



EA/2016/0294

JOHN MCEVOY

Appellant

and

The Information Commissioner

First Respondent

Southern Regional College

Second Respondent

**Appeal Hearing on the Papers: 16 August 2017 Fleetbank House, London
Judgment delivered 21 August 2017**

Before:

Brian Kennedy QC

Rosalind Tatam

Steve Shaw

Subject Matter: Application of exemptions Sections 40 (1) & (2) of the Freedom of Information Act 2000.

Result:

Appeal Refused.

Cases considered: *Waugh v IC and Doncaster College* EA/2008/0038.

REASONS

Introduction:

[1]. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”). The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“DN”) dated 2 November 2016 (reference FS50635346) which is a matter of public record. The Tribunal Judge and lay members sat to consider this case on 16th August 2017.

Factual Background to this Appeal:

[2]. Full details of the background to this appeal, Mr McEvoy’s request for information and the Commissioner’s decision are set out in the Decision Notice and not repeated here, other than to state that, in brief, the appeal concerns the question of whether the Southern Regional College (“the College”) was correct to rely on the s40 FOIA personal information exemption to withhold a report of an investigation conducted into matters raised by the Appellant under the College’s Whistle blowing Policy.

Chronology:

8 Oct 2015	Appellant raises allegations against colleagues (arising from a meeting in April 2014) to the College under its Whistle blowing policy.
11 Dec 2015	Appellant is informed of the outcome of the College’s investigation
3 Feb 2016	Appellant’s request for the report following the investigation into issues he had raised through the College’s Whistle blowing Policy
24 Feb 2016	College refuses request, citing s40 (1) and (2)
9 March 2016	Appellant requests an internal review
8 April 2016	College upholds original refusal
27 June 2016	Appellant’s complaint to the Commissioner

Relevant Legislation:

s40 FOIA Personal information.

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

- (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
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
 - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
- (4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject’s right of access to personal data).

Commissioner’s Decision Notice:

- [3] The Commissioner was satisfied that, where the Appellant’s personal data was contained within the report, the College was entitled to rely on and cite the exemption in s40(1) in regards to the FOIA request. The separate Data Protection Act aspect is not within the scope of this Decision Notice.
- [4] Section 40(2) deals with third party personal information. The Appellant had raised concerns about two particular members of staff, and the Commissioner considered that those staff members could be identified as their names, job titles and other information in the report. Where the requested information deals with internal matters that could invoke disciplinary policies, there is a strong expectation on the part of the identifiable individuals of privacy: See: Waugh v IC and Doncaster College EA/2008/0038. The Commissioner considered that any disclosure of the disputed information would cause unnecessary and unjustifiable stress to these individuals, who have refused to consent to the disclosure of the information. The Commissioner also noted that these

individuals had not been found to have any case to answer, while disclosure of the report committed could lead to unwarranted speculation.

[5] Whilst there is a general public interest in transparency and accountability, the Commissioner accepted that the Appellant maintained the view that wrongdoing did occur and it was important to him to know why the College did not uphold his concerns. Nevertheless, the Commissioner found that this did not override the strong public interest in protecting the privacy rights of individuals who have been found to have done nothing wrong. The Commissioner found that the College, the public authority concerned, had provided the Appellant with all the information that he as a Whistle-blower was entitled to receive, and the Commissioner was, and remains, of the view that the public at large is not entitled to receive the details.

Appellant's Grounds of Appeal:

Ground I – Public Interest

[6] The Appellant claimed that the College failed to retain audit and compliance evidence in what he suspects to be institutional corruption. If the College's leadership and accountability systems are in question, there is a strong public interest in the disclosure of the report.

Ground II – Commissioner's Bias

[7] The Appellant further alleged that the Decision Notice was "partisan", "misleading" and discriminatory in favour of what the Appellant termed the "wrongdoers/offenders", and failed to attach sufficient weight to the Appellant's evidence of what he perceived to be the wrongdoing complained of.

Commissioner's Response:

[8]. The Commissioner repeated the findings in the DN regarding the unjustifiable distress that disclosure would cause, noting that it was no surprise that the accused individuals refused consent for disclosure. Their reasonable expectations in privacy are supported by case law and there is no legitimate public interest.

Ground I – Public Interest

[9]. The Commissioner reasoned that whilst ensuring the integrity of the College's internal systems is arguably in the public interest, this is more properly litigated within the regulatory context of the College as a provider of higher education.

Ground II – Bias

[10] The Commissioner refuted any accusations of impropriety and dishonesty, and noted that any such accusations were neither particularised nor substantiated.

Appellant's Reply:

Ground I – Public Interest

[11] The Appellant argues that he can prove irrefutably that there was malpractice in the conduct of the investigation into his allegations that amounts to a fraudulent whitewash in his view.

Ground II – Bias

[12] The Appellant claims that the Commissioner's bias is evident in the sections of the Decision Notice "where she practically glosses over the two culprits' fakery and deceitfulness", and failed to include in her Notice a statement from the College's Whistle blowing Protection Officer in which he allegedly confirms the destruction of documents at the commencement of the academic year 2015/16 which the Appellant believes contained vital evidence on his concerns.

The College's Response:

[13] The College provided further information regarding the Appellant's complaints. The report concluded that whilst it was unable to uphold the central allegations made by the Appellant, it did find that there was a breach of the exam board's retention regulations. This was explained by a general failure within the College to properly understand these regulations, and as a result measures were put in place to rectify the situation.

Ground I – Public Interest

[14] The College agreed with the Commissioner's conclusions regarding the exemptions relied upon, adding the following observations:

- i) Disclosure may unjustifiably lower the good standing of the individuals accused by the Appellant of misconduct. The investigation has concluded, and to publish the

report would revive the matter without permitted any recourse for the individuals concerned. It may also impact upon their ability to carry out their professional duties if there is undue speculation amongst colleagues and students.

- ii) The duty of trust and confidence to the individuals relates not only to the generic employment relationship between the College and the individuals, but is also explicitly protected in the Whistle blowing Policy.
- iii) The report is of limited interest to the general public. The Appellant's allegations of systemic institutional impropriety on the part of the College are not covered in the report, which deals only with specific allegations against two individuals. The Audit Committee of the College receives a report on Whistle blowing investigations, and the College's mechanisms are scrutinised by the internal auditors (KPMG), the Northern Ireland Audit Office and the Department for the Economy.

[15]. Disclosure would breach the first Data Protection principle as none of the Schedule 2 conditions have been met.

Appellant's Replies:

[16] The Appellant refutes the College's version of the investigation that resulted in the report, denying that there was a widespread failure of understanding on the part of staff members of the exam board's retention policy, but rather a deliberate and fraudulent destruction of corporate assets to prevent disclosure of malpractice. He stated that this alleged criminal activity means that disclosure is in the public interest, as it will show that the College has been claiming public monies from the awarding body under false pretences.

Conclusions:

[17] The Appellant also raised the issue of redactions to solve the issue of the individuals being identifiable to the world at large. This we find demonstrates a fundamental misunderstanding of this appeal process. In any event, as he believes these individuals to be guilty of malpractice he is of the opinion that they should not be permitted to avail of the protection from distress that s40 provides. He also provided an assurance that, if the report were released to him, he would not disseminate it further, and gives his consent to his being identified by name.

[18] Whilst the Appellant disagrees with the investigation, findings and report of the second Respondent, he has failed to produce such compelling evidence to establish the objections he has made as to persuade the First Respondent or this Tribunal that the College got it wrong. The First Respondent and this Tribunal have the advantage of seeing the disputed information in a closed bundle supplied to us but not the Appellant. It is personal and often sensitive information.

[19] The Appellant has failed to persuade the Tribunal that the First Respondent erred on the facts or in the Law or was wrong in the reasoning in the DN, either with relevant evidence or persuasive argument. This Tribunal accepts and adopts the reasoning in the DN and does not find that the Appellant has undermined that reasoning. The Appellant's final submissions make other requests of the Tribunal, which are beyond our jurisdiction (see his Paragraphs 12 ff of 20 June 2017).

[20] The Tribunal find the Appellant's statement regarding s77 FOIA is of no assistance because the information referred to by him was destroyed at the beginning of the academic year and was not the disputed information, the subject matter of this appeal (see Open Bundle pages 90-91, and the Appellants paragraphs 4 – 8 wherein he criticises the destruction of student folders).

[21] In the circumstances and for the reasons set out above we refuse the Appeal.

Brian Kennedy QC

21 August 2017