



First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights

Appeal Reference: EA/2016/0254 & 0260

Heard at Birmingham Employment Tribunal  
On 27/02/2017

Before  
JUDGE FIONA HENDERSON  
TRIBUNAL MEMBER MICHAEL HAKE  
AND  
TRIBUNAL MEMBER MALCOLM CLARKE

Between  
FRANCIS GALLOWAY Appellant  
and  
THE INFORMATION COMMISSIONER First Respondent  
and  
BIRMINGHAM CITY COUNCIL Second Respondent

**Representation**

Mr Galloway represented himself  
The Information Commissioner chose not to be represented at the hearing  
Mr Z Sammour of Counsel represented Birmingham City Council

**Subject:** s 1 FOIA whether information held  
S40 FOIA personal data

**Case Law:**

*Haslam v Information commissioner, Bolton Council [2016] UKUT 0139*  
*Re JR 38's Application for Judicial Review (NI) 2015 UKSC*  
*Goldsmith International Business School v The Information Commissioner and the Home Office [2014] 563 (AAC)*

**DECISION AND REASONS**

**Introduction**

1. This is the determination of two separate appeals<sup>1</sup> against the Information Commissioner's decisions:

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<sup>1</sup> By order of the Registrar dated 7<sup>th</sup> December 2016 it was determined that both appeals would be heard together.

- i. FS50621082<sup>2</sup> dated 11<sup>th</sup> October 2016. The Commissioner having held that the times provided for an incident on CCTV footage answered the information request and that consequently no further steps need be taken by Birmingham City Council (the Council). The Tribunal will refer to this as the “timings” request.
- ii. FS50616313<sup>3</sup> dated 11<sup>th</sup> October 2016. The Commissioner having held that the Council was able to rely on section 40(2) FOIA to refuse this request. The Tribunal will refer to this as the “images request”.

### Background

2. An incident took place on 22.10.14 between the Appellant and the visitor to another tenant in his block. The Police were called to investigate the Appellant’s complaint and a counter complaint. Crime reference 20BW 190046W14 was given. Some footage of the incident was captured on CCTV. It has been viewed by the Council who described it as an “altercation<sup>4</sup>.” They note that there is no sound and they considered the footage to be inconclusive (not least because not all of the incident was captured by cameras). The Council’s record of the Police visit is that the Appellant and the other tenant were spoken to but “no further police action was taken<sup>5</sup>”. The Police case was closed without the Police having viewed the CCTV footage.

### The Timings Request

#### Information Request

3. On 4<sup>th</sup> January 2015 the Appellant requested a number of pieces of information from the Council including:
  1. *Time assailant enters Home Tower [CCTV bin room/fire exit camera] to time he is picked on [CCTV main lobby camera] main lobby (it take 5 seconds. Over that is the tirade/threats/abuse!).*
  - 3 *How long did the Assailant remain on my landing swearing issuing threat whilst I was on the phone to the police #2 (approx 70 seconds plus?)*
4. This was dealt with in Decision Notice FS50569974 which ordered the Council to carry out the following steps:

*“to issue the complainant with a fresh response to parts 1 and 3 of his request providing the recorded times from the CCTV footage...”*
5. In consequence on 17<sup>th</sup> February 2016<sup>6</sup> the Council provided the following information in a letter from a member of Governance and Compliance:

Question 1:  
*“The footage shows [the first person<sup>7</sup>] enter the bin area at 13:06 and remain there. [the second person] then enters the bin area at 13:07  
Both [people] emerge – [the first following the second] at 13:08*

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<sup>2</sup> EA/2016/0254

<sup>3</sup> EA/2016/0260

<sup>4</sup> Council’s letter 29.1.15 p 98 OB/2

<sup>5</sup> P102 OB/2 ICO letter of 15/07/2015

<sup>6</sup> Letter erroneously dated 2015, this clearly a clerical error

<sup>7</sup> The elements in square brackets are the aspect of the narrative to which the Appellant objects, and the Tribunal has therefore not repeated it here.

Question 3:

*“The [first person] enters the landing from the stairwell and remains there for approximately 20 seconds.*

*[That person] then exits the stairwell for approximately 5 seconds.*

*[That person] then reappears from the stairwell, presses the button to call the lift and remains on the landing for approximately 1 minute 10 seconds until the lift arrives.*

*[That person] enters the lift and the doors close.*

*During this entire period no one else is recorded on the CCTV footage from this camera.”*

### Complaint to the Commissioner

6. The Council upheld their response pursuant to an internal review dated 1<sup>st</sup> March 2016<sup>8</sup> and the Commissioner accepted the Appellant’s complaint<sup>9</sup>. The Appellant objected to the narrative provided by the Council which he considers breaches sections 3.2 and 8 of the Equality Act (Sexual Orientation) Regulations 2007 and s127 of the Communications Act 2003. The Commissioner did not consider that she had jurisdiction to investigate these aspects of the case as she is not the Regulator of those two Acts. The Appellant was advised to pursue this with the correct Regulators. The Commissioner limited her investigation to the accuracy of the times provided by the Council which was what had been requested and did not consider the narrative within scope.
7. The Commissioner had held in Decision Notice FS50569974 that determining exactly when to start the timing of someone entering and leaving an area is subjective:  
*“...is it when the door starts to open or is it when the “individual” is in full view after the door has opened? The same for when leaving, is it when the door has fully shut behind?”<sup>10</sup>”*
8. Consequently, the Commissioner was of the view that the times given appeared to be satisfactory and ordered no steps to be taken.

### Appeal

9. The Appellant appealed on 28<sup>th</sup> October 2016 on the grounds that:
  - i. The response was couched in discriminatory language and therefore could not be a valid response under FOIA. It breaches :
    - S 127 CA 2003.
    - s29 DPA 1998 and
    - Article 5 Human Rights Act.The Commissioner should have ordered the Council to provide a “clean response” which omitted the discriminatory language.
  - ii. The Time between the first person’s appearance in the bin room and the first person’s appearance on the subsequent camera was the time spent in the bin room and was what should have been provided<sup>11</sup>.

<sup>8</sup> P67 OB/1

<sup>9</sup> The Appellant originally complained to the Commissioner on 18.2.16 but the Commissioner did not accept the complaint until an internal review had been undertaken.

<sup>10</sup> Paragraph 23 DN p57 OB/1

<sup>11</sup> P12 OB/1

- iii. The Appellant did not want to know how long he was shown on camera as that was not a FOIA request but a DPA request and it was wrong to include him in the FOIA response.
  - iv. The Council provided one response in seconds and another to the nearest minute, the Appellant argues that he should have been provided with both times in terms of seconds.
10. The Commissioner opposed the appeal relying upon her decision notice. The Council were joined in the case management directions of 11<sup>th</sup> January 2017 and relied upon their original response and internal review to oppose the appeal.

#### Camera 7/the bin room camera

11. There was a factual dispute between the parties related to where cameras were placed. At the oral hearing the Appellant confirmed that nothing turned on this in relation to either appeal and that consequently he did not require the Tribunal to investigate this issue and make a ruling. The Tribunal is satisfied therefore that it is not in scope.

#### Ground i

12. The Appellant objected to the narrative provided by the Council which he considers to be discriminatory. The Council do not accept this<sup>12</sup> and point out that the officer who viewed the video did not know the Appellant or the other person and was seeking to distinguish between the 2 persons present. The descriptors used related to age and gender which the Appellant objected to. He points to another letter relating to the CCTV in which the Council used clothing to differentiate between the 2 persons present. The matter has been investigated as a Stage 3 complaint in which the Council found that the Manager had investigated the complaint in an appropriate manner. The Appellant was advised of his right to apply to the Ombudsman. We are satisfied that it is not within our jurisdiction to determine whether the narrative was or was not discriminatory. We agree with the Commissioner for the same reasons that the information requested was for the times and that the narrative is therefore outside of the scope of this appeal.
13. The Appellant raised Article 5 of the Human Rights Act 1998 (the right to liberty and security). At the oral hearing he was unable to expand this argument further. The Tribunal perceives this argument to be in relation to the fact that the Appellant felt that his personal safety was at risk from the behaviour of the data subject, however, the use of Article 5 in that context is misconceived as this relates to freedom from unreasonable detention as opposed to protecting personal safety.

#### Grounds ii and iii

14. The Appellant argues that the time between the first person's appearance in the bin room and the first person's appearance on the subsequent camera was the time spent in the bin room and was what should have been provided. He relies upon the fact that the cameras are activated by motion sensors and are time stamped. Equally, the Appellant maintains that it was wrong to provide a time for his presence in the FOIA response (as

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<sup>12</sup> <sup>12</sup> Council's letter of 19.10.15

it was not asked for) and s40(1) FOIA provides that personal data of the applicant is exempt.

15. In their letter to the Commissioner dated 19.10.15 in relation to the first decision notice the Council explained:
  - i. the recording system is somewhat outdated.
  - ii. The DVD was viewed by a Council officer on a laptop using a basic version of Windows Media Player. The pause/stop control takes several seconds to operate.
  - iii. Sometimes when the officer pressed the pause button the DVD continued to operate and the image continued to scroll forward in slow motion.
  - iv. Pausing the DVD to record the time of certain incidents introduced both an element of technical inaccuracy and human error as the Officer's reaction time was varied.
  - v. The timing would be different depending upon whether the time of exit was deemed to be when someone started going out or had finished going through a door.
16. The Tribunal observes that the camera would be activated by the motion not included within the Appellant's suggested definition e.g. it would continue after the exit from the room and could start prior to the entry into the bin room when the door started to move. Additionally, the Appellant's definition of how the timings should be calculated are subjective and were not specified in the parameters of his request. We note the Commissioner's rehearsal of the difficulties in relation to assessing when someone can be said to have entered or exited a video shot and are satisfied that the Appellant's parameters would not resolve these.
17. Both these grounds proceed on the basis that someone viewing the video would know which figure on the tape was the Appellant and therefore which one was the subject of the information request. The Appellant argued that:
  - I. he had entered from inside the building and the data subject entered from outside the building;
  - II. in the second CCTV he had gone into his flat so it would have been the data subject on the landing;therefore it would have been obvious which one was the Appellant and which the data subject. We are satisfied that both of those conclusions would be assumptions (in particular in light of the elements of the incident not captured on camera) and that this level of analysis would have required more detailed information than it appears that the viewing Council officer had. We accept the evidence of the Council that the Officer who viewed the tape for the purposes of the FOIA response did not know the Appellant and we are satisfied that providing both timings was a proportionate way of ensuring that the Appellant had been provided with the information requested.

#### Ground iv

18. The Council provided one response in seconds and another to the nearest minute (the Appellant argues that he should have been provided with both times in terms of seconds).
19. In their letter dated providing the timings dated 17.2.16 the Council explained that the equipment used by the Council to view the CCTV footage "*is a basic Windows video application and as such is not very accurate. Therefore, please be aware that all times*

*quoted are approximations as, by the time the programme stops the footage several seconds have elapsed*".<sup>13</sup>

20. The Commissioner explored this issue during his investigation questioning whether more accurate times could be provided using screen shots. The Council stated that they did *"not believe that they can obtain any more accurate estimates of the times as there will still be discrepancies of several second as with regards to stopping the DVD to print a "screen capture"*. "
21. They argued that in light of the inherent inaccuracy in any answer, the timings given were reasonable and sufficiently detailed. In accepting this argument we take into consideration that in response to part 2 of the original request there was 14 second discrepancy between 2 attempts to provide the time of a part of the incident. We are satisfied that the information provided in response to parts 1 and 3 of the information request was satisfactory. The information requested has been provided and this appeal therefore is refused.

### **The images request**

#### **Information Request**

22. On 29<sup>th</sup> March 2015 the Appellant wrote to the Council:  
*"I attach my formal request under s35 Data Protection Act 1998 for 3<sup>rd</sup> party image request for evidence"*.  
Initially the Council thought this was a subject access request, and responded on 24<sup>th</sup> April 2015 asking for appropriate identification, however, he clarified on 2<sup>nd</sup> May that he was seeking in that request the images of the other person in the incident of 22<sup>nd</sup> October 2014. The Council refused the request on 28<sup>th</sup> May 2015 stating that they were not legally authorised to release the information to the Appellant under s35 DPA.
23. Although the Appellant complained to the Commissioner about this refusal in correspondence<sup>14</sup> dated 11<sup>th</sup> June 2015, this was not picked up by the Commissioner and was only actioned when the Appellant followed up the progress of this issue on 28<sup>th</sup> January 2016. The Commissioner therefore investigated this complaint and clarified with the Council the basis for refusing the request under FOIA which the Council set out in a formal refusal notice dated 6<sup>th</sup> April 2016<sup>15</sup> as being s40(2) FOIA. The Commissioner issued her decision FS50616313 on 11<sup>th</sup> October 2016 in which she held that:
- The images were personal data.
  - The data subject had a reasonable expectation that images would not be disclosed to the public.
  - The disclosure would therefore be unfair.
24. The Appellant appealed on 31<sup>st</sup> October 2016, his grounds were set out in the notice of appeal and the email dated 2.11.16<sup>16</sup> and are summarised as:
- i. The Commissioner's determination related to the recording of "lawful" acts, this is a recording of criminal acts by the data subject who cannot have an expectation of

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<sup>13</sup> p 31 OB/1

<sup>14</sup> Which included other complaints that were dealt with separately

<sup>15</sup> P46 OB/2

<sup>16</sup> P6 OB/2

- non disclosure. The Appellant relied upon s29 and s35 DPA 1998 in support of this argument.
- ii. The use of FOIA to obtain this information is to enable the Appellant to present the CCTV to the Police who require this evidence (again s29 and s35 DPA are relied upon).
  - iii. The CCTV is evidence that the Council has perverted the course of justice as they have misled the Police as to the contents of the CCTV.
  - iv. The Council are preventing the video being presented to the Police. This is suppressing evidence and amounts to perverting the course of justice and malfeasance in public office.
  - v. The Appellant relies upon the prospect of proceedings:
    - against the Council (whom he accuses of having wrongly asserted that he received a Police Caution and has breached his tenancy) and
    - against the data subject whom he believes should be prosecuted for his behaviour during this incident.

The Appellant argues that they could in his view put forward any defence that they want in Court as without the CCTV they cannot be contradicted.

25. The Commissioner opposed the appeal relying upon her decision notice and observed that s35 DPA provides a mechanism for the disclosure of personal data it does not compel disclosure. The Council were joined in the case management directions of 11<sup>th</sup> January 2017 and relied upon their original response to oppose the appeal.

#### Scope

26. The Appellant argues that disclosure should be made under s29 and s35 DPA. The Council argues that s35 and s29 are a defence to public bodies permitting processing for the purposes of prevention of crime or other legal proceedings but not material to FOIA.
27. S35 provides:
  - (1) *Personal data are exempt from the non-disclosure provisions where the disclosure is required by or under any enactment, by any rule of law or by the order of a court.*
  - (2) *Personal data are exempt from the non-disclosure provisions where the disclosure is necessary—*
    - (a) *for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings), or*
    - (b) *for the purpose of obtaining legal advice,**or is otherwise necessary for the purposes of establishing, exercising or defending legal rights.*
28. S35 is not a gateway for s40 FOIA. It is an exemption in itself outside of FOIA as such this Tribunal has no jurisdiction to order disclosure pursuant to s35. To the extent that disclosure is necessary for any of the stated purposes envisaged in s35 there are separate procedures outside of FOIA to achieve these e.g. pre-action disclosure. The Tribunal is able to address the various potential legal proceedings that the Appellant

has raised in its assessment of fairness and schedule 2 condition 6 below, but that is only insofar as it relates to disclosure pursuant to s40FOIA.

29. S29 DPA provides:

*(1) Personal data processed for any of the following purposes—*

*(a) the prevention or detection of crime,*

*(b) the apprehension or prosecution of offenders, ...*

*are exempt from the first data protection principle (except to the extent to which it requires compliance with the conditions in Schedules 2 and 3) and section 7 in any case to the extent to which the application of those provisions to the data would be likely to prejudice any of the matters mentioned in this subsection.*

30. This is another gateway provision outside of FOIA and therefore not within the scope of this appeal. Disclosure under FOIA is to the world at large and not therefore for the prevention or detection of crime, although these factors are relevant in the Tribunal's assessment of the data subject's expectations and the legitimate interests of the Appellant (in relation to fairness and Schedule 2 condition 6).

#### S40 FOIA

31. S 40 FOIA provides:

*“(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 to a member of the public otherwise than under this Act would contravene—*

*(i) any of the data protection principles*

*...*

*(7) In this section—*

*“the data protection principles” means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;*

32. There is no issue between the parties that the images are personal data in that the data subject can be identified from them and the information is biographical (showing where the data subject was, when and what they were doing).

33. Schedule 1 to DPA sets out the data protection principles. This appeal concerns the first data protection principle which states 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, and*

*(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”<sup>17</sup>*

34. The effect of these provisions is that information which is the personal data of someone other than the requestor may not be disclosed unless disclosure is fair, lawful and one of the conditions in Schedule 2 of the DPA is met.

### **Fairness**

35. Disclosure under s40 FOIA would be lawful, therefore the Tribunal has gone on to consider fairness. Schedule 1 part II DPA provides:

*1(1) In determining for the purposes of the first principle whether personal data are processed fairly, regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed.*

36. Haslam v Information commissioner, Bolton Council [2016] UKUT 0139<sup>18</sup> approved the Commissioner’s guidance which although not legally binding, it found helpfully summarised the proper approach with consideration of:

- *“ the possible consequences of disclosure on the individual;*
- *the reasonable expectations of the individual, taking into account: their expectations both at the time the information was collected and at the time of the request; the nature of the information itself; the circumstances in which the information was obtained; whether the information has been or remains in the public domain; and the FOIA principles of transparency and accountability; and*
- *any legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the individuals who are the data subjects.”*

### **Reasonable Expectation**

37. The Appellant argues that:

- There are notices re video recording in the communal space.
- This was a public place as this was a communal area to a block of flats.
- The data subject was committing a crime, and therefore cannot expect privacy.

38. From the photographic evidence<sup>19</sup> we are satisfied that notices were displayed showing a silhouette of a CCTV camera and stating:

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<sup>17</sup> Despite the Appellant’s arguments that the CCTV shows evidence of criminal activity which might bring it within the scope of sensitive personal data, in light of the Tribunal’s findings relating to fairness and Schedule 2 the Tribunal has not gone on to consider this.

<sup>18</sup> Paragraph 33

<sup>19</sup> P18 OB/1

*“Warning*

*Images and/or sound<sup>20</sup> are being recorded for the purposes of crime prevention and your personal safety”.*

From this we are satisfied that the data subject would have an expectation that images were being recorded but that the purpose to which they would be put were for the purposes of crime prevention and the personal safety of the data subject. The issue before us therefore is whether disclosure under FOIA is compatible with those aims and whether the data subject would have the expectation that the images would be used outside of these circumstances.

39. The Tribunal observes that whilst the data subject’s activities can be said to be in public because they are in communal areas, they are communal areas of a residential block at a time when no others were present. In that sense they were not in the view of casual passers-by at the time of the incident and as such the Tribunal is satisfied that the expectation of privacy was higher than e.g. in a crowded street. The images were not and had not been accessible to the public at the relevant date and as such were not in the public domain.
40. The Commissioner’s view was that there would be no expectation that the images would be disclosed to the public and it would be more reasonable for these images to be passed to the relevant bodies dealing with the incident that took place. The Police were called, investigated and took the view that there was no need to view CCTV as in their view no crime had been committed. By the date of the requests the Police had closed the incident without launching criminal proceedings and in our judgment as a result of this the data subject’s expectation of disclosure to the public at that stage would be even less.
41. The Tribunal was referred to *Re JR 38’s Application for Judicial Review (NI) 2015 UKSC* a case involving Article 8<sup>21</sup> rights relating to the publication of photographs of a juvenile rioting in a public place with a view to identifying him as the culprit. In that case, there was a clear distinction drawn between the expectation that photographs would be taken and the use to which they were subsequently put including future publication. Whilst it is right that there were particular considerations relating to the juvenile status of the data subject in that case, the Court observed *inter alia* that:
- “The fact that the activity in which the person is engaged is suspected to be criminal will not, by reason of that fact alone, be sufficient to remove it from the possible application of article 8”.*<sup>22</sup>
- And
- “I would not however hold that the mere fact that a person is photographed in the course of a criminal activity deprives him or her from the right to prevent the police from publishing the photographs”.*<sup>23</sup>
- We consider this good authority that the fact that the Appellant alleges that the data subject’s conduct amounted to criminal activity alone is not enough to override any expectation of privacy.

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<sup>20</sup> The evidence of the Council was that in fact no sound recording was made.

<sup>21</sup> Article 8. the right to respect for private and family life,

<sup>22</sup> Paragraph 41

<sup>23</sup> Paragraph 112

42. The Appellant argues that the CCTV images depict criminal activity. In his response to the Commissioner<sup>24</sup> he said that for any crime captured on CCTV a defendant's Solicitor in Court cannot claim a FOIA exemption. We accept that the data subject might expect disclosure as a consequence of Court proceedings, however, the Commissioner found (and we agree) that this would be disclosure under the Court disclosure rules and not under FOIA, there would be scope for limitations upon its subsequent use outside of those proceedings.
43. When assessing the data subject's expectation, we have considered whether disclosure to the Appellant (and consequently the world at large) under FOIA would be for the purposes of the prevention of crime. We are not satisfied that it would be.
44. On the facts of JR 38 it was held that the publication of the photographs had been necessary to identify the data subject, however, the Court had regard to the preliminary more proportionate steps taken to try to identify the data subject prior to publication and it was only because those were unsuccessful that it was held that publication was necessary.
45. In this case, the stills were not necessary for the identification of the data subject. There was a clear link to a flat within the block and the tenant was written to about the behaviour of her visitor by the Council. A more proportionate and less intrusive way of identifying the data subject (if that were necessary) would have been for the Police to have used the CCTV footage to investigate. The Tribunal is not satisfied therefore that disclosure to the Appellant (rather than directly to the Police) would be in keeping with the stated purposes for having gathered the images, and for that reason disclosure would not be within the expectation of the data subject.

#### Consequences of Disclosure

46. The Commissioner was satisfied that disclosure would cause some distress to the data subject. The Appellant rejects this as he maintains that this was an unprovoked incident whereby the data subject was the aggressor and it was he who was distressed by the incident. The Tribunal observes that this was clearly a highly charged incident and considers it likely that the data subject would not welcome comment and scrutiny of his actions by the public when he would not have had the expectation that his images would be used in this way. The Tribunal also takes into consideration the "collateral information" which would be disclosed by the images such as the data subject's whereabouts at a particular date and time which is not information that he would have expected to be made public. For these reasons we are satisfied that disclosure could cause some distress to the data subject.

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

47. The Tribunal identifies the following general legitimate interests in disclosure:

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<sup>24</sup> P22 OB/2

- a) Transparency (ensuring that public authorities are working co-operatively with each other),
- b) Ensuring that the public are satisfied that crimes have been thoroughly and robustly investigated.
- c) Enabling the public to challenge the decision making of the Police.

48. However, we are satisfied that there are other more proportionate mechanisms to achieve these aims and that therefore the necessity of disclosure is not sufficient to outweigh the expectations and distress to the data subject associated with disclosure. We take into account that the Council have detailed what CCTV there is, its approximate length and the areas of view that it has, they have also explained what they say can be seen and in particular that no weapon was visible. The Council have articulated their protocols for data sharing with the Police, there are avenues of complaint to the Council with a right of appeal to the LGO<sup>25</sup> and the option of complaining to the Police where it is not felt that they have investigated a case adequately.

49. The Appellant argues that he has the following legitimate interests in disclosure:

*i. An accurate account of what is recorded<sup>26</sup>:*

50. The Council have viewed the tape and say that it shows an altercation, it has no sound and there is no evidence that the other person had a weapon. It is also incomplete as the cameras did not cover all aspects of the altercation. The Appellant argues that he cannot accept that this is an accurate representation without having seen the CCTV himself. He argues that the CCTV is the objective version of the event which does not rely upon his accuracy or veracity and is therefore the best evidence. He said that he did not wish to look at it, it was for the Police to look at it, he was present at the incident and did not wish to re-live it.

51. We are not satisfied that disclosure is necessary under FOIA to satisfy this aspect of the Appellant's concerns, as a less intrusive remedy would be for the Police to request the CCTV and to view it. The Appellant was present at the incident and can form his own view as to whether the Council's description of the CCTV is reliable, he has already been informed of his right to appeal to the LGO following the closure of his stage 3 complaint against the Council, an option that he has not chosen to take up.

*ii. Re-opening the investigation*

52. The Appellant argues that the CCTV is necessary to enable him to give it to the Police to get the criminal case relating to the incident reopened. The Tribunal observes that disclosure under FOIA is without restriction and that although that might be the use to which the Appellant would put the images; if anyone else were to make the same request, if it had been disclosed under FOIA, the information would be considered to be within the public domain and the Council would have to disclose the images even if they were to be used for a different purpose.

53. The Tribunal is not satisfied that disclosure is necessary under FOIA to satisfy this aspect of the Appellant's concerns because even if he were successful in this

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<sup>25</sup> As set out in the stage 3 complaint letter 29.1.15 p 98 OB/2 and p 116 OB/1

<sup>26</sup> The Appellants arguments in this regard overlap with his suspicions that the Council have perverted the course of justice see iv) below.

information request, the CCTV images disclosed would be incomplete, only showing the other person alone. The Appellant argues that the time on the landing when the data subject was alone was when he was at his most violent and shows the severity of the incident. The Tribunal is not satisfied that necessity is made out as:

- a) The information requested would be less than if the Police asked the Council for the complete CCTV recording.
- b) Another avenue would be for the Appellant to ask the Police to reopen the case and if they refused to follow the Police complaint procedure if the Appellant feels that the case was not properly investigated.

iii. *Exercising or defending legal rights*<sup>27</sup>.

54. The Council's position was that no proceedings were extant or anticipated at the relevant date:

- a) all issues including criminal proceedings against the Data subject appeared closed.
- b) There were no eviction proceedings or proceedings for breach of tenancy against the Appellant. Although the Appellant had been told that there might be an investigation, the evidence was that none materialised. The Tribunal observes that had proceedings been started or had the Appellant wanted to start proceedings there were other rules of Court to facilitate disclosure within those proceedings and that this would be more proportionate than disclosure to the world at large under FOIA.
- c) The Council appear to have suggested in the letter of 29<sup>th</sup> January 2015 that the Appellant had received a formal Police Caution in relation to this incident. It is now accepted by the Council that this was wrong as is set out in the Commissioner's letter of 15<sup>th</sup> July 2015. Whilst the Caution issue does not appear to have been resolved at the date the request was made, it had been by the date of the Council's reliance upon s40 FOIA as set out in their letter of 6<sup>th</sup> April 2016. In any event, the fact that it was resolved without reference to the CCTV is good evidence that the CCTV was not necessary in order to resolve it.

iv. *Malfeasance in public office/ perverting the course of justice.*

55. The Appellant's evidence was that previously when there was a concierge system, the Police would view the tape in the office there and then. That is no longer possible. Mr Galloway said he had told the Police that he would contact the Council and let them know of the incident and arrange for the CCTV to be given to the Police. His understanding is that the police are waiting for him to send the CCTV. That the Council are refusing to provide the images to him in his view is preventing the Police from seeing them. As set out in *i)* above the Appellant is also not satisfied that the Council have given an accurate representation of the contents of the CCTV to the Police.

56. The Appellant made a complaint to the Council<sup>28</sup> that:

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<sup>27</sup> The Appellant adopted the s29 arguments when outlining his legitimate interests. Including prospective legal proceedings, for the purpose of obtaining legal advice or for the purposes of establishing, exercising or defending legal rights.

<sup>28</sup> On 13<sup>th</sup> November 2014, details reproduced a p 95 OB/1 13 OB/2

- The Officer: “*mishandled [his] complaint leading the Police to take no criminal action*”
- The Officer: “*failed to notify the Police of the images captured on CCTV despite [the Appellant] asking on numerous occasions.*”

The complaint was not upheld as the Council found:

*“There is or was no obstacle to the Police wishing to look at the CCTV footage as part of their investigation”<sup>29</sup>.*

57. The Council explained in their letter of 18<sup>th</sup> December 2014:

*“The Police are fully aware that we have CCTV recording abilities within this block and all Concierge blocks within the city. It is entirely a matter for the Police to determine whether or not they choose to look at the CCTV footage, no doubt you would have advised them yourself of the availability when you spoke to them on 6<sup>th</sup> November 2014.*

*The Police are fully aware that we share information using data sharing protocols and would not provide data without a formal request from the Police.”*

They added that if a Council employee was asked by the Appellant to provide tapes to the Police he would be right to decline as that would be in breach of data sharing protocols.

58. The Tribunal accepts this evidence and observes that the fact that the Police did not see the images on the day is not the same as having been “prevented”. If there is a concern that the Council have misrepresented the contents of the CCTV, the remedy is to complain about this aspect to the Council and if this is not helpful there is a right of appeal to the LGO, alternatively it would be for the Police to view the tapes. The Appellant accepted that he does not know what the Police have or have not done. He has no evidence that the Council have refused a Police request. He agreed that complaining to the Police that they had not investigated the case adequately was an option, but that he had not done this (the subtext being that he did not wish to be viewed as a troublemaker by the Police with whom he wished to maintain good relations).

59. The Tribunal is not satisfied therefore that it would be fair to disclose the information having regard to the expectations of the data subject and the less intrusive methods available to achieve each of the Appellant’s aims.

### **Schedule 6 Condition 2**

60. The conditions in Schedule 2 include:

*6(1) 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.”*

61. In assessing condition 6 of Schedule 2 the Tribunal has followed the procedure as set out in Goldsmith International Business School v The Information Commissioner and the Home Office [2014] 563 (AAC) namely:

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<sup>29</sup> p114 OB/1 p96 OB/2

- i. *whether the third party to whom the data is disclosed is pursuing a legitimate interest or interests.*
  - ii. *whether disclosure of the identity of the data subject is necessary to the legitimate interest in question. "Necessity" means "more than desirable but less than indispensable or absolute necessity", and disclosure must be the "least restrictive" means of achieving the legitimate aim.*
  - iii. *whether disclosing the personal data is unwarranted by reason of the prejudice to the article 8 rights of the data subjects.*
70. The issue substantially overlaps with that of fairness. The tribunal adopts its analysis of the Appellant's legitimate interests as set out in paragraphs 47-59 above and for the reasons identified there is not satisfied that disclosure under FOIA is necessary. The Tribunal is satisfied that disclosure would be unwarranted because of the prejudice as identified in paragraphs 37-46 above.

### **Conclusion**

71. For the reasons set out above we refuse both appeals.
72. These decisions are unanimous.

Signed Fiona Henderson

Judge of the First-tier Tribunal  
Dated this 21<sup>st</sup> day of April 2017

Promulgated: 21<sup>st</sup> day of April 2017