74. For all these reasons, we dismiss this appeal.

75. Our decision is unanimous.

Signed
Anisa Dhanji
Judge

Date: 25 March 2019

FIRST TIER TRIBUNAL
(INFORMATION RIGHTS)

EA/2018/0200

BETWEEN:

CONAL TIMONEY

Appellant

– and –

THE INFORMATION COMMISSIONER

Respondent

RULING

Introduction

1. The Appellant appealed to the Tribunal under section 57 of the Freedom of Information Act 2000 ("FOIA"), against the Information Commissioner's Decision Notice dated 14 August 2018, reference FS50730664 ("the DN").

2. The DN concerned a request made by the Appellant to Surrey County Council (the "Council"), under the Freedom of Information Act 2000 ("FOIA").

3. The request was for information about complaints relating to child safety issues at [redacted] (the "School"), [redacted].

4. [redacted]. He wanted to know what other complaints of a safeguarding nature had been received by the Council about the School, and what the Council had done about it. The Council refused the Request, citing various exemptions in FOIA.

5. The evidence was that the Council held information as regards only one previous complaint relating to a child who had been a pupil at the School.

6. By a decision dated 25 March 2019, the Tribunal dismissed the appeal. It found, *inter alia,* that the information sought by the Appellant was not just personal data, but sensitive personal data. Disclosure would breach the data protection principles.

7. The Tribunal also found that the information could not be sufficiently anonymised. The fact that it was a single complaint, that it was reported in the press, and that those in the school community would likely know about the nature and date(s) of the incident, meant that the third party or parties whose data was in issue, would be clearly identifiable.

The Appellant's Application for Anonymity

8. Shortly after the decision was promulgated, the following communication was received from the Appellant:

   Your decision is noted.

   I must point out that I expressly do NOT give my permission for you to publish my name or details in any publication of this decision.

   As your decision relies heavily on the right of the individual who wrote to the council to expect privacy I expect you will apply the same respect to my privacy and will take action through my Solicitor should you fail to respect that right.

9. I take this to be an application for anonymity.

10. The Appellant must have known that his appeal would result in a written decision, just as did his complaint to the Commissioner. The application for anonymity should have been made in advance. If it was successful, the decision could have been drafted accordingly, rather than necessitating this separate ruling and possibly now having the decision published with redactions.

11. Nevertheless, and despite his intemperate language, this application has been considered on its merits, without regard to the timing or manner in which it was made.

12. The Commissioner was given an opportunity to make submissions in response to the application, but none were received.

Relevant Principles

13. The Appellant's starting point is misconceived. His appeal was dismissed on the basis that the information he was seeking was the personal data of a third party, and that disclosure would not be fair. He appears to be saying that the same considerations should apply to any other personal data contained in the Tribunal's decision. However, there is generally no expectation of privacy in personal data which is processed by the judiciary exercising judicial functions. This is explained in the Privacy Notice issued by the Lord Chief Justice of England and Wales and the Senior President of Tribunals. See: https://www.judiciary.uk/about-the-judiciary/judiciary-and-data-protection-privacy-notice.

14. The principles that apply where an application for anonymity is made in respect of a decision of a court or tribunal, have been recently considered by the Upper Tribunal in **D v The Information Commissioner: [2018] UKUT 441 (AAC)**, in which Judge Wikeley reviewed the relevant case law. As I understand it, that decision has been appealed to the Court of Appeal. Nevertheless, the decision, as it stands is binding authority on the First-tier Tribunal on whether a party to an information rights appeal can or should be anonymised.

15. I will summarise below, the principles set out in **D**, and some of the case law referred to. However, I will not attempt to be exhaustive, because the decision itself is easily accessible and there is little to be gained from mere repetition.

16. The starting point is always the principle of open justice. This requires not only that cases should be heard in public but that *full, fair and accurate reports naming those involved can and should be published:* **Adams v Secretary of State for Work and Pensions and Green (CSM) [2017] UKUT 9; [2017] AACR 28.**

17. The anonymization of a published judgement is regarded as a derogation from the principle of open justice. Derogations can only be justified to the extent that they are necessary. They are wholly exceptional and should be no more than strictly necessary to achieve their purpose.

18. The burden of adducing evidence and/or reasons to justify a derogation from open justice always falls on the applicant for such an order. The applicant must show that the paramount object of securing that justice is done, would be rendered doubtful if it were not granted.

19. In considering such an application, three Convention rights may be relevant, namely Articles 6 (the right to a fair trial), Article 8 (the right to privacy and family life) and Article 10 (the right to freedom of expression).

20. Articles 8 and 10 are competing rights. They are also both qualified rights. The House of Lords in **Campbell v MGN Ltd [2004] 2 A.C. 457** set out these four propositions on the interplay between Articles 8 and 10 (at paragraph 17):

> *First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.*

21. In **JIH v News Group Newspapers Ltd (Practice Note) [2011] EWCA Civ 42; [2011] 1 W.L.R. 1648**, at paragraph 21, Lord Neuberger of Abbotsbury set out the principles which apply where a claimant seeks an anonymity order or other restraint on publication of details of a case which are normally in the public domain. Principles (8) and (10) have been omitted, below, because they are fact specific:

> *(1) The general rule is that the names of the parties to an action are included in orders and judgments of the court.*
>
> *(2) There is no general exception for cases where private matters are in issue.*
>
> *(3) An order for anonymity or any other order restraining the publication of the normally reportable details of a case is a derogation from the principle of open justice and an interference with the Article 10 rights of the public at large.*
>
> *(4) Accordingly, where the court is asked to make any such order, it should only do so after closely scrutinising the application, and considering whether a*

degree of restraint on publication is necessary, and, if it is, whether there is any less restrictive or more acceptable alternative than that which is sought.

(5) Where the court is asked to restrain the publication of the names of the parties and/or the subject matter of the claim, on the ground that such restraint is necessary under Article 8, the question is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies a party and/or the normally reportable details to justify any resulting curtailment of his right and his family's right to respect for their private and family life.

(6) On any such application, no special treatment should be accorded to public figures or celebrities: in principle, they are entitled to the same protection as others, no more and no less.

(7) An order for anonymity or for reporting restrictions should not be made simply because the parties consent: parties cannot waive the rights of the public.

(9) Whether or not an anonymity order or an order restraining publication of normally reportable details is made, then, at least where a judgment is or would normally be given, a publicly available judgment should normally be given, and a copy of the consequential court order should also be publicly available, although some editing of the judgment or order may be necessary.

22. In **Adams**, after reviewing the case law, Charles J said the following about the principle of open justice (at paragraph 53):

    I agree with Mr Adams that these cases show that:

    i) the principle of open justice is a fundamental and very important one,

    ii) no judge should depart from it without proper regard to its importance and the public interest on which it is founded, and

    iii) no judge has "a general and arbitrary discretion to give privacy rights to parties or children whenever it feels it would be nice to do so, or to avoid supposed discomfort or embarrassment".

    Rather departure from the principle of open justice must be based on a proper assessment of the relevant competing factors.

23. On the specific issue of anonymization, he said (at paragraph 55):

    An aspect of that approach is that anonymization of a report of a hearing in open court, or of a judgment relating to a hearing in open court, is a departure from the default position founded on the public interest and so the burden of justifying that departure falls on the person seeking that anonymization.

24. Does it make any difference where the applicant is the party who instituted the proceedings in the first place? In **R v Legal Aid Board ex p. Kaim Todner [1999] Q.B. 966,** the Court of Appeal acknowledged (at paragraph 978F) that in general, *"parties and witnesses have to accept the embarrassment and damage to their reputation and the possible consequential loss which can be inherent in being involved in litigation."*

25. It went on to say (at paragraph 978E):

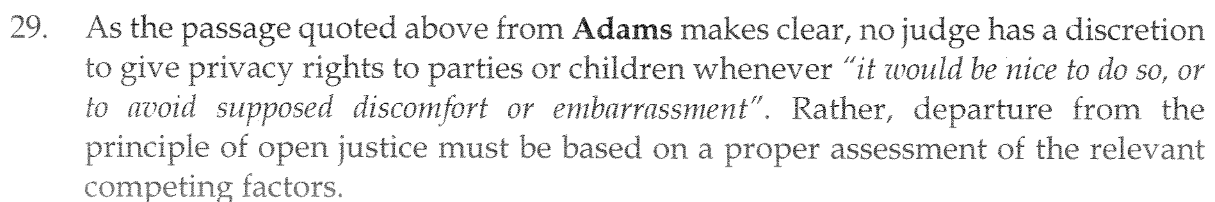
A distinction can also be made depending on whether what is being sought is anonymity for a plaintiff, a defendant or a third party. It is not unreasonable to regard the person who initiates the proceedings as having accepted the normal incidence of the public nature of court proceedings. If you are a defendant you may have an interest equal to that of the plaintiff in the outcome of the proceedings but you have not chosen to initiate court proceedings which are normally conducted in public. A witness who has no interest in the proceedings has the strongest claim to be protected by the court if he or she will be prejudiced by publicity, since the courts and parties may depend on their co- operation.

26. In **D**, Judge Wikeley noted the arguments made before him as to whether this case was still good law, but went on to say (at paragraph 35), that:

> *In my judgement it remains the case that there is a potential distinction to be drawn between the various different categories of participant in any given set of proceedings – but the real question is how that distinction plays out in the* context of the ultimate *balancing test. I am not at all sure the Court of Appeal in ex p. Kaim Todner was seeking to establish some hard-edged proposition of law that turned on the precise status of participants in legal proceedings. Rather, it may just be that simply on the facts in any given case it is likely in practice to be more difficult for the appellant who brought the case to court to argue convincingly for anonymity than it may be for e.g. a witness in legal proceedings. Contrary to Mr Callus's submissions, I am satisfied that the fundamental approach in ex p. Kaim Todner has survived the advent of the HRA, given its approval in several more recent decisions of the highest authority, even if the Court of Appeal's approach in that case might now be expressed using rather different terminology.*

Applying these Principles to the Facts of this Case

27. There is no justification for granting anonymity for the Appellant himself. He was named in proceedings he had initiated. As set out in **JIH,** the general rule is that the names of the parties to an action are included in orders and judgments of the court. The Appellant says he has not consented to his name or details being published. The names of the parties are included in decisions on the basis of the principle of open justice. The parties' consent is not needed.



29. As the passage quoted above from **Adams** makes clear, no judge has a discretion to give privacy rights to parties or children whenever *"it would be nice to do so, or to avoid supposed discomfort or embarrassment"*. Rather, departure from the principle of open justice must be based on a proper assessment of the relevant competing factors.

30. Those competing factors are Article 8 (the right to privacy and family life) and Article 10 (the right to freedom of expression). There are no obvious Article 6 considerations and of course, the appeal has already been heard.

There is no evidence or submissions from the Appellant as to any specific harm, nor even any *"discomfort or embarrassment"* that would arise

32. Nevertheless, the decision does contain some information about There is some interference, therefore, with his Article 8 rights. He was not a party to the proceedings, and and that, in my view, adds some weight to the Article 8 considerations.

33. However, I consider that the need to balance this with Article 10 considerations does not arise because the principles of open justice can be met without referring to Had the Appellant made his application in a timely way, the decision could easily have been drafted so as not to refer to

34. As it is, the references, in the decision, to can be redacted. Attached as **Annex A** is a copy of the decision showing the redactions to be made. These are highlighted in yellow so that the parties can see, at a glance, what is to be redacted.

36. For the avoidance of doubt, whatever interference might be said still to remain of any Article 8 rights of whether from being identified or in any other way, if any, is minimal. It not, in my view, such as to outweigh the Article 10 rights involved or justify derogation of the principle of open justice.

Decision and Directions

37. The Appellant's application for anonymity is refused.

38. However, I direct, pursuant to Rule 14 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended), that:

    (a) any report or other publication of the decision shall be of the decision with the redactions as indicated in Annex A; and

    (b) any report or other publication of this ruling shall be of the ruling with the redactions as indicated in Annex B.

39. Failure to comply with this direction may lead to a contempt of court. This direction shall continue in force until this Tribunal or the Upper Tribunal or an appropriate court, shall lift or vary it.

40. Although I dismiss the Appellant's appeal, I direct that the decision and this ruling not be published on the Tribunal's website or elsewhere for a limited period of one month. This is to allow for the possibility that the Appellant may appeal against this Ruling to the Upper Tribunal. To do otherwise, could defeat the purpose of any such appeal. If further time is needed, the Appellant can make an application, with reasons.

Signed **Date: 4 June 2019**

Anisa Dhanji
Judge