



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

**Appeal Reference: EA/2018/0246**

**Decided without a hearing  
On 4 April 2019**

**Before**

**HH JUDGE SHANKS**

**SUZANNE COSGRAVE**

**STEPHEN SHAW**

**Between**

**PHIL MCCANN**

**and**

**INFORMATION COMMISSIONER**

Appellant

Respondent

## DECISION OF FIRST-TIER TRIBUNAL

For the reasons set out below and in the Confidential Annex hereto the appeal is allowed to a limited extent as indicated in the following substitute decision notice issued by the First-tier Tribunal.

### Substitute decision notice

Complainant: Phil McCann

Public Authority: Cheshire East Council

### **Decision**

Although it was entitled to withhold most of the information requested by the Complainant on 13 March 2018 by virtue of section 40(2) of FOIA, the Public Authority ought to have disclosed the following documents which were not exempted by sections 40(2) or 41:

- (1) the Monitoring Officer's job description (pp 75-78 closed bundle).
- (2) email on setting up of IDC at pp120-122 of closed bundle but with names redacted.
- (3) email at pp 127-128 of closed bundle but with names and the paragraph starting "You should be aware ..." redacted.

### **Steps to be taken**

The Public Authority is to disclose those documents to the Complainant by 14 June 2019.

HH Judge Shanks  
17 May 2019

## REASONS

### Background facts

1. This appeal concerns the Cheshire East Council and an individual we will refer to as A, who was appointed as the Director of Legal Services and Monitoring Officer at the beginning of 2016. The Director of Legal Services and Monitoring Officer is the chief legal advisor to the Council, he is responsible for the operation of the councillors' code of conduct, he leads the Council's legal team and his job is to ensure democratic decision making, good governance and openness and access to information.
2. In 2017 disciplinary issues were raised about A and the other two "designated statutory officers" of the Council (ie the chief executive and the "section 151 officer"). This led to the appointment of an Investigation and Disciplinary Committee (IDC) in March 2017 and the suspension of the chief executive. An Independent Investigator was appointed in relation to A in July 2017. A was also suspended in July 2017.
3. The appointed investigator produced a report in relation to A on 16 November 2017. Before the report was considered by the IDC, on 11 December 2017 A resigned with immediate effect. The resignation had the effect of bringing to an end any further action by the Council in respect of the allegations against him and that part of the investigatory and disciplinary process was therefore never concluded. However, according to the Council's letter of 12 September 2018 at page 54 of the open bundle, the work of the IDC continued.
4. The Appellant, Mr McCann, is a political reporter with BBC North West. On 13 March 2018 he made a request for information addressed to the Council under the Freedom of Information Act 2000 (FOIA) in the following terms:
  1. **Please disclose the report compiled for the council's Disciplinary and Investigation Committee by the independent investigator appointed by that committee, into the former Monitoring Officer [A].**
  2. **Please disclose a summary of the reason ... [A] ... was suspended.**
  3. **... please disclose any correspondence sent to the committee by [A]. This should include, but not be limited to, his resignation letter.**
  4. **... please disclose any correspondence to and from members of the ... Committee into the setting up of the committee in relation to [A].**
5. The Council responded in a letter dated 9 April 2018. They confirmed that they held the information requested but refused to supply it to Mr McCann. They relied on section 40(2) of FOIA (personal data) in relation to requests 1-4 and section 41 (confidential information) in relation to requests 3 and 4.
6. Mr McCann complained to the Information Commissioner. In her decision notice dated 26 October 2018 she upheld the position of the Council. Having reviewed the material, she found that all the information requested was A's

personal data, that none of it was “sensitive personal data”, but that its disclosure would be unfair and would not meet the requirements of para 6 of Schedule 2 to the Data Protection Act 1998, and that it would therefore contravene the first data protection principle. The Council was therefore entitled to rely on section 40(2) of FOIA to withhold all the information requested. The Commissioner did not consider the application of section 41 of FOIA.

### **The appeal**

7. By a notice of appeal dated 8 November 2018, Mr McCann appealed to the Tribunal against the Commissioner’s decision notice under section 57 of FOIA.
8. In his notice of appeal Mr McCann points out that the issues referred to the IDC, which clearly relate to the performance of three senior Council officers, must be of some significance; that the fact that an investigator had been appointed in relation to A indicates that a certain evidential threshold had been met; that the public had been kept “completely in the dark” as to what the investigation was all about; and that A’s resignation meant that the IDC was not able to investigate the matter further so far as he is concerned. Mr McCann recognises that parts of the material he was requesting would need to be redacted; but he says he wants to find out the background (or the “critical events”) leading to the investigation (as opposed to specific disciplinary matters relating to A); he accepts that this might involve the disclosure of some personal data but maintains that since it relates to the performance of senior officers and there is a significant public interest in the public being informed about what was being investigated, disclosure of some of the requested information would be “fair” and satisfy the requirements of para 6 of Schedule 2 to the DPA.
9. The main issues for consideration on the appeal are therefore:
  - (1) to what extent the requested information constituted personal data;
  - (2) whether the disclosure of such data would have contravened the first data protection principle; and
  - (3) in particular, whether its disclosure would have been “fair” and satisfied the requirements of para 6 Schedule 2.

Those issues are to be considered as at March/April 2018. It may also be necessary to consider section 41 of FOIA in relation to some of the requested information.

10. In addition to the material in the “open bundle” we have been supplied on a “closed” basis with (a) unredacted copies of the Council’s letter to the Commissioner in connection with her investigation of the complaint dated 12 September 2018 and the Commissioner’s Response document (b) some other

“closed” evidential material and (c) the bulk of the requested information (or, in relation to the remaining part, a description thereof). We have reviewed all this material carefully.

11. The parties indicated that they wished the appeal to be determined “on the papers”. Although we would have preferred it if the Council had been made a party to the appeal and an oral hearing held, we have nevertheless concluded on reflection that we are in a position to decide the issues properly without a hearing or direct participation by the Council.

### **The relevant law**

12. For the purposes of the Data Protection Act 1998 “data” includes any recorded information held by a public authority (whether or not on a computer and however filed): see definition in section 1(1). “Personal data” means data “which relate to a living individual who can be identified” from those data (or, at least for the purposes of this case, from such data combined with other information reasonably likely to come into the possession of a so-called “motivated intruder”). “Sensitive personal data” includes personal data consisting of information as to “... the commission or alleged commission by [the data subject] of any offence” (see: section 2(g) DPA).
13. Section 40(2) and (3) of FOIA provide in effect that any information which constitutes the personal data of anyone other than the requester whose disclosure to a member of the public would contravene one of the data protection principles is (absolutely) exempt from disclosure under FOIA.
14. The relevant data protection principle relied on by the Council is the first, which states:

**Personal data shall be processed [this includes disclosure] fairly and lawfully, and, in particular, shall not be processed unless-**  
**(a) at least one of the conditions in Schedule 2 is met, and**  
**(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.**

The only condition which is likely to be relevant to this kind of request for information is contained in Schedule 2 para 6 which provides:

**The processing is necessary for the purposes of legitimate interests pursued by the ... third party ... 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.**

15. There is a substantial body of case law on the proper approach to these provisions in the context of a request for information like the one we are dealing with, including in particular the decisions of the Upper Tribunal in

*Farrand v IC and London Fire and Emergency Planning Authority* [2014] UKUT 310 (AAC) and *Goldsmith International Business School v IC Home Office* [2014] UKUT 563 (AAC). It is established that the requirement of fairness in the first principle is separate to the requirement that a conditions in Schedule 2 is met but it is open to the Commissioner or the tribunal to address them in whatever they consider to be the most convenient order (see: *Farrand* para [20]); and, we would add, we think that in most cases it is likely that if the condition in Schedule 2 para 6 is met, disclosure would be fair. The application of para 6 involves consideration of three questions: (i) is a legitimate interest being pursued? (ii) is disclosure necessary for the purposes of that interest? (iii) is disclosure nevertheless unwarranted by reason of prejudice to the data subject's rights, freedoms and legitimate interests? "Necessary" in this context means "reasonably necessary". Only if the answers to the first two questions are positive does any issue of balancing the interests in disclosure against the prejudice to the data subject(s) under question (iii) arise.

16. We should mention in the context of considering the relevant law that Mr McCann relied heavily in his notice of appeal on a previous decision notice of the Commissioner relating to a FOIA request for a report prepared for a local authority disciplinary committee. We have not had regard to that decision: it will inevitably have turned on its own detailed facts and, like decisions of this tribunal, it has no status as a legal authority.

17. Section 41 of FOIA provides as follows:

**Information is exempt information if-**

- (a) it was obtained by the public authority from any other person ..
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence by that or any other person.

### **The requested information and personal data**

18. On analysis, the requested information breaks down as follows:

- (a) Contrary to the finding of the Commissioner at paragraph 18 of her decision notice, there is some material which, although relevant to the issues raised against A, is self-contained and does not constitute A's personal data, but which does constitute the personal data of others: we have decided that this is exempt under section 40(2) for reasons given in the Confidential Annex.
- (b) The bulk of the remaining material undoubtedly constitutes non-sensitive personal data of A, although it is also mixed up with the personal data of others: we consider this material further at paras 19 to 24 below.
- (c) There are some distinct items which we do not consider to constitute anyone's personal data and which also do not come within section 41: see paras 25 and 26 below

### The para 18(b) material

19. It is not really disputed that Mr McCann, as a responsible journalist, has a legitimate interest in being informed of the nature of the allegations against A, including their background, their evidential basis and the views of the investigator on them, all of which are to be found in this material. Nor is there any dispute that disclosure of the material would be necessary for Mr McCann to pursue that legitimate interest. As we have said, the Commissioner's position in the decision notice was that it would be unfair to A for the material to be disclosed and that disclosure would not meet the condition in para 6 of Schedule 2 to the DPA.
20. We have considered the Commissioner's decision notice in relation to these issues, in particular paras 35 to 40. We think that the Commissioner has rather underestimated the weight of the legitimate interest being pursued by Mr McCann. She appears not to have taken account of the nature and importance of A's position in the Council: it cannot be right to say (as she does at para 39) that he "... should be treated no differently than any other staff member involved in an employment disciplinary process." Nor does she appear to have taken account of the fact that, as Mr McCann puts it, the public had been left "completely in the dark" about what was going on for a year by the time of his request. And the fact that A's resignation had brought an end to the investigatory process in relation to him should, it seems to us, be a factor making it more important that a journalist, and therefore the public, should be informed of what it was all about.
21. On the other hand, we accept that A had a reasonable expectation that the material, at least at the stage at which he resigned, was confidential, in the sense that it was to be used as part of a disciplinary process and not publicised. Further, we accept that its disclosure in March 2018 would very likely have caused serious harm to his home and work life. We also note from the material that he was disputing the allegations with vigour and on reasonable grounds and we do not think it would be right to draw the inference that he resigned just in order to bury the allegations.
22. Further, it is not only A's personal data which is contained in the material; there is personal data relating to a number of other people, who would be identifiable by a "motivated intruder" even if an attempt was made to disguise their identities. We accept the Commissioner's case that there is no sensible way of removing such data from the rest of the material before making disclosure: an attempt to do so would render the material meaningless or (at least) mean that Mr McCann's legitimate interest was not furthered in any useful way. Similar expectations of confidentiality and possible harm to the interests of the data subject would undoubtedly apply in relation to these others as they do in relation to A.

23. Taking all this into account we consider that, notwithstanding the strong points made by Mr McCann, disclosure of the material would have been “unwarranted ... by reason of prejudice to the rights and freedoms or legitimate interests ...” of the various data subjects and that the condition at para 6 would not have been met and disclosure would therefore have been unfair. On this basis we consider that the Commissioner was right to uphold the Council’s reliance on section 40(2) FOIA to refuse disclosure.
24. There is a further consideration in relation to personal data of those other than A which we refer to in the Confidential Annex.

**Severable items which do not constitute personal data**

25. There are a number of documents in the closed bundle forming part of the requested information which seem to us of some (albeit slight) relevance to Mr McCann’s request but which do not contain personal data (or from which any personal data can be easily redacted) and which do not come within section 41. In the circumstances it seems to us that they should be disclosed, redacted as appropriate.
26. The documents are as follows:
- (1) the Monitoring Officer’s job description (pp 75-78 closed bundle).
  - (2) email on setting up of IDC at pp120-122 of closed bundle: names may be redacted.
  - (3) email at pp 127-128 of closed bundle: names and the paragraph starting “You should be aware ...” may be redacted.
  - (4)

**Disposal**

27. We therefore reject the appeal save in relation to the contents of the documents we refer to in para 26 above which do not constitute “personal data” and can be severed from the rest in a sensible way. That material must be supplied to Mr McCann by 14 June 2019. This is a unanimous decision.
28. In the normal way a copy of this decision and the Confidential Annex were supplied in draft to the Information Commissioner and the Public Authority before the decision was promulgated for them to check that the Tribunal was not inadvertently disclosing any information which ought not to be disclosed. The contents of the Confidential Annex cannot be disclosed to Mr McCann or the public and are to remain confidential unless this Tribunal or the Upper Tribunal direct otherwise.

HH Judge Shanks  
17 May 2019