First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2019/0179/A

Heard at Birmingham Combined Court
On 30 October 2019 and 30 January 2020

Before
JUDGE HOLMES
ANNE CHAFER
JOHN RANDALL

Between

JULIAN SAUNDERS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

SANDWELL METROPOLITAN BOROUGH COUNCIL

Second Respondent

Appearances:
Appellant : In Person
First Respondent: Written Submissions
Second Respondent: Mr Robin Hopkins, Counsel

DECISION AND REASONS

1. The Tribunal allows the appeal, the Decision Notice, no. FS50738692, dated 30 April 2019 is revoked, and the following Decision is substituted in its place:

   1.The public authority was entitled to withhold the requested information pursuant to s.40(2) of the Freedom of Information Act 2000, as the same constituted personal data, the processing of which would not be in accordance with the data protection principles, and which it was not in the public interest to disclose.

2. The public authority, further , was entitled to withhold the requested information pursuant to s.31(1)(g) and s.31(2)(b) of the Freedom of Information Act 2000, as to disclose the same would be likely to prejudice the public authority in exercising its function of carrying out an investigation for the purpose of ascertaining whether any person had been responsible for conduct which was improper, and which it was not in the public interest to disclose, and no further action is required from the public authority.

REASONS

2. In this appeal the Appellant , Julian Saunders, appeals against a Decision Notice issued by the Information Commissioner on 30 April 2019, in which she determined that (save for a delay in responding to the complaint) the public authority, Sandwell MBC ("Sandwell" or "the Council") , had correctly applied s.30(1)(b) of the FOIA, and had correctly withheld the requested information.

3. The Appellant appealed the Decision Notice by a Notice of Appeal dated 26 May 2019. In the Notice the Appellant indicated that he required a Decision after a hearing. He filed further grounds of appeal, entitled "Possible ICO Bias" on 2 July 2019

4. The Commissioner filed her response to the appeal on 5 July 2019. She was content for a hearing on paper and was content to rely upon written representations.

5. The Tribunal issued case management directions on 20 June 2019. It directed that Sandwell be joined as Second Respondent and made directions for that party to file a response. Sandwell did so on 17 July 2019. Further Directions were given by the Registrar on 20 September 2019 (amended on 27 September 2019). She directed that closed material be held pursuant to rule 14(6), and recorded what had been received by the Tribunal, and considered what the Panel was to be permitted to see in the redacted material. The hearing date of 30 October 2019 was notified to the parties in these Directions.

6. The Appellant attended the appeal in person. The Commissioner did not appear at the hearing but submitted written submissions in the appeal. The Second Respondent was represented by Mr Hopkins of Counsel. There were two Hearing bundles, one open (in two parts), and one closed. References to page numbers are to the pages in the open bundle, which follow sequentially across the two parts.

7. The Tribunal started to hear the appeal on 30 October 2019. The Appellant made his submissions first but did not give evidence. The Second Respondent made submissions in the afternoon of the hearing, and called David Stevens, the Interim Chief Executive of Sandwell. He gave evidence in open session,

when he was cross – examined by the Appellant and gave further evidence then in closed session.

8. That took the Tribunal to the end of the hearing day, so it adjourned, part heard, resuming in open session on 30 January 2020. In the interim, a gist of the closed session was prepared, approved by the Tribunal, and provided to the Appellant. The Tribunal resumed the hearing on 30 January 2020, when final submissions were heard.

9. The Judge apologises for the delay in promulgation, occasioned initially by pressure of judicial business, and more latterly, by the restrictions occasioned by the Covid – 19 emergency which has limited access to judicial premises and resources.

The Decision Notice.

10. The Decision Notice that is the subject of this appeal is dated 30 April 2019 (No. FS50738692), and relates to the Appellant's FOIA request of 30 January 2018, given the reference no. FS – Case – 76135478 by Sandwell [pages 39 to 40 of the bundle].

The Background.

11. The background to the request made by the Appellant which gives rise to this appeal is that the Appellant is the author of a blog "the sandwellskidder", in which he comments upon the actions and conduct of Sandwell as a local authority, and local political issues.

12. On or about 24 January 2018 the Council suspended seven secretaries in the Cabinet secretariat of the Council, following concerns that had been raised that there had been a "leak" , a breach of confidentiality, in relation to a meeting of the Ethics and Standards Sub Committee that was to take place that day in relation to a Councillor, and indeed, did take place that day. An application was made that the meeting be postponed. The issue was that there had been a pre-meeting discussion the day before the Sub – Committee meeting, which had come to the attention of the Councillor's representative, and was the subject of complaint that this was a secret "briefing" , which could have had the purpose or effect of compromising the Sub – Committee meeting the following day.

13. The suspensions were carried out that day, or over the next two days. Subsequently it came to light that none of the secretaries was responsible for the leak, and the decision was made to lift their suspensions. That occurred on, it seems, 31 January 2018.

14. The Appellant made his FOIA request that day, in these terms [page 39 of the bundle]:

"Today Darren Carter has written to members saying 'the suspension of employees in the Cabinet Secretariat was taken by Council Managers on HR advice' and that "the suspensions have been lifted".

The said "Council Managers" can have no presumption of anonymity in respect of such a serious act. Documents identifying lower status employees should be disclosed but with their identities suitably redacted.

1. *What offence are the seven employees alleged to have committed?*

2. *How did "Council Managers" become aware of the alleged offence? What evidence did they obtain before taking the extreme measure of suspension?*

3. *Please disclose all documentation with regard to the investigation from outset to conclusion including all emails, file notes and any other documentation arising in connection with this whole affair including the request for HR advice and the advice given.*

4. *Identify the Council Managers involved in this affair and their individual involvement in the same.*

5. *When was suspension lifted and why? Were all seven employees allowed to return to their positions without sanction? If not why not? "*

15. The Appellant's request was acknowledged that day and given the reference FS-Case-67027833 by the Council. The Appellant added to his request a further request later the same day in which he made reference to the suspensions being carried out by Stuart Taylor, and he sought the contract of employment or other delegated authority permitting him to act in the manner that he did.

16. The Council's response to the request was not provided until 23 March 2018 [pages 41 to 42 of the bundle]. The requested information was withheld as exempt by virtue of s.30(1)(a) and (b), investigations, and s.40(2), personal data. The council went on to state that under the s.30(1) exemption it would not be in the public interest to release information which is the subject of internal investigations. In relation to s.40(2, release of this personal information not constitute a fair processing of the data and therefore would be a breach of the first principle within the Data Protection Act 1998. The response went on to state that the right to privacy outweighed any public interest in release of the information.

17. The Appellant was advised of his right to seek an internal review, and thereafter of his right to complain to the Commissioner.

18. The Appellant did seek an internal review, on 20 May 2018 [page 43 of the bundle]. In his application he said this:

"Council employees are regularly named in SMBC documents and reports. They have no reasonable expectation of anonymity when doing the normal job they are paid for by us taxpayers save where security or other issues require. It is senior managers involved in this fiasco and it needs to be said what the (false) allegations were and who made the decision to suspend the seven in the absence of Jan Britton and, seemingly, other persons at Director level.

Stuart Taylor is already identified in this saga. He is an employee way below Director level and it seems inconceivable that he has been given the delegated power to suspend seven secretaries. Did he have the requisite delegated powers to take such drastic action?

Today I have received confirmation that the seven secretaries had [sc. "been"] *innocent of the allegations against them that led to their suspension. Further they have received compensation but subject to them signing confidentiality clauses. Tis is wholly unacceptable and it is clearly in the public interest that the truth about what happened here is disclosed not least because some sort of disciplinary action is required against the "Council Managers" who made such a catastrophic decision based on false evidence.*

The taxpayer as had to pay for this shambles and deserves to know the truth . I await the internal review."

19. The Council conducted the review, on 10 July 2018 [pages 44 to 46 of the bundle]. The Council repeated the Appellant's original request and confirmed that the information requested was held. It asserted, however, that it was exempt pursuant to s.30(1) of the FOIA as it was incorporated into an investigation undertaken by the Council and was therefore covered by that section.

20. The review then went on to apply the public interest test. The reviewer stated the Council's belief that , whilst there was a requirement for openness and transparency , there remained times when information collected during internal investigations were not placed in the public domain, as by doing so would prejudice future investigations as people would be less willing to provide information if they knew it would be disclosed into a public forum.

21. Further, the Council considered that all but Q4 raised by the Appellant constituted personal information and this would not be disclosed on the basis of s.40(2) of the FOIA.

22. By way of summary of the provisions that the Council were relying upon, they were:

Freedom of Information Act 2000

30 Investigations and proceedings conducted by public authorities

(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of–

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained–

(i) whether a person should be charged with an offence, or
(ii) whether a person charged with an offence is guilty of it,

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or

(c) any criminal proceedings which the authority has power to conduct.

(2) Information held by a public authority is exempt information if–

(a) it was obtained or recorded by the authority for the purposes of its functions relating to–

(i) investigations falling within subsection (1)(a) or (b),
(ii) criminal proceedings which the authority has power to conduct,

And, in relation to personal data:

40 Personal information

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if –

(a) it constitutes personal data which does not fall within subsection (1), and

(b) the first, second or third condition below is satisfied.

(3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act –

(a) would contravene any of the data protection principles, or

The ICO's investigation.

23. The Appellant complained to the ICO on 13 April 2018 [page 47 of the bundle], and his complaint was assigned reference no. FS50738692 in a response from the ICO dated 16 May 2018 [page 47 of the bundle]. The Appellant wrote further to the ICO on 21 May 2018 [page 49 of the bundle] to say that he had originally applied for an internal review, and had applied for another one, which he was monitoring.

24. The ICO informed Sandwell of the complaint by writing to Sandwell on 16 July 2018 [pages 51 to 52 of the bundle]. An Investigating Officer ("IO") was then allocated the investigation of the complaint. On 24 July 2019 he asked Sandwell to provide him with a copy of withheld information, together with any further arguments that Sandwell wished to advance in support of the application of sections 30(1) and 40(2) of the FOIA.

25. After some delay, Sandwell replied to the ICO on 22 August 2018 [pages 58 to 59 of the bundle, in redacted form] . The unredacted version appears in the closed material. There is very little in the way of redaction and the Council's arguments can be discerned and understood perfectly well without the need for sight of the redacted details.

26. On 3 September 2018 the IO wrote to Stuart Taylor [page 60 of the bundle] asking him when the file note, which was amongst the withheld material, was prepared, pointing out that if it was after 31 January 2018 it fell outside the scope of the request. Stuart Taylor replied on 5 September 2018 [page 61 of the bundle] saying that the file note was prepared on 30 January. He also made reference to the suspension letters, a sample of which he enclosed in unredacted form. He went on to say how the only other written information held was the email from the person who alerted the Council to the situation which led to the suspensions. He also informed the ICO of his impending departure from the Council, and provided a new contact, Mr Philip Tart.

27. On 7 September 2018 the IO wrote to Mr Tart [page 62 of the bundle] asking for more information and making reference to hyperlinks to press articles in which the suspensions were already in the public domain. He asked, in the light of this, if the Council would be prepared to disclose a redacted version of the information.

28. Maria Price it was, in fact, who replied to the ICO on 19 September 2018 [pages 63 to 65 of the bundle]. In this email, redacted in the open bundle, she provided further information, in relation to the five specific questions raised in the request. She referred to the only records being the "letters of dismissal" (inaccurate, of course, as the employees were suspended not dismissed) , and went on to provide the information sought by the ICO. She went on to explain the Council's application of s.30 of FOIA, both s.30(1a) (i) and (ii) and s.30(1b). She referred to the Council's authority to undertake investigations against officers for a variety of reasons. She also went on to refer to s.30(2)(a)(i) as

exempting this information from disclosure. She referred to the Commissioner's published guidance on s.30.

29. She said the Council was acting "under the Employment Rights Act 1996", as well as the common law duty of confidentiality. She also referred to s.40 of the FOIA, in particular s.40(3(a)(i)(ii). She went on to say that the Council was of the opinion that disclosing anything in relation to the Cabinet Secretaries would personally identify them as individuals, and there was a real concern that disclosing the information would, in all likelihood cause significant distress to the individuals concerned.

30. The IO wrote to the Appellant on 20 September 2018 [page 66 of the bundle], informing him of the response that he had received from the Council, and asking if there was any further information that was in the public domain, apart from the article in the Express and Star which had been referred to.

31. The Appellant replied on 13 October 2018 [page 67 of the bundle]. In this email he said that he had not been able to locate any other public information but had written about all this in his own blog. He went on to summarise the events of the suspension and its lifting and who the Council had stated had taken the decision. He went on the refer to the fact that six of the seven had received compensation, but one, whom he named, had not.

32. The ICO responded on 3 December 218 indicating that a Decision Notice would soon be issued, but on 15 January 2019 wrote further to the Council [page 69 of the bundle] asking for more details of the Council's case on the s.30 exemption. Maria Price of the Council replied on 8 February 2019 [pages 71 to 72 of the bundle]. She clarified the position and referred to the Council having a duty under the Employment Rights Act 1996 to ensure that if and when allegations are raised about employees they are properly investigated. She confirmed the sequence of events, and how the investigations were conducted as part of the employer's disciplinary process. She went on to say how the Council had a duty to ensure that its employees act properly and to investigate employees suspected of disciplinary or criminal offences.

33. In relation to the three criteria for s.30(1)(b) , reference was made to the Council's powers under s.1 of the Localism Act 2011, and s.222 of the Local Government Act 1972 , under which it had power to institute and conduct any criminal proceedings , which in this instance would potentially have been for interference with the Standards regime for an elected member.

The IC's Decision Notice.

34. The Decision Notice was sent to the Appellant and the Council on 30 April 2019 [pages 1 to 7 of the bundle].

35. The Commissioner found that s.30(1) was engaged. The Council's position was rehearsed, and, in relation to its power to prosecute, accepted by the Commissioner. She accepted that the requested information related to an investigation which fell within s.30(1)(b) of the FOIA, and was accordingly exempt, subject to the public interest test.

36. In applying that test (at paras. 26 to 34 of the Decision Notice), the Commissioner, whilst recognising the public interest in promoting openness and transparency, concluded that, whilst the fact of the suspensions and the subsequent reinstatements was in the public domain, the reasons why, and the persons responsible, were not.

37. She recognised the need for protection of a safe space to allow internal investigations in relation to matters in which criminal proceedings may be contemplated. She also recognised the need to prevent the inhibition of participants in the investigatory process because of fear that their comments may be subsequently made pubic via the FOIA. She therefore concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.

38. As she held that the s.30 exemption was made out, she did not go on to consider the s.40(2) grounds also advanced by the Council.

39. She did, however, acknowledge that the Council had been in breach of the requirement to respond to the request within 20 working days, and had thereby breached s.10 of the FOIA.

The Appellant's grounds of appeal, and submissions.

40. The Appellant's Grounds of Appeal are in the bundle [pages 15 to 19].

41. In essence, the Appellant , after setting out his concerns that there had been wrongdoing in relation to the initial pre – meeting, which the Council wished to cover – up, and there was never any potential for criminal proceedings, he then goes through the public interest test as applied by the Commissioner, and advances his arguments as to why the decision was wrong, and why the public interest favours , consistently with the presumption , disclosure. These Grounds were elaborated upon in the appeal and need not be rehearsed again here.

The IC's response to the appeal.

42. The IC did not appear, but her written submissions, dated 5 July 2019 [pages 24 to 29] uphold the Council's position. The Commissioner found that s.30 was engaged, and that the public interest favoured the maintaining of the exemption. She did not advance any argument in support of the s.40(2)

exemption, as she had indeed not determined the case on that basis. She held that the allegedly defective nature of the investigation and any alleged "cover – up" were irrelevant. She cited ***Toms v Informaion Commissioner (EA/2005/0027)*** in support of her conclusion.

The Second Respondent's response and submissions.

43. Mr Hopkins prepared the written response for the Second Respondent [pages 30 to 36 of the bundle]. It initially refers to the Appellant's history of FOIA requests and appeals, and his campaign of public commentary, which is alleged to, on occasion, be humiliating and demeaning. This was relied upon in support of a contention that disclosure may, firstly, make individuals less likely to volunteer input to investigations, and secondly, be likely to cause damage and distress to affected individuals.

44. Reliance was placed on s.30, but in the alternative, s.31(1) of the FOIA was advanced.

45. The relevant provisions of s.31 relied upon were:

31. Law enforcement

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice–

(a) to (f) N/a

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

(h) N/a

(2) The purposes referred to in subsection (1)(g) to (i) are–

(a) the purpose of ascertaining whether any person has failed to comply with the law,

46. Under either provision, disclosure was likely to prejudice the Council's ability to conduct investigations. The balance of the public interest lay with non – disclosure, and the Appellant had given a misleading characterisation of the events leading to the suspensions.

47. He did, however, go on to advance a case under s.40(2) of the FOIA, arguing in the alternative, that that the suspended secretaries had a reasonable expectation of privacy in respect of information relating to their suspension , and , absent their consent, disclosure could not be justified under Schedule 2 to the DPA 1998 as a proportionate means of serving a pressing social need.

The hearing(s)

48. Prior to the hearing, on 22 October 2019 , the Appellant submitted further documents he wished to be considered, comprising of (open) communications between the Council and Unite the Union, which represented six of the suspended employees, and the apology that the Council issued to six of the secretaries, in August 2019, following an investigation that was subsequently held. He numbered these documents 80A to 98A.

49. For the Second Respondent Mr Hopkins provided a Summary of the Council's position , dated 24 October 2019, in which he advanced, in the alternative, a further submission based upon the "steps discretion" which arises under s.50(4) of the FOIA, in relation to the Commissioner, and hence also is available to the Tribunal when hearing an appeal under s.58.

50. At the first hearing the Appellant, at the outset, made an application that the proceedings be recorded. The basis for this was that he wanted to ensure that there were no misrepresentations or distortions of the proceedings, as he did not, in short, trust the Council. The Second Respondent was neutral upon the application. The Tribunal considered it, but did not consider that the Appellant had made out any good grounds for the Tribunal to depart from its normal practice of not allowing recording of its proceedings.

51. Before the Tribunal was an Open bundle, in two parts, pages 1 to 74, and pages 75 to 121. The latter contains, at pages 117 to 121, a Witness Statement from David Stevens, the Interim Chief Executive of the Second Respondent. He conducted an investigation in August 2019 into the suspensions and commissioned an independent report from an external consultant. As a result of that , further documents came to light, and , following a meeting on 22 October 2019, those further documents which had not previously been disclosed in response to the Appellant's FOIA request were then, in redacted form, provided to him, and are in the second part of the open bundle.

The Appellant's oral submissions.

52. The Appellant made his submissions, in essence amplifying his Grounds of Appeal. He considered that the Council was, at the relevant time at least, dysfunctional, and wrongdoing had occurred, which it was trying to cover up by relying upon the FOIA to deny his request for all of the information relevant to the improper suspension of the affected employees. He referred to the Council's characterisation of him as a troublemaker, with five previous appeals, and criticism of his blogging activities. But three of his appeals had been settled, and more information was released.

53. He referred to having received the latest material 631 days after his request, when it had been "magicked up" by the Council. He referred to what he

considered were the Council's attempts to discredit him with the ICO, and what he saw as the ICO's failures to deal with this, and indeed four other cases, properly.

54. He agreed that the secretaries were the victims in all of this, and he had been present on the day when these events had started. He was supporting the secretaries, this was the reason for the speed of his request. There were local newspaper reports, and this was a major piece of news. It was crazy to suggest that there was any expectation of privacy, the entire Council knew of the suspensions which were the subject of gossip, and a major story.

55. The secretaries have been reinstated, but the Express and Star had run a story six days previously, and an apology had been given to them.

56. It was not the secretaries whom he had been trying to identify, but managers. He had been very fair to junior employees.

57. He took the Tribunal through the Decision Notice. He considered that the legal argument relied upon by the Commissioner and the Second Respondent in relation to s.30(1) of the FOIA was nonsense. There was no question of criminality involved, as the Second Respondent now appeared to accept. The Council could not rely upon s.30 in respect of all investigations in general.

58. In relation to the withheld material that he was seeking, it was the allegations and suspension letters that he wished to see. Unite the Union was never informed of any interviews or action taken. The file note in question was made after the trade union representative had spoken to the investigating officer.

59. He went on to refer to the Employment Rights Act 1998, as is referred to in paragraph 20 of the Decision Notice, which was, as the Judge agreed, clearly wrong, as the date of that Act is 1996.

60. He agreed that the investigation could have been used for disciplinary purposes but did not understand how it would be likely that secretaries could be prosecuted for interfering with the standards regime for the conduct of an elected member. He doubted that the Council could take criminal proceedings or had power to do so.

61. Turning to the public interest test, and in particular paragraph 31 of the Decision Notice, the "safe space" argument, this it was contended was ridiculous, as within three or four days it been decided that the suspended employees had no case to answer. There could be no longer any public interest when by 19 April 2018 it was clear that there would be no criminal proceedings.

62. Turning to the Commissioner's decision not to give consideration to s.40(2), but noting that the Second Respondent had done so, he did not see how it could do so when a public apology had been made in a blog that went to 5000 employees. This was tantamount to it going in the public domain and was the catalyst for the recent article in the Express and Star.

63. He agreed that the file note was an absolutely key document.

64. In relation to the law cited in paragraphs 8 and 9 of the Commissioner's response to the appeal, he considered that this was an attempt to "retro-fit" the purpose of the investigation into section 30. He did, contrary to what the Commissioner asserted, dispute the application of s.30.

65. In relation to the case of ***Toms v Informaion Commissioner (EA/2005/0027***cited by the Commissioner, he pointed out that civil proceedings would fall under s.31.

66. The Appellant then took the Tribunal through the response of the Council. He made reference to paras. 6 to 8, which he contended were attempts by the Council to discredit him, and his blogging activities.

67. Mr Hopkins, however, made it clear that these were not pursued as grounds of resistance to the appeal.

68. In relation to the Council powers referred to in para. 11 of the response, the Appellant said this was an employment matter, pure and simple.

69. Reliance on s.31 in para. 13 had been "dreamt up" by the Council, when everything had previously been based on s.30. Whilst s.31 was of wider application, there were no criminal or civil proceedings taken.

70. Turning to the Council's s.40(2) argument, he pointed out that the Commissioner had not made her decision on that basis. Addressing the public issue test, however, he went on to express his concerns about the political leadership at the time, and what he termed the "craven surrender" to it that had occurred. In general terms gossip was rife, the entire Council knew of the suspensions, and everybody knew who the employees been suspended were. They were immediately identifiable. He accepted their right to privacy, but he was not asking for information about them, he was actually fighting for them.

71. He referred to the documents that had been provided to him, some 631 days late, and the individuals identified in them. All this would be in the public domain. He went on to raise concerns as the manner in which the ICO had dealt with the matter, communicating with the Council but not with him. He went through the responses given to the ICO's enquiries, and to various recently disclosed documents. He did not consider that this documentation

was complete, there were gaps in it. The list of people involved was growing, and these documents suggest that there are others that have not been disclosed. There was no HR advice, in email form, for example.

72. There was, he submitted, a public interest in not letting a local authority act in this way. It was not satisfactory for the Council to offer a secret report that had been commissioned at public expense.

The Second Respondent's oral submissions.

73. Mr Hopkins for the second respondent made his submissions. He spoke to the written response document. He first of all made it clear that the Council was not relying upon the matters previously raised relating to the Appellant's blogging activities, or his other FOIA appeals. Whatever the position previously, the focus in this appeal was now upon the Commissioner's decision, and how it was expressed in the Decision Notice. The Council was not trying to "stitch up" the Appellant, and had not, for example, tried to resist disclosure on s.14 (vexatious request) grounds. That it had considered these issues afresh, and provided the Appellant with more disclosure, showed this.

74. Whilst the Appellant had ranged widely, it was important to see the wood for the trees, and to be alive to the Tribunal's function to consider the information within the possession of the respondent at time that fell within the scope of the Appellant's request.

75. There was a small amount of information at issue, which wa, firstly, a file note, which was confirmed (see page 61 the bundle) to have been prepared on 30 January 2018. The second items were the suspension letters, and the third a set of emails, which had recently been disclosed and are at pages 78 to 109 of the second part of the bundle. Very little had in fact been withheld, and such reductions as there had been were uncontentious, and were not disputed to amount to personal data.

76. It was irrelevant that the Second Respondent had not previously relied upon s.31, as caselaw had established several years ago that there could be late reliance upon an exemption not previously advanced by a public authority or relied upon by the Commissioner.

77. Mr Hopkins went on to discuss the s. 30 and s.31 exemptions. He referred to the email at page 97 of the bundle, relating to the suspensions following a "serious information breach". He submitted that it would be a criminal offence under s.55 of the Data Protection Act to disclose personal data without consent. This would bring the investigation into s.30(1)(c) territory.

78. Moving on to s.31, however, this was something for which a better argument could perhaps be made. It would be wrong to treat these provisions is relating

only to civil claims or litigation. S.31(2)(b) covered the position precisely. The tribunal was satisfied that the prejudice test would then apply.

79. The focus is the protection of the secretaries who were wrongly suspended in January 2018. They wish to have the matter put behind them and did not want further publicity. They had not consented to disclosure. It was wrong in 2018, and it would be wrong now, to put this material into the public domain. He referred to paragraph 19 of the response, and how the secretaries had a reasonable expectation of privacy in respect of information about their suspension. Without their consent to this data being so processed, a pressing social need will have to be shown, and disclosure would have to be a proportionate means of achieving that need. These employees would suffer if the letters entered into the public domain.

80. The Appellant argues that this information is already public, "the cat is out of the bag", but that, if anything, was an argument for withholding it and not allowing the Appellant's request. There would be no point in anonymising the information, the individuals would be readily identifiable, even if their names were omitted from the documents.

81. The emails that had been disclosed relating to the trade union members had been redacted, as had the narrative of what was alleged. This would mean that it was unfair to disclose the personal data of the individuals.

82. Mr Hopkins went on to refer to the witness statement of David Stevens, at paragraph 23, where he states that the matter is now live again and could result in a further investigation. If there was any doubt in January 2018, there was no doubt now, and there could be further disciplinary action (i.e against other persons, not the secretaries). There would be dangers if this information was put into the public domain before any investigation had run its course. There would be a risk of unfairness in any subsequent disciplinary proceedings, and a risk of trial by media.

83. In relation to the "steps discretion", under s.50 of the FOIA, he took the Tribunal to the relevant case law, but initially invited the Tribunal not to consider it, as if it stood in the shoes of the Council at the time on 31 January 2018, would have been wrong to give the requested information then.

84. He then called David Stevens, whose witness statement is at pages 117 to 121. He is the Interim Chief Executive of the Council and was appointed in mid-2019. He was not therefore in this post at the time giving rise to the Appellant's request. His evidence sets out the history of the suspensions and the Appellant's request in January 2018.

85. On 13 August 2019 he undertook an investigation into this matter, and his statement sets out the enquiries that he made, the independent report that he

commissioned, and the further documents that came to his attention in the course of this investigation, which were then provided to the Appellant, in redacted form.

86. He apologised on behalf of the Council for the late provision of this information, which was itself the subject to investigation that might require further action. He accepted that there were errors in the process that led to the suspension of the Cabinet secretaries.

87. In paragraph 18 David Stevens states that he has met with all of the Cabinet secretaries, and that they remain very upset by the way that they were treated by the Council. They were distressed by the attention that this matter received in the media. By way of making amends to them, a public apology had been provided on his weekly blog, which went out to all 5000 Council employees. At paragraph 19 he stated that the secretaries did not wish to have any further exposure in relation to this matter and that further disclosure of information relating to it would not be in their interests. Having reiterated in paragraph 21 that the secretaries wanted to put the matter behind them, he expressed his view that to release the information may cause further distress, concern and reputational damage for the secretaries and their families.

88. He went on to say how the matter was still live, and that his investigation could result in action been taken against other Council officers for their conduct during the suspension investigation, and handling of the original request. Public disclosure in the circumstances would be highly prejudicial to this investigation.

89. He went on in paragraph 24 to make the broader point of the need for the Council to have the ability to conduct internal investigations fairly and transparently, with witnesses engaging fully in the process. Public disclosure of such information would be likely to lead to those involved in such investigations being less candid and unwilling to cooperate with the Council which he submitted would be strongly contrary to the public interest.

90. He was cross – examined by the Appellant, and questioned by the Tribunal, in open session. He confirmed that there may be a further investigation which may involve a number of members of staff. When he had first met with the secretaries they were still upset and wanted recognition that they had done nothing wrong. They had had a private apology, which they did not consider enough they wanted colleagues to know that they had done nothing wrong as there was a feeling that there was "no smoke without fire".

91. He had wanted an independent investigation so that someone could look at the processes as it was clear that the Council did not follow its own processes or procedure, which was indefensible. The secretaries had wanted him to do

the right thing, and if others had done something wrong they too should face action.

92. The Appellant asked David Stevens if there was an element of dysfunctionality in the Council, and he replied that, when he had been asked to look into this, he realised that the Council had not followed its own processes.

93. He was asked about the documents that had recently been disclosed, and if these been sent to the investigator. He believed that they had, and they would be some of the documents which had been sent to the ICO, along with all the emails that have been obtained which related to the incident.

94. When it was put to him that there was a complete absence of documentation, he said he did not believe that there were any other emails. The suspensions took place over a day or so. He did not believe there were any other emails in relation to them. He would have expected a report, and then an independent officer determining the suspension or making a disciplinary report, but in this instance this did not happen.

95. He was asked about the file note, and it was put to him that by 26 January 2018 it had come to light that none of the secretaries were responsible for the alleged leak. He said he could not say when the trade union representative had made this clear, but it may have been on 26 January. He understood all the circumstances and could answer more in the closed session if necessary.

96. He was referred to pages 88A to 94Aof the open bundle, which was an email from the Union to the Council raising a grievance about the way in which their six members had been treated.

97. Thereafter, the Tribunal went into closed session, which ended the first day of the hearing, which then had to be re-convened

The closed material and closed session.

98. The Tribunal viewed the closed material. It cannot, of course, reveal its contents, but suffice it to say that its contents are as contained in the summary of the closed session provided to the Appellant, as follows:

    The closed session lasted approximately 15 minutes.

    Mr Hopkins showed the Tribunal the suspension letters. Those letters did not mention possible criminal offences.

    Mr Hopkins indicated that he did not propose to walk the Tribunal through the redactions made to the email correspondence; the Tribunal could consider those redactions for itself. The Council's position was that the redacted text should remain withheld because (a) its public disclosure would be unfair to the cabinet secretaries, in revealing further details about what happened to

them, and/or (b) it was likely to be relevant to the issues under consideration in the live investigation to which Mr Stevens had referred in his open evidence.

Mr Hopkins showed the Tribunal the file note. He explained that (as Mr Stevens had explained in open), while the Council was not seeking to defend the process that had been followed in suspending the cabinet secretaries, the file note did explain the chronology, the steps followed and the issues arising in the investigation that had occurred up to 30 January 2018. The Council maintained that this should remain exempt from disclosure, for the reasons given in open.

99. In the closed session argument was advanced as to whether disclosure of the substance of these discussions would assist public understanding of enforcement policy, and the where the balance of public interest would lie.

Further Submissions.

100. During the adjournment the Appellant was provided with the "gist" of the closed session, and the second respondent provided him the authority of ***Birkett v Information Commissioner [2011] EWCA Civ 1606***, which confirmed the Decision of the Upper Tribunal (***[2011] UKUT 39 (AAC))*** which was cited as authority for the proposition that on appeal this Tribunal is not confined to the reasons upon which the public authority relied, or the Commissioner relied in making her Decision, but may find alternative grounds for its own Decision.

101. The Appellant, in the resumed hearing, conceded this proposition, whilst, of course, urging the Tribunal not to accede to the Second Respondent's invitation to take this approach.

102. The parties then made their final submissions. Mr Hopkins concluded his for the Second Respondent. He explained the "steps discretion", and the caselaw in support of it, as the alternative position that the Council would take.

103. He referred to the s.40(2) exemption first and referred to David Stevens' evidence. The reasons relied upon were even more cogent now, the investigation was continuing. He also referred to the fact that the withheld material would also reveal the trade union membership of the secretaries in question, which would be considered sensitive personal data.

104. He then went on to consider the s.30 and s.31 exemptions. The Commissioner had accepted the s.30 exemption, but the Second Respondent had not majored on it. If the Commissioner had got it wrong, the Tribunal could substitute a decision on the basis of s.40(2).

105. Alternatively, the Tribunal could find that the s.31 exemption was made out. He took the Appellant's point that this was not the exemption relied on, but he cited ***Birkett*** as authority for the power that the Tribunal had to do this. The Second Respondent was relying on s.31(1)(g), not (h). The investigation was into improper conduct suspected on the part of the secretaries.

106. The exemption did not apply only during the currency of the investigation, it lasted after it. The purpose of the exemption, the "safe space" argument, would be defeated if at some later stage the material could become public. In any event, this investigation was not over, it was ongoing, given more recent events.

107. In due course, after an adjournment, Mr Hopkins conceded that he could not resist the appeal in relation to the s.30 ground relied upon.

108. The Appellant's final submissions addressed firstly, what he termed the "dreamt up" s.31 exemption. He argued that it was not engaged, as the Guidance cases are all on policy decisions, and not about specific investigations. He referred to ***London Borough of Camden v The Information Commissioner & Yiannis Voyias [2012] UKUT 190 (ACC)*** referred to in the Commissioner's Guidance.

109. He argued that the Council had to prove that to release the information would prejudice the investigation.

110. He referred to the Decisions in ***Alan Digby – Cameron v Information Commissioner and Bedford Police and Hartfordshire Police [EA/2008/0023 & 0025]*** and ***Toms v Information Commissioner [EA/2005/0027]*** where this exemption had been considered. He pointed out that it could be in the public interest to disclose where the investigation had not been conducted properly.

111. He referred to the late disclosure of the further material. It was important to know what the withheld file note did not contain, as well as what it did. The Union's involvement was apparent from the open material. Their request for reinstatement would then be dealt with in confidential meetings, of which there would be no file note.

112. He went on to reference the need for disclosure to expose inadequate investigations, citing the Commissioner's Guidance, this time in relation to s.30, in relation to the Jeremy Thorpe trial (***Guardian Newspapers Ltd v Information Commissioner and CC Avon and Somerset Police [EA/2006/0017]***).

113. He then turned to the s.40(2) exemption. His request had been about Council managers, not the individuals who were suspended. He had never asked for the suspension letters. The Judge did, at this juncture, point out the terms of para. 3 of his request. He replied that it should be read in the context

of the opening paragraphs, which refer to managers. He did not want to impinge upon any junior employees' rights, or the data protection rights of the secretaries.

114. He referred to paras. 99 to 101 of the Commissioner's Guidance, headed "Prejudice to Investigations". There had to come a point at which, after months, the risk of prejudice to an investigation was negligible. Only real risk had to be considered, not fanciful risk, as the Guidance pointed out.

115. He had not sought sensitive data and had only been maintaining the proper public interest in ensuring that proper procedures had been followed, to re-assure staff and the public. He reiterated that much was already in the public domain, there was a lot of gossip, and hundreds of employees knew about the matter, which then was in the Press.

116. He made reference to page 25 of the Commissioner's Guidance on s.40, ("Private v Public Life") , and how there had been an intrusion into the private lives of the secretaries when this all happened. They had not invited it. Here was, he said, no evidence of the secretaries not wanting disclosur, prior to the Decision Notice.

117. Now, 18 months later the Council had been picking and choosing what it would disclose, had made the public apology and had expected there would be leaks (he referred to p.94 of the bundle). The secretaries may now say they do not want disclosure, but should they too be allowed to pick and choose in this way?

The Law.

118. The relevant provisions of FOIA and other legislation are set out in full in Annexe A to this Decision.

Discussion and Findings.

a.)The s.40(2) exemption.

119. Whilst the Council and the Commissioner have approached this request initially from the standpoint of s.30 or s.31, the Tribunal differs from them by preferring first to consider the personal data exemption under s.40(2). As will be apparent, much the same considerations arise, when applying the public interest test under both exemptions, but the Tribunal considers that the employees' private personal data protection rights are as important, if not more so, than the wider, more public, interests that the Council seeks to protect under s.31.

117. In approaching this issue, once it is accepted, as is clear, that the information requested is personal data, the question then arises as to whether it can be released, or whether to do so would breach the data protection principles. The principles engaged are those now to be found in the GDPR in Articles 5 and 6, set out in the Annexe to this Decision. Article 6(f) is particularly relevant :

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data …".

118. The GDPR, however, came into force on 25 May 2018, shortly after the request in this appeal. Consequently, the provisions of the DPA 1998 apply, and in particular Schedule 2, which at para. 6(1), is similarly worded:

"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 is disclosed, except where the processing is unwarranted in any particular case by reason of the prejudice to the rights or legitimate interests of the data subject."

119. It is to be noted that the word used is "necessary". Necessary is a strong word, it means more than just "desirable" or "advantageous to". It suggests that without the information the requester would either be prevented from, or seriously hampered in pursuing any of the legitimate interests referred to. As is clear, the Appellant has not been prevented from, or hampered in his holding to account the actions of the Council in suspending, and then reinstating, the secretaries in question. There has been considerable public debate about this, including upon the Appellant's own blog. The basic facts are known, and it is difficult to see what more of any significant value is likely be added by the release of the personal data that the Appellant seeks.

120. The Appellant argues that the information is already in the public domain, citing in particular the apology made to the relevant employees in the blog from David Stevens in August 2019. That may be so, but the evidence of David Stevens, which the Tribunal has no reason to doubt, is that the secretaries have told him that they do not want this data released. What the Appellant seems not to appreciate is the difference between release of this some of this data, the basic facts of their suspensions, for limited purposes to a limited audience (i.e the secretaries requiring a public apology made for their colleagues in the Council to see) , and release of the totality of the personal data held in relation to this matter to the world in general, and for ever.

121. There is a difference between the fact of their suspensions and their identification as the persons who were suspended, and the actual personal

data contained in the documentation that the Appellant seeks. The latter is likely to go further, of course, than the former.

122. There is an obvious course open to the Appellant, which he has not taken, and that is to seek the consent of the individuals (any one or more of them) to release of this personal data. Whilst he has argued that by the requirement for the public apology that has now been given, they have somehow given that consent, or waived their data protection rights, he cannot demonstrate that they or any of them, have consented to their personal data being processed in this way.

123. David Stevens' evidence was that they would be distressed and upset if this request were to be acceded to, wanting, as they do to put this matter behind them, which the Tribunal accepts. That factor, together with the absence of any real impediment to the pursuit by the Appellant of the interests of accountability and transparency in which he is engaged, satisfies the Tribunal that the balancing exercise falls in favour of non – disclosure. That this may, as the Appellant would see it, enable the Council to shelter behind the interests of the secretaries, be a consequence of this approach, is indeed correct, but it arises because of the primacy of the individuals' personal data protection rights in these circumstances. The Tribunal would accordingly allow the appeal, but substitute an alternative Decision Notice, maintaining this exemption, on that basis.

b.The s.30/31 exemptions.

124. The first question that this aspect of the appeal raised was whether s.30 applied, could the Council rely upon its provisions? The Tribunal's provisional view was that it could not, and the Council, and then the Commissioner, misapplied these provisions. The reason they did so, was a misunderstanding of the actual purpose of the creation of the data in question. Whilst prosecution was a possibility, the Tribunal is quite satisfied that it was a remote one, and not in the mind of the Council at the time. The provisions of s.30 apply to criminal investigations, not to anything else. The fact that nothing in the open or the closed material makes any reference whatsover to potential criminal proceedings demonstrates that this section is not engaged. The Second Respondent conceded, in closing submission, that this exemption could not succeed. The First Respondent, of course, has not made any such concession, so the Tribunal has to determine the matter. As will be apparent, the Tribunal considers that the appeal on this basis should succeed.

125. The Tribunal's view, however, is that s.31 is indeed engaged. The Council were under a duty to investigate possible breach of confidentiality on the part of its employees. That may have led to disciplinary action, after the suspensions that it clearly did lead to.

126. With respect to the Commissioner and the Council whose argument this initially was, they have both been somewhat confused as to the role and relevance of the Employment Rights Act 1996. That Act does not confer any "power" to conduct an investigation, or any requirement to do so. Investigation is almost invariably a pre – requisite for a dismissal to be found to be fair under the provisions of s.98 of that Act, but the Act itself confers no powers or even specific duties to conduct such investigations.

127. The power to do so, the Tribunal considers, is derived from the Council's duties as an employer, and its general powers to carry out those duties for the purposes for which it exists, the administration of the local authority functions that it carries out. Section 1 of the Localism Act 2011 contains such powers.

128. The Council's written submission is a little misconceived too, when, at para. 11, reference is again made to the Employment Rights Act 1996, and how unfair treatment may lead to "constructive unfair dismissal". That is so, but it has nothing to do with the power that the Council was exercising when it suspended, and then reinstated the employees in question. Their suspected conduct may have led to actual, not constructive dismissals (which would have required resignations on the part of the employees) , which may in turn have led to claims of unfair dismissal under the Act. Equally, and perhaps more pertinently, regardless of any Employment Tribunal proceedings, which would have to have been instituted by any affected employee, the Council, faced with suspected breaches of confidentiality, was entitled to consider taking proceedings itself, in the High or County Court against the relevant employees in which injunctive relief may have been sought. There is, however, no evidence it actually did have such proceedings in mind when conducting what was described (para.15 of the Council's response, page 34 of the bundle) as "an internal and preliminary investigation".

129. The Council was, we are satisfied, exercising its powers and functions as an employer, and s.31(1)(g) was engaged. In relation to the functions set out in s.31(2), these are wide ranging and include at s.31(2)(a), investigations for the purpose of ascertaining whether any person has failed to comply with the law. "The "law" includes civil as well as criminal legal obligations, and in this case, it is arguable that the investigation was to ascertain whether the secretaries had broken their legal duty of confidentiality. That said, we must bear in mind that it is the purpose in the mind of the Council that we must examine, and whilst we have expressly discounted that the purpose of potential criminal proceedings was in the contemplation of the Council at the time, we could equally question whether the purpose truly was to ascertain if any person had actually broken the (civil) law. Rather, if the investigation did not fall truly under s.31(2)(a), it clearly would fall under s.31(2)(b), i.e it was to ascertain if any person was responsible for conduct which was improper, such as leaking confidential information. Either way, s.31 is, in our view, engaged.

We are satisfied that to disclose the requested information would be likely to prejudice the carrying out of the function of the Council to conduct such investigations.

130. Having made that finding, s.31 too providing only a qualified exemption (s.2(3) of the FOIA), the Tribunal has then had to consider the public interest test. In doing so, in part, the same considerations really apply as apply under the public interest test for the purposes of s.40(2) above, in relation to the personal data interests of the secretaries. Additionally there are the other, wider , interests relied upon by the Council in support of the contention that data obtained in the course of such investigations should be exempt , because of the likely effect upon such investigations of the potential for subsequent release into the public domain upon the willingness with which , or the manner in which, persons involved participate in, or carry out, such investigations. The Tribunal accepts that too as a weighty point, militating against disclosure.

131. Again, the Appellant has not been able to demonstrate how the absence of these particular, and rather limited, pieces of data have impeded his ability to pursue the legitimate interests he seeks to advance, and for all these reasons, the Tribunal, having found s.31 was engaged , is satisfied that the public interest test falls against disclosure.

132. As will be appreciated, the Tribunal has upheld these exemptions, but on different grounds, and has relied upon the authority of ***Birkett v Information Commissioner [2011] EWCA Civ 1606*** as entitling it to do so. Whilst not cited by Mr Hopkins, ***Birkett*** was approved, and cited by a three Judge Upper Tribunal in ***Information Commissioner v Malnick and the Advisory Committee on Business Appointments [2018 UKUT 72 (AAC)*** (see para. 102 in particular). In the circumstances, the Tribunal has not considered the "steps discretion" advanced in the alternative by the Second Respondent.

133. The appeal is accordingly allowed, as the Commissioner's Decision Notice was not in accordance with the law. We, however, uphold the exemption in respect of the requested information on two alternative bases, and accordingly substitute a Decision Notice in those terms. Our decision is unanimous.

Signed: Judge Holmes

Judge of the First-tier Tribunal
Date: 30 April 2020
Date Promulgated: 04 May 2020

ANNEXE A

Freedom of Information Act 2000

30 Investigations and proceedings conducted by public authorities

(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of–

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained–

(i) whether a person should be charged with an offence, or

(ii) whether a person charged with an offence is guilty of it,

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or

(c) any criminal proceedings which the authority has power to conduct.

(2) Information held by a public authority is exempt information if–

(a) it was obtained or recorded by the authority for the purposes of its functions relating to–

(i) investigations falling within subsection (1)(a) or (b),

(ii) criminal proceedings which the authority has power to conduct,

(iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty´s prerogative or by virtue of powers conferred by or under any enactment, or

(iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and

(b) it relates to the obtaining of information from confidential sources.

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) or (2).

(4) In relation to the institution or conduct of criminal proceedings or the power to conduct them, references in subsection (1)(b) or (c) and subsection (2)(a) to the public authority include references–

(a) to any officer of the authority,

(b) in the case of a government department other than a Northern Ireland department, to the Minister of the Crown in charge of the department, and

(c) in the case of a Northern Ireland department, to the Northern Ireland Minister in charge of the department.

(5) In this section–

"criminal proceedings" includes– [N/A]

31 Law enforcement

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice–

(a) the prevention or detection of crime,

(b) the apprehension or prosecution of offenders,

(c) the administration of justice,

(d) the assessment or collection of any tax or duty or of any imposition of a similar nature,

(e) the operation of the immigration controls,

(f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

(h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty´s prerogative or by virtue of powers conferred by or under an enactment, or

(i) any inquiry held under the [1976 c. 14.] Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty´s prerogative or by virtue of powers conferred by or under an enactment.

(2) The purposes referred to in subsection (1)(g) to (i) are–

(a) the purpose of ascertaining whether any person has failed to comply with the law,

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,

(d) the purpose of ascertaining a person´s fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,

(e) the purpose of ascertaining the cause of an accident,

(f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,

(g) the purpose of protecting the property of charities from loss or misapplication,

(h) the purpose of recovering the property of charities,

(i) the purpose of securing the health, safety and welfare of persons at work, and

(j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

40 Personal information (as amended post GDPR; prior provisions have references to the DPA 1998)

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if –

(a) it constitutes personal data which does not fall within subsection (1), and

(b) the first, second or third condition below is satisfied.

(3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act –

(a) would contravene any of the data protection principles, or

(b) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.

4 .. N/A

(5A) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

(5B) The duty to confirm or deny does not arise in relation to other information if or to the extent that any of the following applies –

(a) giving a member of the public the confirmation or denial that would have to be given to comply with section 1(1)(a) –

(i) would (apart from this Act) contravene any of the data protection principles, or

(ii) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded;

(b) giving a member of the public the confirmation or denial that would have to be given to

(6) . . .

(7) In this section –

"the data protection principles" means the principles set out in –

(a) Article 5(1) of the GDPR, and

(b) section 34(1) of the Data Protection Act 2018;

"data subject" has the same meaning as in the Data Protection Act 2018 (see section 3 of that Act);

"the GDPR", "personal data", "processing" and references to a provision of Chapter 2 of Part 2 of the Data Protection Act 2018 have the same meaning as in Parts 5 to 7 of that Act (see section 3(2), (4), (10), (11) and (14) of that Act)

(8) In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (disapplying the legitimate interests gateway in relation to public authorities) were omitted.

Data Protection Act 1998

SCHEDULE 2

CONDITIONS RELEVANT FOR PURPOSES OF THE FIRST PRINCIPLE: PROCESSING OF ANY PERSONAL DATA

1The data subject has given his consent to the processing.

2The processing is necessary –

(a)for the performance of a contract to which the data subject is a party, or

(b)for the taking of steps at the request of the data subject with a view to entering into a contract.

3The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

4The processing is necessary in order to protect the vital interests of the data subject.

5The processing is necessary –

(a)for the administration of justice,

(b)for the exercise of any functions conferred on any person by or under any enactment,

(c)for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or

(d)for the exercise of any other functions of a public nature exercised in the public interest by any person.

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.

(2)The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.

The relevant provisions of the GDPR are as follows*:*

Article 5 Principles relating to processing of personal data

1. Personal data shall be:

(a) processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency');

Article 6 Lawfulness of processing

1. Processing shall be lawful only if and to the extent that at least one of the following applies:

(a) to (e) – N/A

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

Localism Act 2010

1.Local authority's general power of competence E+W

(1)A local authority has power to do anything that individuals generally may do.

(2)Subsection (1) applies to things that an individual may do even though they are in nature, extent or otherwise-

(a)unlike anything the authority may do apart from subsection (1), or

(b)unlike anything that other public bodies may do.

(3)In this section "individual" means an individual with full capacity.

(4)Where subsection (1) confers power on the authority to do something, it confers power (subject to sections 2 to 4) to do it in any way whatever, including-

(a)power to do it anywhere in the United Kingdom or elsewhere,

(b)power to do it for a commercial purpose or otherwise for a charge, or without charge, and

(c)power to do it for, or otherwise than for, the benefit of the authority, its area or persons resident or present in its area.

(5)The generality of the power conferred by subsection (1) ("the general power") is not limited by the existence of any other power of the authority which (to any extent) overlaps the general power.

(6)Any such other power is not limited by the existence of the general power (but see section 5(2)).
