IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2014/0061
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice dated 11 March 2014
FS50517404

Appellant: **Benjamin Crompton**

First Respondent: **Information Commissioner**

Considered on the papers

Date of Decision: 29th May 2014

Date of Promulgation: 30th May 2014

Before

John Angel
(Judge)

and

Jacqueline Blake and Pieter de Waal

Decision

The appeal is dismissed.

Reasons for Decision

Background

1. On 23 August 2013, Mr Crompton made the following request to Basingstoke and Deane Borough Council ("the Council"):

> *"…Can I please make a request for the following information:*
>
> *For the financial year 2012-2013:*
>
> ** The number of BDBC Councillors who are members of the Local Government Pension Scheme.*
>
> ** The names of those councillors.*
>
> ** The total employer contributions by BDBC for the above (i.e. the cost to BDBC for the above councillors to be members of the scheme)"*

2. On 23 September 2013 the Council confirmed that 11 Councillors were members of the Local Government Pension Scheme ("the Scheme"). The Council also provided the names of those Councillors who consented to the disclosure of their names and that the total employer contributions amounted to £13,037.55. However, the Council withheld the names of those Councillors who had not consented to the disclosure of their names relying on section 40(2) (personal information) of the Freedom of Information Act 2000 ("the Act").

3. On 23 September 2013, Mr Crompton sought an internal review. In particular, he referred to an earlier decision notice of the Information Commissioner (reference FS50233989, 14 October 2010). This decision notice concerned a request made by another individual who sought the names of Buckinghamshire Councillors who were members of the Scheme. In this case, the Commissioner determined that Buckinghamshire Council was not entitled to rely on section 40(2).

4. On 11 October 2013, the Council upheld its earlier application of section 40(2). The Council explained that it had reviewed another decision notice of the Commissioner (reference FS50465848, 9 May 2013) in which an individual requested the names of those Central Bedfordshire Councillors who claimed pension contributions from the Scheme. In this case, the Commissioner upheld the application of section 40(2) in respect of the names of those Councillors who had not consented to the disclosure of their names.

5. The Council also referred to The Authorities (Members Allowance) (England) Regulations 2003 ("the 2003 Regulations") which outline the information which Councils should publish regarding councillor

allowances and which make no specific reference to the disclosure of pension entitlements.

6. On 21 October 2013, Mr Crompton complained to the Commissioner saying *"…the crux of the argument [is] the differences between two conflicting decisions of your office...*"

7. As part of the Commissioner's investigation, the Council disclosed the name of one further Councillor who had now given consent to disclose her name.

8. The Commissioner issued a decision notice on 11 March 2014 and found that the Council was correct to rely on section 40(2).

The Legal Framework

9. Section 1(1) of the Act provides:

> *"Any person making a request for information to a public authority is entitled –*
>
> > *(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
> >
> > *(b) if that is the case, to have that information communicated to him"*

10. However, section 2 of the Act provides that section 1(1)(b) will not apply where any relevant exemption is engaged. The relevant exemption in this case is section 40(2).

11. In short, section 40(2) permits a public authority to refuse to disclose information if (a) that information can be said to constitute the personal data of a third party and (b) where disclosure of that information would breach any of the relevant data protection principles.

12. In relation to the first issue, section 1(1) of the Data Protection Act 1998 ("DPA") defines personal data as follows:

> *"…'personal data' means data which relate to a living individual who can be identified-*
>
> > (a) *from those data, or*
> >
> > (b) *from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller…"*

13. All parties agree that the disputed information is personal data.

14. If so then the data should not be disclosed if one of the data protection principles ("DPP") is breached. The relevant DPP in this case is the first which states:

> *"1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-*
>
> *i. at least one of the conditions in Schedule 2 is met, and*
>
> *ii. in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met".*

15. The only arguably applicable condition from Schedule 2, other than consent given by the data subject, in this case is condition 6(1), which states that:

> *The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject*.

Is it fair and lawful to disclose the personal data?

16. In order to consider this question the Commissioner sets out three propositions. Firstly, although any request is submitted by an individual requester and any information is disclosed to that individual, the Act operates on the principle that disclosure is effectively made to the world at large. Further, the Act operates on an applicant blind and motive blind basis. It is for these reasons that in considering whether any exemption is engaged, the Commissioner takes into account the benefits and consequences, if any, for the world at large rather than for the individual requester.

17. Secondly, when considering fairness, the Commissioner considers the reasonable expectations of the data subjects; the consequences of any disclosure to those data subjects and whether there is any legitimate interest which may justify disclosure.

18. Thirdly, the Commissioner points out that there is no presumption in favour of the disclosure of personal data and relies on the House of Lords' decision in *Common Services Agency v Scottish Information Commissioner* [2008] 1 WLR 1550 where Lord Hope said at §7:

> *"…In my opinion there is no presumption in favour of the release of personal data… 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…"

19. We accept these propositions. The Commissioner then applied these arguments to Mr Crompton's grounds of appeal.

20. Mr Crompton argues that the Commissioner has not made a *"…concrete conclusion…"* on whether the Councillors had a reasonable expectation that this information would not be disclosed. In any event, he argues that the actual expectations of the Councillors are irrelevant to the question of whether it is correct to say that Councillors should reasonably expect that information of the type sought here should be disclosed.

21. The Commissioner says that the actual views of the relevant data subjects, in this case the Councillors who withheld consent to disclose their names in response to the material request, are relevant to a consideration of whether the relevant data subjects would expect their personal data to be disclosed. It is then a matter for the Commissioner to consider whether or not those expectations are reasonable.

22. Mr Crompton goes on to argue that it is not reasonable for the Councillors to expect that this information would not be disclosed, for the following reasons.

(i) with reference to the 2003 Regulations, Mr Crompton argues:

"…Whilst I accept that, in those regulations, regulation 15(3) states that only the total sum paid for the various allowances should be published not LGPS membership, Regulation 15(1) states that an authority 'shall keep a record of the payments made by it in accordance with a scheme'.

Regulation 11 states that '…a scheme made by [an authority] shall set out (a) which members of the authority are to be entitled to pensions…"

Therefore, payments made by the authority for pensions are payments in accordance with the scheme. Therefore such pension payments fall within Regulation 15(2)(b) that the record of payments referred to in Regulation 15(1) shall 'be available, at all reasonable time, for inspection and at no charge…' Therefore, any expectation arising from these regulations that the information would not be disclosed cannot be reasonable as the regulations refer to making payments for pensions available…"

23. The Commissioner responds that it is not entirely clear that the 2003 Regulations are to be interpreted in the way suggested by Mr Crompton. It is the Commissioner's view that regulation 15(2) only requires details of allowances to be made available for inspection. This is on the basis that regulation 15 is headed *"records of allowances"*. Part 2 of the 2003 Regulations is also headed *"Allowances"* and refers to the following types of payment:

- basic allowance (regulation 4);

- special responsibility allowance (regulations 5 and 6);

- dependants' carers' allowance (regulation 7);

- travelling and subsistence allowance (regulation 8); and

- co-optees' allowance (regulation 9).

There is no specific reference to the possibility of inspecting pension payment information. The first and only specific reference to pensions is made in Part 3 of the 2003 Regulations where regulation 11 states:

> *"…A scheme made by a district council, county council or a London borough council shall set out-*
>
> > *(a) Which members of the authority are to be entitled to pensions in accordance with a scheme made under section 7 of the Superannuation Act 1972…"*

24. Regulation 15(3) goes on to set out the categories of information which must be disclosed on an annual basis. This also only refers to the disclosure of scheme information insofar as it relates to the allowances referred to above.

25. Mr Crompton does not agree with the Commissioner's interpretation of the 2003 Regulations. He submits that regulation 15, as opposed to the heading, compels authorities to "*keep a record of the payments made by it in accordance with a scheme*" and that, as the reference in Regulation 11 states a scheme includes pensions eligibility, this *record* includes pension payments. Regulation 15(2) says this record should be available for inspection, which makes expectations of non-disclosure based on the Regulations unreasonable. In addition, Regulation 15(3) does not say that an authority shall make arrangements for the publication of *the record of payments referred to in Regulation 15(1) and (2).* Instead, Regulation 15(3) states "*an authority shall make arrangements for the publication within the authority's area of the total sum paid by it in the year under the scheme to each recipient in respect of each of the following*" and then lists the five types of allowance. If the Regulations are read in the way the

Commissioner submits, namely that the *record of payments* cited in Regulation 15(1) and (2) only consists of the allowances named in Regulation 15(3), then the words in Regulation 15(3) are redundant and surplus. He submits, therefore, that when formulating these Regulations, the Secretary of State must have meant the list in Regulation 15(3) to be distinct from the record of payments of Regulation 15(1) and (2). Therefore, the interpretation submitted above is more favourable than suggested by the Commissioner.

26. We have considered all these arguments on the interpretation of the 2003 Regulations and prefer the interpretation of the Commissioner. There is no express requirement to allow for the inspection of pension records in contrast to that of allowances. The schemes relating to pensions and allowances are treated differently.

27. However Mr Crompton argues the similarity between allowances and pension payments and that knowledge that the former is routinely disclosed mean that there should be an expectation that the latter would be disclosed. Mr Crompton refers us to parts of the Commissioner's response to the appeal to substantiate this argument.

28. Clearly the Commissioner has taken different views about this in the two previous decisions quoted above. We are of the view that although it is widely accepted today, particularly following the MPs expenses cases, that allowances are published, this is not the case for pensions which relate to a benefit which results in a future payment and not an immediate payment as with allowances. This is reflected by the 2003 Regulations. Similarly salary bands, job titles/functions and information regarding decisions by employees as part of their professional life and which affect large numbers and involve large sums of public money are usually routinely published or else disclosed on request.

29. However, the information sought in this case is of a somewhat different quality. While the option to join the Scheme is solely dependent on the Councillor's employment in that role, confirmation of an individual's decision to join the Scheme and to contribute a set proportion of his/her salary to that Scheme both confirms a personal financial decision as well as reveals something of that individual's personal financial circumstances.

30. Further, where an individual has expressly refused to consent or at least has not positively consented to the relevant disclosure then this could be considered to be an expression of the views they held at the date of the request had they been asked for their views at that point. Also, the fact that an individual has not expressly consented to the disclosure is one factor to take into account in considering the data subject's expectations as to what would happen to their personal data.

31. Therefore when considering whether it would be fair and lawful to disclose the disputed information we find that there is no reasonable

expectation on the part of the Councillors that their names will be disclosed, unless they expressly consent to this. Also the 2003 Regulations cannot be interpreted in a way which makes it unlawful not to disclose such information.

32. The Commissioner makes much of the fact that he considers that Councillors will suffer damage and distress if their names are disclosed. Mr Crompton disagrees. We find that the Commissioner provides little evidence for his contention and that his arguments are unconvincing. However this does not affect our finding in the previous paragraph.

33. If we are wrong to find that it would be unfair and unlawful to disclose the disputed information then we need to consider the relevant part of the second limb to the first data protection principle, namely "*at least one of the conditions in Schedule 2 is met".* In this respect we need to consider condition 6(1).

The legitimate interests test

34. The Commissioner argues that when considering the disclosure of personal data, the starting point is the following extract from the speech of Lord Hope in *Common Services Agency v Scottish Information Commissioner* (paragraph 7):

> "In my opinion there is no presumption in favour of the release of personal data under the general obligation that [FOIA] lays down. The references which that Act makes to provisions of DPA 1998 must be understood in the light of the legislative purpose of that Act …. The guiding principle is the protection of the fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data."

35. In *Corporate Officer of the House of Commons v Information Commissioner and others* [2008] EWHC 1084 (Admin), [2011] 1 Info LR 987, the High Court noted that for personal data to be disclosed, "there should be a pressing social need and… the interference [should be] both proportionate as to means and fairly balanced as to end" (paragraph 43, emphasis added).

36. We are bound by these decisions and must consider the application of Condition 6(1) accordingly.

37. Mr Crompton argues there is a strong public interest in being able to

> *"…hold to account those elected representatives that are causing public money to be spent in a particular way. This requires the disclosure of the names of the members of the LGPS…"*

Mr Crompton also argues that this public interest is not met by the release of the total number of members and the amount of money spent and in any event that this public interest more than outweighs the weight, if any, which should be attributed to the other factors in the fairness analysis.

38. This is, in effect, the legitimate interest pursued by Mr Crompton.

39. The Commissioner accepts that there is a public interest in the disclosure of the requested information as it would provide specific detail on where public money is being spent. However, it is his view that this public interest is satisfied by the disclosure of the total number of individuals who have joined the Scheme along with the total amount spent thereon.

40. What the Commissioner is arguing is that it is not necessary to disclose the disputed information for Mr Crompton to pursue his legitimate interest. This is achieved by the information already disclosed.

41. The Commissioner also maintains that any additional public interest in being able to scrutinise which Councillors have made the personal financial decision to contribute towards their own retirement provision and also to receive publically funded contributions does not outweigh the Councillors' reasonable expectation that such information would not be disclosed.

42. What the Commissioner is arguing here is that it would be unwarranted to prejudice the Councillors' privacy rights where it is unnecessary to disclose the information for Mr Crompton to pursue his legitimate interests.

43. We have considered this matter in the circumstances of this case and agree with the Commissioner. Once it is known how much is being paid into the pension scheme on behalf of the 11 Councillors who have opted in we are not convinced there is a pressing social need to know the names of those Councillors. The terms of the pension scheme are in the public domain. The control is the hands of the Scheme trustees unlike allowances which are in the control of those claiming it. In contrast the privacy right of data subjects is a fundamental right recognised in a European Convention, Council Directives and the DPA.

44. But Mr Crompton says there have been different outcomes expressed in decision notices FS50233989 in 2010 and FS50465848 in 2013 and that this is undesirable. The Commissioner is not bound by his own decisions or for that matter by previous decisions of the First-tier Tribunal. The FTT is not bound by decisions of the Commissioner, hence the appeal process. Both the Commissioner and FFT must consider each case on its merits however desirable consistency is.

45. We conclude that, in the circumstances of this case, when applying the test under Schedule 2 condition 6(1) of the DPA the legitimate privacy

interests of those Councillors which do not want their names disclosed prevails. Public disclosure of their identity is not necessary for the purposes of the public interest or legitimate interests pursued by Mr Crompton and would be unwarranted by reason of prejudice to the those Councillors' privacy rights and legitimate interests.

Conclusion

46. We dismiss the appeal and uphold the Commissioner's Decision Notice.

Signed

John Angel
Judge

Date 29th May 2014