



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

Case No. EA/2018/0271

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50733118
Dated: 12 November 2018**

Appellant: David Gavriluk
Respondent: The Information Commissioner
Date and venue of hearing: 13 May 2019, Field House
Date of decision: 15 June 2019

Before

Anisa Dhanji
Judge
and
Michael Jones
Andrew Whetnall
Panel Members

Subject matter

FOIA section 40(2) - whether the information requested is personal data. Whether disclosure would breach the first data protection principle.

SUBSTITUTED DECISION NOTICE

Dated: 15 June 2019

Name of Complainant: David Gavruluk

Public Authority: Archbishop Hutton's Primary School

Address of Public Authority: Back Lane
Carnforth
LA5 9QU

The following Decision Notice is substituted in place of the Commissioner's Decision Notice dated 28 June 2018.

The appeal is allowed in part. Within 28 days of the attached decision being promulgated, the Public Authority must provide to Mr Gavruluk the role descriptions referred to at paragraphs 40 and 41 of the decision, which we consider do not constitute personal data.

Except as set out above, we uphold the Commissioner's Decision Notice.

Signed

**Anisa Dhanji
Judge**

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REASONS FOR DECISION

Introduction

1. This is an appeal by Mr David Gavriluk (the “Appellant”), against a Decision Notice (“DN”), issued by the Information Commissioner (the “Commissioner”), on 12 November 2018.
2. It concerns a request made by the Appellant to Archbishop Hutton’s Primary School (the “School”), under the Freedom of Information Act 2000 (“FOIA”).
3. The request was for the School’s budget reports for specific years.

The Request

4. The Appellant’s request (the “Request”), was made on 1 February 2018 on the following terms:

Please provide the “full budget reports” for Arch Bishop [sic] Hutton Primary School, Warton, Lancashire, between 01/04/07 to 31/03/17 with the exception of 2015/16 as I have previously been provided with this document. For the avoidance of doubt, I have enclosed a sample report of the information I require. To confirm I require the full reports for the years stated above with the only exception being 2015/16. Please note I do not want “draft” reports as previously supplied.

5. On 15 May 2018, Lancashire County Council (the “Council”) responded on behalf of the School. It said that neither the School nor the Council held the information requested for the years prior to 2012. It released the budget reports relating to the period after 2012, with some redactions, citing the exemption in section 40(2) of FOIA (personal data of third parties). We will refer to the redacted information as the “disputed information”.
6. The Appellant requested an internal review. He also took issue with how long it had taken the School to provide a response and that it had not provided all the information he had requested.
7. The School did not undertake an internal review.

Complaint to the Commissioner

8. The Appellant complained to the Commissioner on 18 May 2018.
9. The Commissioner investigated the complaint. On 12 November 2018, she issued a DN stating that the Council had correctly applied section 40(2) FOIA to the disputed information. She considered that disclosure would be unfair and would contravene the first data protection principle as it would not be in the reasonable expectation of the data subject(s) that the disputed information would be disclosed to the public.

10. During the course of the Commissioner's investigations, the School told the Commissioner that its primary position was that the information is personal data and exempt from disclosure under section 40(2). Its alternative position was that the Request was vexatious under section 14(1). Having reached the findings that she did, the Commissioner did not go on to consider the applicability of section 14(1).
11. The Commissioner found that the School had breached section 10(1) of FOIA because it had not responded to the Request within the prescribed timescale. There is no appeal by the School against that finding.

Appeal to the Tribunal

12. The Appellant has appealed against the DN under section 50 of FOIA.
13. His grounds of appeal are extensive. In brief, he says that the disputed information is not personal data, that disclosure would not be unfair, and that it would not contravene the first data protection principle.
14. 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.
15. The burden of satisfying the Tribunal that the Commissioner's decision was wrong in law, or that she should have exercised her discretion differently, rests with the Appellant.
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 two open bundles. In addition, we have been provided with a closed bundle which comprises the unredacted budget reports. These correspond with the redacted budget reports provided to the Appellant and reproduced in the open bundle. There have been no closed submissions.
18. 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

19. In line with the Supreme Court's decision in **Bank Mellat v Her Majesty's Treasury [2013] UKSC 38**, we have said (at para 29, below), as much as we reasonably can about the disputed information, without undermining the purpose of the appeal.

20. However, only approximately 5 numbers have been redacted from each year's budget. The Appellant has the 2015/16 budget (although see para 29 below), and therefore knows the structure of the budget which has remained largely unchanged for the years in question. He therefore already knows the nature of the disputed information, though not the detail.

Statutory Framework

21. 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.
22. The duty on a public authority to provide the information requested does not arise if it does not hold the information, or if the information is exempt under Part II of FOIA.
23. Under section 40(2), personal data of third parties is exempt, subject to certain exceptions.
24. "*Personal data*" is defined in section 1(1) of the Data Protection Act 1998 ("DPA"). This 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.

25. The exemption from disclosure of personal data of third parties is contained in section 40(2) of FOIA. 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.

Findings

26. In considering whether the disputed information comprises personal data, the principles to be applied are well settled.
27. Pursuant to section 1(1)(b) of the DPA, the disputed information comprises personal data if any individuals could be identified from it and other information which is in the possession of, or likely to come into the possession of a person, other than the data controller, after disclosure. In **R (Department of Health) v Information Commissioner [2011] EWHC 1430 (Admin)**, Cranston J said, at paragraph 66, that an assessment of the likelihood of identification should include:

assessing a range of every day factors, such as the likelihood that particular groups such as campaigners and the press will seek out information of identity and the types of other information, already in the public domain, which could inform the search.

28. When determining whether information constitutes personal data because of the likelihood of identification, the Tribunal must consider the identifiability on the basis of a “motivated intruder”: **Information Commissioner v Magherafelt District Council [2012] UKUT 263 (AAC)**.
29. The budget reports in the closed bundle are for the years 2012/13, 2013/14, 2014/15, 2015/16, and 2016/17, respectively. The budget report for 2015/16 has been disclosed to the Appellant in response to a previous FOIA request, but the Commissioner says that the figures in the version in the closed bundle are slightly different. It appears that he may also have been provided with an unredacted copy of the 2014/15 report. Looking at the budget report for 2013/14 for example, the following redactions have been made:
 - Under the heading Teaching Staff, there are only two lines describing, by reference to roles rather than individual names, the payments that were made. All this information has been redacted. Only the total of the two amounts has been disclosed.
 - Under the heading Education Support Staff, there are three lines, and all have been redacted. Again, these describe by reference to roles rather than individual names, the payments made. Two further brief notes are redacted indicating what is or is not included in the amounts redacted. Only the total of the three amounts has been disclosed.
 - Under Staff Development and Training, only the note indicating what is or is not included in the corresponding amount has been redacted.
30. The other budget reports follow the same structure, and with limited exception, the same line items have been redacted.
31. The Council has explained that the School is a very small rural primary, with fewer than 20 full and part time members of staff.
32. The Appellant claims to have no interest in the pay of any specific individuals. He says he is interested in trends in the remuneration of the senior management of the School. He believes that the disputed information is being withheld because it supports his belief that certain individuals may have benefitted from wrongdoings. However, we note from the large number of previous information requests, that he had previously asked for the combined salary of Head Teacher and Deputy in each year from 2007 to 2017. It appears that the Appellant’s interest, initially at least, was focused on the Headteacher and his/her salary.
33. Budget entries under the heading “Teaching Staff”, are broken down into two lines for “Leadership Scale Staff”, and “Mainscale and Unqualified Staff”, respectively. Some of the information under the heading “Teaching Staff”, relates

to the Headteacher, including some information relating to his/her performance related pay review.

34. The Appellant says that the information redacted under the heading "Teaching Staff" does not constitute personal data because it includes payments to more than one individual. He says that the Commissioner has not explained how it would be possible to determine individual salaries within a combined group of two or more, even assuming the Appellant knew how many individuals were included. He also points out that he had been provided with the budget report for 2015/16 without redactions.
35. The Commissioner says that since the "total" figure for "Teaching Staff" has been released, disclosing the figure for the "Mainscale and Unqualified Staff", would make it possible to work out the Headteacher's pay. Disclosure would allow his/her salary to be identified separately from that of other members of staff. In other words, even though some of the information is not inherently personal data, its disclosure would lead to the disclosure of personal data relating to the Headteacher, bringing the information within the exception in section 40(2).
36. We note that for some years, the Headteacher appears to be the only person on the "Leadership Scale Staff", until joined in later years by a Deputy. Where the Headteacher is the only person on the "Leadership Scale Staff", disclosure of either of the two amounts under "Teaching Staff" would disclose the Headteacher's pay and is therefore clearly his/her personal data.
37. We have reached the same conclusion even where the pay for both Headteacher and Deputy are presented as a combined figure under "Leadership Scale Staff".
38. In our view, in a small school, disclosure of even the combined figure risks disclosing the pay of the two individuals, particularly if the remuneration of one of them is known (which will be the case at least to the recipient of one of the salaries and possibly to others). Disclosure would therefore involve the personal data of both individuals, especially in the context of disclosure of consecutive budget reports where the salary of one of the individuals can be broadly inferred from previous years.
39. In addition, because the Appellant has asked for the budget reports for consecutive years, it would likely be possible to calculate whether the Headteacher had received a pay increase in any given year, and possibly also to identify how the Headteacher had performed at his/her annual review.
40. We therefore agree with the Commissioner that disclosure of the figures redacted under the heading "Teaching Staff", would amount to disclosure of personal data. We do not, however, consider that the corresponding role descriptions are personal data, nor has the Commissioner explained why those redactions are justified.
41. We have reached the same view about the information redacted under the heading "Education Support Staff". We accept the Commissioner's argument (paras 21 and 22 of the DN), that given the small number of staff at the school, it would be possible to identify at least some members of staff from this information,

and that it therefore constitutes their personal data. Again, we do not, however, consider that the corresponding role descriptions are personal data.

42. As to the comment redacted under the heading Staff Development and Training in the 2013/14 budget report, the School explained to the Commissioner that this relates to a specific member of staff. On this basis we accept that this, too, is personal data.
43. Having found that some of the disputed information amounts to personal data, the next question is whether disclosure would breach any of the data protection principles.
44. Only the first data protection principle is relevant here. 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.
45. 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.

46. The first issue is whether disclosure would be fair and lawful.
47. When assessing the fairness of disclosure, 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.

48. The continued primacy of the DPA, notwithstanding FOIA, 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.

49. 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 on the relationship between FOIA and the DPA:

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.

50. The Commissioner says, and we agree, that disclosure would not be fair because the staff members whose personal data is in issue, would have had a reasonable expectation that their salary would not be disclosed to the public. The Commissioner rightly recognised that disclosure of personal data of senior staff is more likely to be fair than for more junior or support staff.
51. However, as already noted, fairness also requires a consideration of any legitimate interests of the Appellant, and of the public in having access to the disputed information, and the balance between these interests, and the rights and freedoms of the individuals who are the data subjects.
52. Whilst acknowledging that public interest may make it fair to disclose the disputed information, the Commissioner says that there is no such interest in this case to justify disclosure. The Commissioner says she has not seen any evidence to suggest that there is a particular public interest in this information. She maintains that there is only a general public interest in transparency, and that that is insufficient to make disclosure fair in this case.
53. The Appellant notes that the Commissioner has said (para 32 of the DN), that he had not provided any wider public interest arguments. He says that the Commissioner did not request such arguments, and that in fact, he did provide an indication to the Commissioner as to why he was requesting this information. In particular, he explained his concern to know how public funds were spent in the School. He says that there is a public interest in the School being "open, honest and transparent" in how it spends public money. He also says there is evidence of wrongdoing, mismanagement, and misconduct at the School.
54. The Appellant has set out various allegations in paras 4.2 - 4.4 of his grounds of appeal, and in an e mail to the Tribunal dated 9 December 2018. However, unsubstantiated allegations and suspicion do not amount to evidence. It was not incumbent upon the Commissioner to ask for such evidence. Rather, it was for

the Appellant to submit it. Not only did he not do so when the matter was before the Commissioner, but he has also not done so before the Tribunal. There is, for example, no evidence before us from others in the school community or the public more widely, expressing concern that there has been any wrongdoing. We also note that the Appellant's information requests follow a grievance which was considered through formal procedures including an independent element. It is not for this Tribunal to reopen or attempt its own re-determination of such matters.

55. While we accept that there is always a public interest in transparency as to the use of public funds, we do not find, in this case, that beyond transparency, there is a public interest in disclosure such as to outweigh the privacy interests of the data subjects. In reaching this finding, we bear in mind that salary information is generally regarded as being particularly private.
56. For all these reasons, we find that disclosure would not be fair. Having reached this finding, it is not necessary to go on to consider whether any Schedule 2 condition is met. It is also not necessary to consider the alternative basis for refusal under section 14.

Other Matters

57. The Appellant has raised a number of other matters which we need deal with only briefly.
58. Although it is not something he raised in his grounds of appeal, the Appellant is disputing the School's position that it does not hold any budget reports prior to 2012.
59. The obligation under FOIA on a public authority to communicate the information requested applies only to the extent that the public authority holds the information. It is, of course, a fact of life that some public authorities have good records management policies, and some do not. FOIA imposes no obligations and offers no remedies in the case of poor record-keeping practices of a public authority. As Judge Wikeley stated in **Metropolitan Police v Information Commissioner and McKenzie [2014] UKUT 479 (AAC)**, FOIA "*is not a statute that proscribes any particular organisational structure or record-keeping practice in public authorities*". This is the case even where the public authority is subject to record-keeping obligations imposed by another statute, as was the case in **Cruelty Free International v Information Commissioner [2017] UKUT 318 (AAC)**.
60. However, it is implicit in the obligation on a public authority to provide the information that it holds, that an assertion that it does not hold the requested information must be made responsibly. In its response to the Appellant's Request, the School said that it did not hold historical financial information. Its delay in responding to the Request was because it had been trying to ascertain whether the Council held it, but it did not. The Council also confirmed this to the Appellant by e mail on 15 March 2018, explaining that only 4 years of budgetary information was held.

61. We have read the correspondence on the issue contained in the second bundle, in particular. We can understand why the Appellant may have thought that while the School did not hold this information, the Council did. The Council has said, however, that it does not. We can see nothing in the correspondence to suggest that the Council held this information. We also bear in mind that for the same reasons as set out above, even if it were held, the information the Appellant is seeking would likely constitute personal data and would not be disclosable to him.
62. The Appellant states that arguments based on the requester's identity or motives are irrelevant. The Commissioner agrees with this, as do we. We are satisfied that the Commissioner reached her decision, as have we, based on section 40(2), and not on the Appellant's identity or motive.
63. The Appellant says that the Commissioner accepted what the School said without proper investigation, and that the Commissioner did not see all the unredacted information. We do not find that the Commissioner accepted the School's evidence at face value, as the Appellant claims. She clearly investigated the complaint and reached reasoned findings. During her investigation, for reasons set out in her Response, the Commissioner did not receive an unredacted copy of the budget report for the year 2016/2017. However, the Commissioner reviewed this report subsequently and noted that its structure is identical to that of the previous budget reports. Consequently, the Commissioner says, and we agree, that her analysis is equally applicable to the 2016/2017 report.
64. The Appellant also says that the Commissioner's decision is unreasonable in the context of how inconsistently the School has applied the personal data exception under FOIA. The Appellant points out that he received an unredacted copy of the 2015/2016 budget report in 2016 as part of a previous FOIA request.
65. The Commissioner says that she has been informed by the Council that the relevant people involved in the previous disclosure are no longer employed by the School and so they have been unable to establish the reasons for their decision to disclose the unredacted budget reports. The Commissioner also says that it is perfectly possible that the School acted appropriately in 2016. There may have been consent for the disclosure, or there may have been additional factors that made disclosure fair. Each disclosure is an assessment based on the circumstances at the time.
66. We agree with the Commissioner that previous disclosures are not precedents. If the School was mistaken in 2016 and should not have disclosed the information, that does not nullify the School's position now that the disputed information is personal data and that its disclosure would be unfair.
67. Finally, the Appellant points out that other categories of information (for example "Caretaking and Cleaning Staff"), have not been redacted even where there was clearly only one member of staff in that category. He says that here, too, the School has been inconsistent. We agree that this does appear to be the case. The information has already been disclosed, however, and it is now for the Commissioner to decide what, if any, steps to take. It does not undermine our findings about some of the disputed information being personal data.

Decision

68. We allow this appeal in part, and direct that within 28 days of this decision being promulgated, the School should provide to the Appellant the role descriptions referred to at paragraphs 40 and 41 above, which we consider do not constitute personal data.
69. Except as set out above, we uphold the Commissioner's Decision Notice.
70. Our decision is unanimous.

**Signed
Anisa Dhanji
Judge**

**Date: 15 June 2019
Promulgation date: 17 June 2019**