IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2013/0272
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice dated 21 November 2013
FS50485593

Appellant: **Philip Hyman**

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 7 January 2013, Mr Hyman made a multi-part request to the Governing Body of Brooklands Primary School ("the School") for anonymised statistical information on the progress of pupils at the School in reading, with the information split between girls and boys. That request took the form of 5 tables which he asked the School to populate.

2. On 8 January 2013, Mr Hyman made an additional request. He provided a sixth table ("table 6") which he asked the School to populate with the following information:

> *"Number of pupils on the Special Educational Needs Register by year group from Nursery through to year 6 and how many pupils by school year are on SA, SA+ or have a statement of Educational Need."*

3. This appeal concerns some of the information requested in table 6.

4. The School's response was to provide Mr Hyman with the information he had requested, except that where the number of pupils in a field in any of the six tables was 0, 1 or 2, it redacted that number and instead said that the number was "below 3".

5. This was because, in the School's view, the disclosure of those low numbers created a real likelihood of the individual pupils being identified. The information in the School's view constituted the pupils' "personal data" within the meaning of section 1 of the Data Protection Act 1998 ("DPA"):

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

> and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

6. The School considered that disclosure of that personal data in response to Mr Hyman's request would be unfair, contrary to the First Data Protection Principle at Schedule 1 to the DPA ("1st DPP"), which is that:

> Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—
> (a) at least one of the conditions in Schedule 2 is met...

7. Because the School considered the disclosure would be unfair, it relied on section 40(2) of FOIA in refusing to disclose the withheld information. Section 40(2) provides that:

> (2) Any information to which a request for information relates is also exempt information if—
> (a) it constitutes personal data which do not fall within subsection (1), and
> (b) either the first or the second condition below is satisfied.
>
> (3) The first condition is—
> (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—
> (i) any of the data protection principles, or...

8. Mr Hyman requested an internal review on 4 February 2013. On the same day the School upheld the refusal notice.

9. Mr Hyman complained to the Information Commissioner ("Commissioner") on 13 February. The Commissioner issued a Decision Notice dated 21 November 2013 ("DN") in which:

   (i) He agreed with Mr Hyman that the information requested in the first five tables was not personal data. This was because, though the case was finely balanced, the risk of identification was sufficiently remote

to mean that the definition of personal data was not satisfied (see paragraph 18 of the DN).

(ii) He found that the information withheld from table 6 did come within the definition of personal data. This was because "it would be more reasonable to suppose that students with defined special educational needs are more likely to be receiving extra support or intervention and that therefore the School's arguments around potential identification carry more weight in relation to this particular set of data" (paragraph 19).

(iii) As regards the personal data withheld from table 6, the Commissioner found that it would not be unfair to disclose the information about pupils with special educational needs *for year 6 only* (paragraph 23). This was because, given the Department for Education's practice of publishing such information for year 6, pupils would not have a reasonable expectation that this information would be withheld.

(iv) As regards the remaining personal data withheld from table 6 – i.e. the information about pupils with special educational needs for years *other than year 6* – there was no such practice of publication. In the circumstances, the Commissioner considered that disclosure of this information would be unfair.

10. In short, the Commissioner found that the School was entitled to withhold only the information from table 6 relating to pupils, other than for those in year 6, where the relevant number was 0, 1 or 2.

11. Mr Hyman disagrees with that aspect of the DN. He appealed to the First-tier Tribunal ("FTT"). He seeks the disclosure of the information described in the previous paragraph, which is accordingly the disputed information for the purposes of his appeal.

Grounds of appeal and the Commissioner's response

12. In broad terms, Mr Hyman advances three arguments.

Identification

13. *First*, Mr Hyman argues that the disputed information is not personal data, because the likelihood of the relevant persons being identified is too low. In particular, he argues that the risk for the disputed information is no greater than the risk for the information which the School had withheld from the other five tables and which the Commissioner found was *not* personal data.

14. The Commissioner agrees with Mr Hyman that in order for the "identification" limb of the definition of personal data (set out above) to be met, it must be *reasonably likely* that those individuals could be identified: see *Department of Health v IC* [2011] EWHC 1430 (Admin), [2011] 2 Info LR 27 and Recital 26 of Directive 95/46/EC - (paragraph 18 of the DN). The Commissioner found that the table 6 information was personal data because there was a *reasonable likelihood* of the individuals being identified, not simply because this likelihood was greater for table 6 than for the other tables.

15. The Commissioner brought to our attention that when assessing the risk of identification, "account should be taken of all the means likely reasonably to be used either by the controller *or by any other person* to identify the said person" (Recital 26 of the Data Protection Directive 95/46/EC with emphasis added; see also the speech of Lord Hope in *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47, [2011] 1 Info LR 184).

16. In other words he found that the risk of identification is to be assessed not by reference to what the data controller is reasonably likely to do, but by reference to what others – including "motivated intruders"[1] are reasonably likely to do.

17. The motivated intruder is taken to be a person who starts without any prior knowledge but who wishes to identify the individual from whose personal data prima facie anonymised information has been derived (in this case, the disputed information). The motivated intruder should be assumed to be reasonably competent, to have access to resources and to employ investigative techniques such as making enquiries of people who may have additional knowledge of the identity of the data subject (for example, pupils and parents).

18. In light of the principles summarised above, the Commissioner argues he was correct to find that it was reasonably likely that the pupils to whom the table 6 information refers could be identified.

19. The School had explained that it has a relatively small number of pupils receiving learning support (paragraph 14 of the DN). It also explained how parents are likely to be able to obtain information about pupils from their children. In addition, some parents helped in the classroom. Those factors, the Commissioner agues, are relevant to the likelihood of identification.

20. Mr Hyman points out that the Commissioner had found the information requested for tables 1-5 to fall outside of the definition of personal data, i.e. to fall below the 'reasonably likely' threshold of identification. The Commissioner agrees with this, but argues the difference between tables 1-5 and table 6 is that the former information related to pupils' assessments, progress, performance, targets and expected results. He continues that it was less likely that those pupils could be identified by, for example, observing whether they received learning support or intervention. The correlation between a pupil's progress and their receipt of such support was insufficiently strong. Table 6, on the other hand, is about pupils on the Special Educational Needs Register. It is

[1] Information Commissioner's Code of Practice for Anonymisation and Managing Data Protection Risk November 2012 page 22.

very likely that a pupil with Special Educational Needs will be receiving such support.

21. The Commissioner found that the likelihood of identification for tables 1-5 was finely balanced (paragraph 18 of his DN). For table 6, the stronger correlation described above tipped the scales in terms of likelihood of identification and the Commissioner found that the table 6 information was personal data.

22. We have considered all these arguments and find that for table 6 the entries registering <3 are personal data. The fact that the table contains information for a minority of pupils at the school with Special Educational Needs who represent a small percentage of students makes the likelihood of identification more likely. This together with the fact that parents and others related to the school will have other information which could increase the likelihood of identification leads us to the conclusion that the disputed information is personal data.

Fairness

23. *Second*, Mr Hyman contends that even if the disputed information does come within the definition of personal data, disclosure would be fair. This is because disclosure of such information ought reasonably to be expected, and because in Mr Hyman's view disclosure of this information would create no additional risk of the data subjects suffering stigmatisation or bullying on account of their being identified as having special educational needs.

24. The Commissioner considers he was right to find that the public disclosure of such personal data would be contrary to the expectations of the pupils and/or their parents. The Commissioner accepts that Mr Hyman is right to point out that the unexpected nature of a publication does not *necessarily* render that publication unfair. It is, however, one factor, the Commissioner argues, which tends to point towards unfairness.

25. Next, Mr Hyman argues that when assessing fairness under the First Data Protection Principle, the theoretical impact on parents (as opposed to the data

subjects themselves) should be disregarded. The Commissioner disagrees. Fairness to data subjects – particularly minors – includes fairness to their immediate families.

26. Mr Hyman further contends that disclosure of this information would not lead to any *increased* risk of stigmatisation or bullying for pupils other than those in year 6. Again, the Commissioner disagrees: disclosure of the disputed information would, in his view, be likely to *confirm* any pre-existing 'suspicions' that a given pupil was on the Special Educational Needs Register. Moreover, disclosure under FOIA is disclosure to the public at large. This increases the risk of the data subjects' interests being prejudiced.

27. Finally, Mr Hyman argues that some of the data subjects may have left the School by the time of his request and would therefore not be at risk of stigmatisation or bullying at the School. In response the Commissioner submits that the fact that a pupil may have moved on by the time of the request does not detract from the unfairness of their being publicly identifiable, contrary to their expectations and without their consent, as someone who was on the Special Educational Needs Register at a particular point in their life.

Legitimate interests

28. *Third*, Mr Hyman argues that "there is sufficient public interest in the publication of such data to justify overriding the personal data interests".

29. 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."

30. 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).

31. The Commissioner submits the public interest in the disclosure of the particular information in dispute in this case is insufficiently weighty to ensure the fairness of disclosure or to meet condition 6(1). Mr Hyman's argument, he says, is based on transparency in *general* terms. The Commissioner accepts that this should be given some weight, but it does not suffice, he argues, to justify the public disclosure of the fact that particular individuals (who are reasonably likely to be identified) were on a Special Educational Needs Register, given that they had no reason to expect such disclosure and had not consented to it.

Our Conclusions

32. We would point out firstly that the cases which the Commissioner relies on above are of higher courts and that we are bound by their judgments.

33. Having already found at paragraph 22 above that the disputed information is personal data we now need to decide whether or not the First Data Protection Principle would be infringed if the data was disclosed.

34. We have considered the parties arguments in relation to fairness and legitimate interests set out above. We are not convinced that it would be fair to disclose the disputed information. We do not accept that there would be a reasonable expectation of disclosure by the data subjects who are minors and cannot give their consent except through their parents. We accept the Commissioner's arguments about the possibility of increased bullying and stigmatisation and cannot believe that parents who will be more than familiar with these issues would have a reasonable expectation of disclosure.

35. If we are wrong then we need to consider whether the Schedule 2 condition 6(1) test is satisfied.

36. In the circumstances of this case we cannot see why it would be necessary for Mr Hyman to have the disputed information to pursue his legitimate interests which seem to relate to improving parents' ability to make judgments about a school's provision of education with special educational needs. Information has already been published in tables 1-5 which enables Mr Hyman to understand generally how the School is doing in terms of assessments of students and their level of progress. This information should enable him to pursue his legitimate interests. When compared with the unwarranted prejudice to the data subjects' privacy in respect of the remaining disputed information in table 6 the balance favours non disclosure. The fact that the data for year 6 in table 6 has been disclosed because the information was already in the public domain does not change our view. We do not see how this disclosure should prejudice other students with Special Educational Needs particularly because they are younger.

37. Although it was not argued before us we consider that it could have been argued that the disputed information is "sensitive personal data". Under section 2 DPA:

> "sensitive personal data" means personal data consisting of information as to:
>
> (e) his physical or mental health and condition…

38. Students with Special Educational Needs are more than likely to come within this definition. If so there are a different set of conditions which need to be satisfied before such data can be disclosed. These are set out in Schedule 3 to the DPA. As far as we are concerned there are no conditions in Schedule 3 which apply to the disputed information in this case. Therefore the disputed information falls to be withheld as personal data or as sensitive personal data.

39. For all these reasons we dismiss the appeal and uphold the Commissioner's DN.

Signed

John Angel
Judge Date 29th May 2014