



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

**Appeal No: EA/2014/0282**

**BETWEEN**

**JOHN WHITTAKER**

**Appellant**

**and**

**INFORMATION COMMISSIONER**

**Respondent**

**and**

**MOLE VALLEY DISTRICT COUNCIL**

**Second Respondent**

**Tribunal**

**Brian Kennedy QC  
Nigel Watson  
David Sivers**

**Hearing: 26 February 2015.**

**Location: Field House, London.**

**Decision: Appeal Refused.**

**Subject Matter:** The Freedom of Information Act 2000 ("FOIA") and reliance by the Second named Respondent ("the Public Authority") on Section 40 (2) to withhold disclosure of information it consisted of personal data and would breach the Data Protection Act 1998 ("the DPA").

## **Introduction:**

1. This decision relates to an appeal brought under section 57 of the FOIA. The appeal is against the decision of the the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“the DN”) dated 16 October 2014 (reference FS50548546) which is a matter of public record.
2. A hearing on the papers took place on 26 February 2015. The appellant indicated he would be happy to attend an oral hearing if that would assist the Tribunal. The registrar has listed the case as a paper hearing and the Tribunal were satisfied that all live issues have been covered in the papers, pleadings and submissions before us.

## **Background:**

3. The Appellant wrote to the Public Authority on 12 Jun 2014. The request, was made in the following terms ; *“Please supply to me under FOIA a copy of the report by [named independent investigating officer], sent to the council by [named independent investigating officer] on 28 September 2013, regarding complaints about the conduct of Councillor [name].*
4. The public authority responded on 9 July 2014. It stated that the information was held but that it was exempt from disclosure under section 40(2). It explained that the information was the personal data of the councillor and other third parties and its release was beyond their reasonable expectations and would breach the first data protection principle.
5. Following an internal review the public authority wrote to the Appellant on 14 July 2014. It stated that its position remained that the report comprised personal data and its disclosure would breach the first data protection principle. It therefore upheld its original decision that the exemption at section 40(2) applied.

## **Scope of the Case:**

6. The Appellant contacted the Commissioner on 16 July 2014 by way of complaint against the Public Authority’s handling of her request for information. The Commissioner investigated the complaint and for the following reasons decided the Public Authority had properly relied on section 40(2) of FOIA when withholding the requested information. This Tribunal feel it is helpful to follow the Commissioners reasoning as set out in the DN to demonstrate the detail of his investigation and illustrate the logic and veracity of same in doing so as it is only in doing so that we can properly demonstrate our agreement and adoption of his reasoning herein.

### **Legislative framework:**

7. Section 40(2) of the FOIA provides that: *“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”;*
8. Section 40(3) provides that - *“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”.*

### **Is the information “personal data”?**

9. In order for the exemption to apply the information being requested must constitute personal data as defined by section 1 of the DPA. Section 1 states that: *“personal data” means data which relate to a living individual who can be identified - (a) From those data, or (b) From those data and any other information which is in the possession of the data controller.”*
10. All the requested information relates to an investigation that was conducted following a number of allegations made about a councillor. The information is the independent investigating officer’s full report which details the allegations, the investigation he conducted, and his conclusions. The Commissioner considered it appropriate to consider the report in its entirety as comprising the personal data of the councillor, who can be identified from that information. Furthermore, the information also includes the personal data of third parties who were involved in the investigation and who also can be identified.

### **Would disclosure breach one of the Data Protection Principles?**

10. The Commissioner considered that the most relevant principle in this case is the first data protection principle which requires that personal data is processed fairly and lawfully.
11. As the Commissioner explained in determining whether a disclosure is fair under the first data protection principle for the purposes of section 40 of the FOIA, he considers it appropriate to balance the consequences of any disclosure and the reasonable expectations of the data subject with general principles of accountability and transparency, as well as any legitimate interests which arise in the specific circumstances of the case.

### **Reasonable expectations:**

12. The Commissioner stated that when considering whether a disclosure of personal information is fair, it is important to take account of whether the disclosure would be within the reasonable expectations of the individual or individuals concerned. However, he argued, their expectations do not necessarily determine the issue of whether the disclosure would be fair. Public Authorities need to decide objectively what would be a reasonable expectation in the circumstances.
13. In this case, the public authority explained that the report is marked as private and confidential and the contents relate to an investigation into an individual's conduct, it is clearly information of a confidential nature. The public authority has stated that in the circumstances of the investigation and the report, a reasonable expectation of privacy was conferred on the councillor. In addition to this, the councillor later confirmed that they did not wish the report to be placed in the public domain.
14. The public authority also provided background information which the Commissioner considers would shape the data subjects reasonable expectations. It has stated that if a report commissioned by the monitoring officer finds wrongdoing, it is then referred to the Standards (Complaints) Subcommittee which has the authority to take action and make recommendations. In the event of a finding of wrongdoing, it is council practice that the relevant report will be put into the public domain. In this case there was no finding of wrongdoing, and therefore the councillor/data subject had no reasonable expectation that the report would be made publicly available.
15. The Commissioner in his DN accepted that an expectation of privacy generally arises in relation to information pertaining to disciplinary matters or issues of an individual's conduct because of the inherent sensitivity of that information.

### **Consequences of disclosure:**

14. The public authority argued that disclosure of the information would be prejudicial to the councillors rights and legitimate interests as they would be likely to suffer unjustified distress and upset by reopening the matter. In addition to this the public authority maintains that following the outcome of the report, the councillor has the right to continue with their civic responsibilities unhindered by allegations that have been put to rest in the report.

### **Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure:**

15. The public authority acknowledged that all of its residents have a legitimate interest in their elected representatives complying with the Members' Code of Conduct. However, it maintains that it has fulfilled this legitimate interest in a number of ways. It had released information that was contained in the monitoring Officer Assessment Summary, it had provided a full copy of the report to each of the complainants and challenges could be made to the Local Government Om-

budsman. It stated that a challenge was made to the Local Government Ombudsman who did not consider there should be any further action by the public authority in respect of the allegations and complaints at issue.

16. The public authority's position was that the councillor was thoroughly investigated and the conclusion of the report confirmed that evidence did not show that there had been any breach of the code of conduct. The public authority considered that the matter was a time consuming and complex case which had been challenged through the appropriate channels and the allegations had been put to rest. It had stated that the matter was now closed and that releasing the report at the time of the request would be to reopen matters which had been concluded for some time.
17. The public authority accepted that its residents have a legitimate interest in knowing that allegations against elected representatives are taken seriously and investigated thoroughly. It considered that publishing its Monitoring Office Assessment Summary and a press release confirming the nature of the allegations and the outcome of the investigation satisfies residents in this regard and therefore balances the requirement to be open and transparent with the need to protect an individual's personal information.
18. The appellant considered the matter was not closed as the planning issue to which the allegations relate was still a live matter at the time of the request. The planning application decision had recently been appealed to the Court of Appeal which had overturned an earlier High Court decision to quash planning. In May 2014 the Court of Appeal refused permission for a Supreme Court appeal against the plans. He therefore considered that the report into the councillor remained relevant and that there was a legitimate public interest in it in connection with these clearly contentious planning issues.
19. The appellant had indicated that he did not consider the requested information to relate to the councillor's personal life, but rather to their public life and as such there is a lesser expectation of privacy and the likelihood of damage or distress was reduced.
20. The appellant had explained that the councillor and their political party issued press statements on the outcome of the investigation which were inaccurate in their portrayal of the complaints as "false and malicious", comments that had since been withdrawn. He therefore suggested that the concept of fairness should not be invoked for the councillor's benefit. The Commissioner's position was that the concept of fairness in terms of data protection is not qualified in this way. The councillor's statement and subsequent withdrawal of parts of it did not and do not impact whether or not it would be fair to disclose the councillor's personal data to the world at large.
21. The Commissioner noted that the appellant had been provided with extracts of the report by the report's author, and he had provided these to the Commissioner as he had considered that they demonstrate that the councillor acted in breach of the Planning Code of Good Practice. He was therefore sceptical of the

conclusion of no wrongdoing. The report had been commissioned by the Standards (Assessment) Sub-committee into alleged breaches of the Members Code of Conduct. The issues raised by the appellant at the time were brought to the Investigating Officer's attention after the report and investigation had been commissioned by the sub-committee and did not form part of the remit of the investigation, the Investigating Officer therefore had addressed the concerns 'for completeness'.

22. The public authority understands that the appellant does not agree with the outcome of the investigation. It had informed the Commissioner that the appellant had referred the matter to the Local Government Ombudsman who had concluded that although the independent person should have consulted sooner, there was no case to answer.
23. The Commissioner considered and commented that there is always some legitimate interest in the disclosure of information that is held by public authorities. This is because disclosure helps to encourage the general aims of achieving transparent and accountability. In cases such as this, it also assists people in understanding the decisions made by public authorities. and to be more involved in that process.
24. However the Commissioner recognised, the circumstances of each case and each request for information will not always warrant the disclosure of every last detail of a particular matter in order to satisfy the legitimate public interest in that information. Public authorities have to balance their obligations under the DPA to protect individual's rights to privacy.
25. In the circumstances of this case, the Commissioner found that the public authority had correctly balanced the data subject with the legitimate interest in disclosure. It was, the Commissioner found, clear that there were strong reasons why the individuals concerned would have expected confidence in the circumstances. The councillor had been investigated through the proper public authority process and was found not to have breached the code of conduct. The outcome of the investigation was made publicly available and the Local Government Ombudsman had also found no case to answer. As the matter had gone through the appropriate channels of appeal, it was clear that it was therefore closed. As such, the Commissioner found that it was fair for the councillor to expect that they should have the opportunity to move on in the absence of accepted and specific evidence to prove wrongdoing.
26. It is evident the Commissioner found, that the appellant continued to feel the matter is not closed. He does not agree with the outcome of the investigation and he considers that the report is inextricably linked to the planning application which has long been active. The Commissioner accepted that the wider planning matter had been, and perhaps still is, a contentious issue as was demonstrated by the fact it had been appealed to the High Court and the Court of Appeal. As he had noted above, the Commissioner observed that the Court of Appeal denied an application to appeal its decision to the Supreme Court in May 2014.

27. In his DN the Commissioner recorded there did not appear to be any grounds that would warrant revisiting this issue now through the disclosure of more information, whether in the form of the whole report or more piecemeal disclosures lacking in complete context. The council, he felt, had been reasonably transparent about the investigation that was conducted in line with the proper procedures. In view of the nature of the issues, the Commissioner found further disclosure would be disproportionate.
28. Accordingly at paragraph 31 of the DN the Commissioner considered that disclosure of the information would breach the first data protection principle because it would be unfair and he found section 40(2) was engaged and the public authority were correct to withhold the requested information. This Tribunal agree with his logic, reasoning and conclusion as set out above as in his DN. We have set it out in detail precisely because we adopt it for the purposes of this appeal.
29. The appellant has lodged an appeal and the grounds are set out at pages 15 & 16 of the OB. It appears that the issue for this Tribunal is whether or not the Commissioner was correct to find that it would not be fair to disclose the report in all the circumstances. We have indicated that we agree with the Commissioner's conclusions in his DN and we find nothing in the Grounds of appeal that persuades us that the Commissioner was wrong. The appellant properly identifies the core issue for this Tribunal as the balancing of the rights of the data subject with those of the public interest in disclosure - her "reasonable expectation of confidentiality and the legitimate interest in disclosure".
30. We have, as the appellant suggested in his grounds of appeal considered the report in some detail and can say it is a detailed, thorough and comprehensive study by an independent expert who considered all issues of concern raised by all complainants (including the appellant) and concluded that there had been no breaches of the Code of Conduct by the councillor. We are of the opinion that the matter has been decided and should be put to rest as otherwise, we find disclosure would cause the data subject unjustified distress and upset and we find to no further advantage, or any legitimate interest which is to be served in terms of transparency or accountability, by such disclosure.
31. The Commissioner reminds us in his Response of the dicta of Lord Hope in the House of Lords case of *Common Services Agency V Scottish IC* [2008] 1 WLR 1550 where Lord Hope said at paragraph 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 - -*"
32. In our unanimous opinion, the public authority have followed due process and to be fair in all the circumstances the matter must, in our view, be allowed to move on.
22. We repeat, accept and adopt the reasoning of the Commissioner as set out in paragraphs 9 to 31 of the DN as supported by the detailed Response on behalf of the Public Authority dated 23 December 2014. We find nothing of significant

weight in the appellants Reply dated 14 January 2015 to persuade us that the Commissioner was wrong. In our view the public can be assured that the allegations in the complaints have been put to rest in the finding of the independent and objective report without the need for disclosure thereof.

23. For the above reasons we refuse the appeal herein.

**Brian Kennedy QC**

**8th April 2015.**