



**Tribunals Service**  
Information Tribunal

**Information Tribunal Appeal Number: EA/2008/0038**  
**Information Commissioner's Ref: FS50165354**

**Heard at Bradford on 13 November 2008 and Decision Promulgated**  
**considered further on the papers in closed session**  
**at Procession House, London, EC4 29 December 2008**  
**on 11 December 2008**

**BEFORE**

**CHAIRMAN**

**ROBIN CALLENDER SMITH**

**and**

**LAY MEMBERS**

**DR HENRY FITZHUGH**  
**DAVID WILKINSON**

**Between**

**ROB WAUGH**

**Appellant**

**and**

**INFORMATION COMMISSIONER**

**Respondent**

**and**

**DONCASTER COLLEGE**

**Additional Party**

**Subject matter:**

**FOIA**

Absolute exemptions

- Personal data s.40

**Cases:**

*Common Services Agency v Scottish Information Commissioner [2008] 1 WLR 1550 and House of Commons v The Information Commissioner and Norman Baker MP (EA/2006/0015 and 0016).*

**Representation:**

For the Appellant: Ms Rosemary Jay (Mason Pinsent, instructed by the Yorkshire Post)

For the Respondent: Mr Gerry Facenna (Counsel, instructed by the Information Commissioner)

For the Additional Party: Ms Kate Horton (Eversheds, Leeds) who took no part in the oral hearing

**Decision**

The Tribunal upholds the decision notice dated 19 March 2008 and dismisses the appeal.

## **Reasons for Decision**

### **Introduction**

1. Doncaster College (“the Additional Party”) is the largest provider of further education in South Yorkshire and one of the largest providers of higher education in the region. Last year 22,000 students were enrolled on full-time and part-time courses across the College’s two campuses and 1,200 people were employed at the College.
2. Mr David Gates - formerly principal and chief executive at Keighley College in West Yorkshire - took up his appointment as Principal in January 2006 as Doncaster College moved to a new £65 million campus on the town’s Waterfront. His appointment followed the resignation of the College’s previous Principal.
3. An OFSTED report in June 2007 – after Mr Gates’ subsequent departure - noted that the College had had four Principals in just two years.
4. Within months of Mr Gates’s appointment, the Yorkshire Post, among others, discovered that he was “away from work” following a meeting with the College’s governing body. Mr Gates subsequently left the job on 7 April 2007 by mutual agreement with the College and with a confidentiality clause in place.
5. As a matter of record (and following the IC’s decision in respect of the severance payment, see below at Paragraph 8) the College disclosed the severance sum in relation to Mr Gates was £163,333 which, with the cost of Mr Gates’ salary while he was suspended and additional legal costs, came to a total in excess of £300,000.
6. Mr Rob Waugh (“the Appellant”), a senior investigative journalist with the Yorkshire Post, wanted to know more about the background, facts and circumstances of Mr Gates’ departure.

### The request for information

7. On 27 April 2007 Appellant asked Doncaster College for information the College held "on the investigation into its former Principal, David Gates, including any reports drawn up during the enquiry or its conclusion". On 7 June 2007 the College refused the request under section 40 (2) FOIA on the basis that disclosure would contravene the data protection principles or would be likely to cause damage or distress to the data subjects. That decision was upheld on internal review on 21 June 2007.

### The complaint to the Information Commissioner

8. The Appellant complained to the Information Commissioner ("IC") on 22 June 2007. Following an investigation the IC concluded that the requested information – save for the amount of the severance payment from the College to Mr Gates - was the personal data of Mr Gates and other data subjects within the meaning of section 1 (1) of the Data Protection Act 1998 ("DPA") and that disclosure would breach the first data protection principle (the data should be processed fairly and lawfully).

### The appeal to the Tribunal

9. The Appellant challenged the IC's finding in relation to the application of the exemption at section 40 FOIA. That challenge was on the basis that the information related to a senior official carrying out public functions and the public interest favoured disclosure. The IC's decision to rely on the fact that disclosure of the information would cause damage and distress to Mr Gates was wrong because it placed "too great an influence on protecting the rights of the highly paid individual who has been sacked as opposed to the rights of the public who have funded his position and placed great trust in him as a senior employee at a town's largest educational establishment".
10. This point was further developed in the Appellant's skeleton argument at the open session of the Information Tribunal appeal hearing in Bradford on 11 November 2008. Using publicly available information, Ms Jay, on behalf of the Appellant and the Yorkshire Post, noted that Doncaster College was and is one of the largest

colleges in the United Kingdom. It served a deprived area in particular need of good-quality and well-run education and training for local people and that a significant amount of public money had been spent on the College with £65 million alone spent on a new campus opened in September 2006. Mr Gates had been appointed as Principal to take his position from January 2006 having been Principal of Keighley College.

11. Prior to Mr Gates' appointment there had been concerns about the under-performance of the College and a threat of redundancies. Before Mr Gates was appointed the Learning and Skills Council intervened to appoint two "highly experienced representatives" to the Board to assist the College in view of the difficulties it was facing.
12. By 14 September 2006 Mr Gates was reported in the press as being "away from work" with the Vice Principal taking over at the College. A public statement from the Governors in September reported in the press was to the effect that there were "issues" over Mr Gates but that these did not include disciplinary matters. By 21 September 2006 a report appeared in the press that Mr Gates had been suspended from his post.
13. A subsequent report appeared in the press on 7 April 2007 that Mr Gates had been suspended on full pay for the previous seven months but had now been dismissed and was appealing against his dismissal. The College statement said:

"The reasons for the Principal's dismissal relate to his conduct and performance of his responsibilities, particularly in respect of his behaviour and relationships with senior individuals connected with the College and its Corporation."

14. A statement from the College dated 9 May 2007 and sent to all staff and those press who made enquiries included the statement that:

"None of the matters that relate to the dismissal were of a criminal nature. Mr Gates appealed against the decision and continues to disagree vigorously with the decision to dismiss him. However both the Corporation and Mr Gates recognise that, regardless of the outcome of the appeal hearing and in the likelihood of an unsuccessful appeal being contested at an Employment

Tribunal, it would be impossible for him to return to his substantive post of Principal at the College. Terms have been agreed to the mutual satisfaction of both parties that now brings an end to the appeal process and Mr Gates' relationship with the College. Neither the Corporation nor Mr Gates will make any further statements on this matter."

15. The Appellant argued -- from the statement above -- that the College acknowledged there had been a dispute between senior management figures and Mr Gates, that Mr Gates had been prepared to take the matter to a public Tribunal and had only agreed not to pursue his case in return for a substantial settlement, including a confidentiality agreement.

16. In June 2007 an OFSTED inspection found that the College was failing to provide a good standard of education and that "leadership and management and governance are inadequate" The OFSTED report stated that:

"Governors have failed to discharge several of their key duties effectively. They have not set a clear strategic direction and their monitoring of the performance of the college is weak. Progress has been hindered by a lack of stability in the senior leadership of the college"

"Governors had not handled the appointment and removal of senior staff holders appropriately. Decisions made by the governing body to pay compensation to a senior post holder whose performance they judged to be unsatisfactory and payments made to some other senior post holders upon their departure, represent an inappropriate use of public funds."

17. The Appellant submitted that the circumstances outlined above supported his contention that there was a very strong legitimate interest in the disclosure of information which related to the reasons for and the circumstances of the dismissal. The Appellant argued that there was no evidence that Mr Gates' position would be prejudiced because there was no evidence that Mr Gates had sought secrecy or privacy for information relating to him. Although he had maintained silence while he was an employee of the College it was a matter of public record that he was prepared to take the matter to an Employment Tribunal which would have involved a public hearing. The fact that the settlement with the College included a

confidentiality agreement binding on Mr Gates should not be used as a way to frustrate the public's right to know about what had happened under the provisions of the Freedom of Information Act 2000.

18. Doncaster College served a full bundle of all the confidential material relating to the circumstances surrounding Mr Gates' departure on the IC and the Information Tribunal. The College took no further part in the appeal proceedings. Mr Gates was not joined and did not apply to be joined as a further Additional Party in the appeal.

19. The determination in relation to the Closed Material had to take place at a special hearing (of the Tribunal only) arranged in London on 11 December 2008 - after the open oral hearing in Bradford on 13 November 2008 - only because it became apparent at Bradford that not all members of the Tribunal had complete versions of the confidential material. The problem was subsequently corrected.

#### The questions for the Tribunal

20. Is the disputed information in this appeal - which is set out in 383 pages of closed material - the personal data of Mr Gates and other third parties including Miss J Outram, the then Chair of the Governors of the College

21. If it is, would disclosure of that information be contrary to the first data protection principle because it would not be fair?

22. Would disclosure of this personal data be likely to cause substantial damage or distress to Mr Gates or other third parties contrary to section 10 DPA?

#### Evidence

23. Beyond the factual information explored in the open portion of this appeal hearing there was no additional direct evidence or witness statements in the public hearing of the appeal.

24. The Tribunal has read and considered carefully the closed material supplied by Doncaster College.

### Legal submissions and analysis

25. The thrust of the legal submissions of the Appellant has been explored in outline earlier in this decision. The Appellant accepted that the relevant information included personal data which related to both Mr Gates and a number of other senior officials and officers of the Corporation. He was surprised that no further information was to be released.

26. The Appellant submitted that the relevant provisions of the DPA were Principle 1 and, in particular, Ground 6 of Schedule 2 which provided 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*".

27. In relation to the fairness and lawfulness of the disclosure of the information about Mr Gates and other senior staff, the Appellant submitted:

- it should be within the reasonable expectation of senior staff that information about management issues of this nature and significance would be of public concern and disclosable under the Freedom of Information Act;
- the fact that an Employment Tribunal was anticipated had put the individuals on notice of possible disclosure;
- notice could be given to the individuals before any specific disclosures were made;
- the Compromise Agreement's confidentiality provisions which applied to Mr Gates and the College did not bind the Tribunal and could be overridden by an order of the Tribunal.

28. In relation to Ground 6 of Schedule 2, the Appellant submitted that:

- the Tribunal should consider the balance between the legitimate interest in disclosure of the relevant information to the press and thereby the general public by applying the test of proportionality imported by the term "necessary". This was not a requirement that the disclosure be essential but



that the disclosure be a reasonable response in all the circumstances, balancing the need to protect individual privacy on the one hand and to ensure that the legitimate societal interests are served on the other;

- there was a strong legitimate interest in the disclosure of the relevant information because of matters already advanced, including the highly critical findings of the OFSTED inspection report;
- there was a particular interest in supporting the Freedom of the Press to investigate and report on matters of public interest such as this;
- the commission had failed to give proper weight to the strength of those interests in reaching his decision;
- the balance in Ground 6 was in favour of disclosure because Ground 6 required that the balance be struck between the legitimate interest in disclosure and whether a disclosure was unwarranted *in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject*. This required consideration to be given to the actual data subject not a notional data subject. In relation to Mr Gates in this particular case there was no evidence before the Commissioner and nor was there any evidence before the Tribunal in relation to Mr Gates.
- Specifically there had been no objection from Mr Gates nor had Mr Gates expressed any concern about the effect on his privacy or whether he regarded the possible disclosure as detrimental. He had not raised any specific objection to the disclosure of the disputed information. How could he have done any of these things when the College had not attempted to notify Mr Gates or seek his views or consent? In reaching his decision the Commissioner had given weight to the fact that Mr Gates did not speak to the press about his departure. The Commissioner had been in error in giving weight to this final point because it was an irrelevant consideration: the information provided by the College stated that Mr Gates was prepared to go to a public Tribunal to argue his case.

- In relation to the other senior staff and officials there was no specific evidence before the Tribunal that they regarded the disclosure as personally prejudicial to them. They would not have a reasonable expectation that information about their work life would be regarded as private.

29. The IC's position had been clearly stated from the start of the appeal. Section 40 (2) FIOA provided an exemption for information that is the personal data of any third party where either the condition in section 40 (3) FOIA or the condition in section 40 (4) FOIA was satisfied. Under section 40 (3), the condition can be satisfied under section 40 (3) (a) in a case where the information falls within any of the paragraphs (a) to (d) of the definition of 'data' in section 1 (1) DPA or under section 40 (3) (b) in any other case.

30. Where disclosure of the information to a member of the public would contravene any of the data protection principles the condition in section 40 (3) FOIA would be satisfied under section 40 (3) (a) (i) or 40 (3) (b) FOIA, thereby conferring an absolute exemption from disclosure.

31. In essence and as described in the Decision notice the disputed information could be summarised as containing the details of allegations made against Mr Gates and the details of disciplinary proceedings that flowed from those allegations. The information related to matters internal to the College and contains the Minutes of the Special Committee that considered the allegations. There were also two agreements entered into by the College and Mr Gates -- a compromise agreement and a termination agreement -- which contained details of the financial package offered to Mr Gates.

32. The focus of the documents is Mr Gates and the investigation of the allegations against him. The Commissioner was clear that the information was the "personal data" of Mr Gates and of those third parties such as witnesses who gave evidence or who were otherwise involved in the investigation.

33. The Commissioner noted the Appellant's argument set out in the grounds of appeal focused primarily on the public interest in disclosure of the information and the weight to be given to the public's right to know about the circumstances of Mr Gates departure. The exemption in issue in this case, however is an absolute exemption.

This meant there was no requirement to apply the public interest balancing test under section 2 (2) FIOA. The only question of law was whether disclosure of the personal data would contravene any of the data protection principles. If the disclosure of the information would be unfair and contrary to the first data protection principle, it was exempt from disclosure under section 40 (2) FOIA read together with section 40 (3) (a) (i) and/or section 40 (3) (b).

### Conclusion and remedy

34. The Tribunal took an early decision in the hearing of this appeal that it should be heard as far as possible in public and in the relevant locality. For that reason the oral public hearing took place in Bradford on 13 November 2008. At least one member of the press (apart from Mr Waugh) was present.
35. Doncaster College, having disclosed all the confidential material that was at issue in this appeal, chose to take no part in the proceedings.
36. The Tribunal notes that the College chose to appoint a Principal in Mr Gates who came from Keighley College, a college subsequently criticised in another OFSTED report. The Tribunal also noted in open session that a document Doncaster College characterised as a press release – the dismissal statement of 9 May 2007 – was no such thing. The details contained within it were only for release to the press on enquiry. That is the very antithesis of a press release.
37. At a number of stages information that did become public had to be dragged from the College by astute observation or enquiry. In terms of openness to the community it served the College did not set a shining example during this unhappy time.
38. The Tribunal observes that the first data protection principle requires the personal data must be processed fairly and lawfully and shall not be processed unless one of the conditions in Schedule 2 of the DPA is met. The concept of fairness for the purposes of the first data protection principle is concerned with the method by which the information was obtained and, in particular, whether the person from whom it was obtained may have been deceived or misled.

39. It is necessary to consider in terms of fairness what would be Mr Gates's reasonable expectations about the use and subsequent release of the material (except the details of the severance payment).
40. In addition there is a recognised expectation that the internal disciplinary matters of an individual will be private. Even among senior members of staff there would still be a high expectation of privacy between an employee and his employer in respect of disciplinary matters. The majority of the information sought consists of material not normally available to the public. The agreement between the college and Mr Gates included a provision at Clause 15 that expressly limits the amount of information that would be made available to the public about the termination of his employment, giving rise to a reasonable expectation that no further information would be released save the press release was agreed between the parties. Even in the public sector compromise agreements may be expected to be accorded a degree of privacy as long as there is no evidence of wrongdoing or criminal activity present. There is no such evidence in this case. Nor is there any evidence to suggest that Mr Gates actively sought to put details of his departure from the college into the public domain.
41. The Tribunal's view in this case is that disclosure of the information would represent a significant invasion of Mr Gates' privacy and would be unfair. Witnesses who gave evidence during the investigation that eventually led to his departure from Doncaster College would also have a reasonable expectation that the information they provided in the context of the investigation would not be released to the general public. It follows that disclosure of their personal data would be unfair to them as well as Mr Gates.
42. The Tribunal notes the decision in *House of Commons v The Information Commissioner and Norman Baker MP (EA/2006/0015 and 0016)* where the Tribunal recognised that a distinction can be drawn between information relating to public and private lives when considering the disclosure of personal data relating to public officials.
43. In Paragraph 6 of Schedule 2 DPA the only condition that could be relevant to the proposed disclosure can only be satisfied is where the processing is "necessary for

the purposes of legitimate interests pursued by the data controller or other 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".

44. In the *Norman Baker MP* case the Tribunal suggested that the application of the condition "involves a balance between competing interests broadly compare report, but not identical, to the balance that applies under the public interest test for qualified exemptions under FOIA". The Tribunal has concluded (agreeing with the IC) that the legitimate interests of the public in accessing the requested information are not sufficient to outweigh Mr Gates's right to privacy, particularly given the substantial detriment that would result from disclosure, which would involve a significant invasion of his privacy.

45. The Tribunal notes and applies the comments by Lord Hope in *Common Services Agency v Scottish Information Commissioner [2008] 1 WLR 1550* at Paragraph 7 (referring to the equivalent exemption in the Freedom of Information (Scotland) Act 2002 ('FOISA')):

"In my opinion there is no presumption in favour of the release of personal data under the general obligation that FOISA lays down. The references which that Act makes the provisions of DPA 1998 must be understood in the light of the legislative purpose of that Act, which was to implement Council Directive 95/46/EC. 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....".

46. For all the reasons above the Tribunal upholds the decision of the Information Commissioner and dismisses this appeal.

47. The Tribunal recognises the public importance, especially locally, of the closed information it had to consider in dealing with this appeal. If there had been ways of editing and redacting the material so that a meaningful document still existed at the end of the process then the Tribunal would have required Doncaster College and the Information Commissioner to produce such a document.

48. After considering this information carefully the Tribunal has concluded that this exercise would be futile because, in the edited and redacted form, what is left would be meaningless.

49. Our decision is unanimous.

50. There is no order as to costs.

Signed:

Robin Callender Smith

Deputy Chairman

Date 24 December 2008