IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2015/280**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50569714
Dated: 12 November 2015

Appellant: **Michael Cheetham**

Respondents: **(1) The Information Commissioner**

(2) Wharton Church of England Controlled Primary School

On the papers

Before

HH Judge Shanks

and

Anne Chafer and Andrew Whetnall

Date of decision: **21 July 2016**

Subject matter:

Freedom of Information Act 2000 (FOIA)

Section 40(2) (Personal information)

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal dismisses the appeal.

REASONS FOR DECISION

1. On 5 December 2014 the Appellant, Michael Cheetham, who was at the time a Regional Official of the Association of Teachers and Lecturers (ATL), wrote to the Headteacher of the Wharton Church of England Controlled Primary School making a large number of FOIA requests for information about the school and its staff. Following a substantial initial response from the Headteacher, a review and a complaint to the Information Commissioner resulting in a Decision Notice dated 12 November 2015, and the provision of a substantial amount of information at each stage, just one request remains in dispute for the purposes of this appeal.

2. Mr Cheetham seeks "confirmation of the decision on the Headteacher's pay progression for the last appraisal cycle (2013/4)". There is no dispute that there was an appraisal of the Headteacher in Autumn 2014 relating to her performance in the school year 2013/4 and Mr Cheetham has clarified a number of times that all he seeks to know is whether the Headteacher received pay progression following that appraisal. He is not seeking any figures or even ranges of figures in relation to her salary.

3. There can be no dispute that the information sought is the Headteacher's "personal data" for the purposes of the Data Protection Act 1998. In those circumstances, section 40(2) of FOIA provides an absolute exemption from the requirement to disclose the information if one of the data protection principles would be contravened by its disclosure. The relevant data protection principle is the first. That provides:

> **Personal data shall be processed [which includes disclosure] fairly and lawfully and, in particular, shall not be processed unless –**
>
> **(a) at least one of the conditions in Schedule 2 is met, and**
>
> **(b) [relates only to "sensitive personal data" and is not applicable].**

The only condition in Schedule 2 that is potentially relevant is condition 6(1) which provides:

> **The processing is necessary for the purposes of legitimate interests pursued 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 the prejudice to the rights and freedoms or legitimate interests of the data subject.**

The Commissioner in this case, as he commonly does, looked first to the question whether disclosure of the information would be "fair" to the data subject (ie the Headteacher in this case) and concluded that it would not. We consider that it is much preferable in this kind of case (that is in particular where the personal data was not supplied to the public authority by the data subject) first to consider condition 6(1), which itself first involves an inquiry as to why the requester is seeking information which is subject to the Data Protection Act and which on the face of it ought therefore in general to be kept confidential. That is the approach which we believe has consistently been advocated by this Tribunal in recent years and which was followed by the Upper Tribunal in *Information Commissioner v (1) CF and (2) Nursing and Midwifery Council* [2015] UKUT 449 (AAC). That decision also makes it clear that it is the "legitimate interests" of the requester himself that are relevant in relation to condition 6(1) (albeit public interest considerations may also come into the decision in a particular case), which also appeared to be the view of Lady Hale in the judgment of the Supreme Court in a Scottish case, *South Lanarkshire Council v The Scottish Information Commissioner* [2013] UKSC 55. We therefore look first to the question whether condition 6(1) would be met if disclosure was made in this case, focussing on the legitimate interests of the requester.

4. The request for information and the complaint to the Commissioner in this case were made by Mr Cheetham who signed himself off as "Michael Cheetham, ATL Regional Official". The appeal was brought in his own name although the address given was "Association of Teachers and Lecturers, 7 Northumberland Street [etc]". This gave rise to a query by the school and to a direction by the Registrar of the Tribunal on 2 March 2016 that in his Reply Mr Cheetham may feel it appropriate to make representations about whether he made his request on his own behalf or for ATL and as to why he says disclosure of the disputed information is "necessary" by reference to condition 6(1). As far as we can see the question of whose interests lie behind the request has not been addressed save that a John Easton emailed the Tribunal on 13 June 2016 to say that he was the ATL's Senior Regional Official for the North West of England and that Mr Cheetham had left the ATL " … but is still dealing with this …". That answer does not really bring any additional clarity but it seems to us that if the ATL is not prepared expressly to adopt the request and the appeal we can only properly regard it as one made personally by Mr Cheetham, albeit that his former status as an official of a union concerned with education would tend to indicate that he is not just a "busybody".

5. Mr Cheetham's position on why he wants the information is in effect that it should be disclosed to him because it is in the public interest that information about the performance of a senior figure in a public role which involves the expenditure of public money should be made public, in order for there to be transparency and accountability. He also draws attention to two Ofsted reports on the school carried out in June and October 2014 which he says were "unfavourable" and to the Government's policy that poor performance should not result in pay progression. He also refers to the general principle that "suspicion of wrongdoing" is an argument in favour of disclosure and to another case decided by the Tribunal on 22 November 2012, *Dicker v Information Commissioner*.

6. We have considered the Ofsted reports and the point about suspicion of wrongdoing in the context of all the material supplied to us and it is sufficient to say that they do not seem to us to take matters any further. The *Dicker* decision relates specifically to the salary of a quite different type of employee and is anyway not binding on us.

7. We are left therefore with a (no doubt) "legitimate" but entirely general and public interest being pursued by Mr Cheetham, namely the public interest in transparency and accountability in relation to the pay and performance of headteachers. We have to ask ourselves whether disclosure of the particular information sought was "necessary" for the purpose of that interest. We are of the view that it was not. Although our attention was drawn to a number of policy documents we were not shown anything that indicated that pay progression decisions relating to individual teachers should be made public and general practice seems to be that they are not. Further, Mr Cheetham is seeking information about the outcome of an appraisal relating to one Headteacher, in one school, in one year: it is hard to see how that can advance a general public interest in disclosure of such information in any meaningful way.

8. In case our analysis in paragraph 7 is wrong we have also asked ourselves whether, assuming disclosure of the information was "necessary," it was nevertheless "unwarranted" by reason of the harm it could cause to the Headteacher in question. In this context we note the Commissioner's conclusion, which we endorse, that she would have had a legitimate expectation that the information would remain confidential. We note that she has expressed a clear wish that the information should not be disclosed. And we note that the school is in a small community and that disclosure of the information could be used as a "stick to beat her with" whatever the outcome of the appraisal was. Set against the general and public interest for which disclosure was *ex hypothesi* necessary we are of the clear view that disclosure would have been unwarranted in the circumstances of this case.

9. We therefore consider that condition 6(1) would not have been met and that disclosure would have breached the first data protection principle. For somewhat different reasons we accordingly unanimously uphold the Commissioner's decision and dismiss the appeal.

HH Judge Shanks
21 July 2016