Appeal number: EA/2017/0149

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

JULIAN HUNT	**Appellant**
- and -	
THE INFORMATION COMMISSIONER	**First Respondent**
UK LAWYERS FOR ISRAEL LIMITED	**Second Respondent**

TRIBUNAL: JUDGE ALISON MCKENNA
Mr JOHN RANDALL
Ms MARION SAUNDERS

Heard in public at Fleetbank House, London on 27 March 2018

The Appellant was represented by Daniel Lightman QC
The Information Commissioner was represented by Robin Hopkins, counsel
UKLFI was represented by Jonathan Turner

DECISION

1. The appeal is dismissed.

2. The Tribunal's open reasons are set out in full below. There is also a short closed annexe to this Decision, which refers directly to the withheld material.

REASONS

Background to Appeal

3. The background to this appeal is that on 19 January 2016, the Kings College London Student Union Israel Society and the London School of Economics Students' Union Israel Society jointly organised a meeting at KCL's Strand campus, featuring an invited speaker, Admiral Ami Ayalon. Admiral Ayalon is a prominent Israeli politician, and his lecture was to be about bringing peace to the Gaza region. The event was disrupted by a protest during which protestors gained entry to the meeting and violence ensued. The police attended, and the event was brought to a premature end due to concerns about the safety of those present.

4. Kings College London ("KCL") investigated the incident and compiled a report dated 3 February 2016. That report has been disclosed to the Appellant in a redacted form. KCL issued a public statement about it and there were many media (including social media) reports of the incident. Photographs of some of those present have been published.

5. There was one arrest, which resulted in a conviction for assault, of a person who was not a KCL student. Again, there were multiple media reports of that process.

6. The Appellant made a request to KCL on 16 September 2016, in the following terms:

> *"(a) Following the disruption of the talk by Ami Ayalon on 19 January, how many King's College London students were disciplined (whether formally or informally) for their behaviour by KCL?*
>
> *(b) Please state what specific disciplinary measures were taken against the students disciplined (if any were disciplined)?*
>
> *(c) Were any members of King's College London Action Palestine disciplined by KCL?*
>
> *...Please note that I do not seek for any individuals to be identified"*

7. KCL initially refused to confirm or deny whether it held the requested information, in reliance upon s. 40 (5) of the Freedom of Information Act 2000 ("FOIA"). Having conducted an internal review at the Appellant's request, KCL later confirmed that it held information within the scope of the request but was withholding

it in reliance upon s. 40 (2) FOIA. KCL has subsequently confirmed that the number of KCL students disciplined in relation to the incident was more than zero but fewer than five.

8. The Appellant complained to the Information Commissioner, who issued Decision Notice FS50661862 on 29 June 2017. The Information Commissioner upheld KCL's reliance upon s. 40 (2) FOIA in withholding the information requested and required no steps to be taken by KCL. This is the Decision Notice now appealed to the Tribunal.

9. The application to the Tribunal was made in the name of Julian Hunt, who is a Director of UK Lawyers for Israel ("UKLFI"). It had apparently been intended that UKLFI should be the Appellant in this appeal. An application for substitution was refused (because UKLFI had not been the complainant to the Information Commissioner and so had no standing to bring an appeal under the statutory scheme), but UKLFI was joined as the Second Respondent to enable its participation in the appeal. The Appellant and the Second Respondent generally supported each other's case.

10. KCL was not joined as a party to this appeal, but the Tribunal was told that it supported the Information Commissioner's position.

Appeal to the Tribunal

11. The Appellant's Notice of Appeal dated 17 July 2017 relied on grounds that:

> *(1) the Information Commissioner had erred in concluding that the information sought was "personal data", because the request was for the number of students disciplined only;*
>
> *(2) if the information sought was "personal data" then it was not "sensitive personal data" under the DPA[1];*
>
> *(3) there was no expectation of privacy by students disciplined because KCL's disciplinary code refers to communication of sanctions to interested parties;*
>
> *(4) even if the information requested did constitute sensitive personal data, disclosure would be fair in view of the public interest in what had occurred, and the particular concern of the Jewish community that some universities have not adequately responded to intimidation of Jewish students on campus;*
>
> *(5) the Information Commissioner had failed to give adequate weight to the concern that this was not an isolated incident but an example of wider misconduct, in relation to which the public had a legitimate interest in knowing whether universities were taking appropriate measures;*

[1] Data Protection Act 1998

(6) the Information Commissioner had failed to give adequate weight to the importance of deterring misconduct of this kind by making public the fact that sanctions are imposed;

(7) the Information Commissioner had failed to give adequate weight to the statutory duty of KCL under s. 43, Education (No 2) Act 1986 to secure freedom of speech, and the public's right to assess whether KCL's obligations have been adhered to.

12. The Information Commissioner's Response dated 20 September 2017 largely maintained her analysis as set out in the Decision Notice. It was submitted that:

(1) given the small number of individuals involved, there is a reasonable likelihood of them being identified from the information requested at part (a) of the request, particularly in view of the media coverage and level of knowledge of others present at the incident. Part (b) of the request cannot readily be answered without giving rise to further inferences about the answer to part (c);

(2) the withheld information was "sensitive personal data" but she no longer relied on the provision at "(g) disciplinary investigations or sanctions" in DPA s. 2, so that in her submission the sensitivity of the personal data related to the provision at (b) only, regarding the political opinions of the individuals concerned;

(3) disclosure of the requested information would be unfair, contrary to the first data processing principle, because (i) it would go against the reasonable expectation of the individual(s) concerned; (ii) the individual(s) would be likely to suffer distress and reputational damage; (iii) whilst there is legitimate public interest in the information requested, KCL has already published a redacted disciplinary report and confirmed that the number is lower than five, so the incremental public benefit of disclosure of the requested information does not outweigh the rights and interests of the individual(s). Similarly, there is no "pressing social need" for the additional information under condition 6 (1) of DPA Schedule 2;

(4) disclosure would contravene the rights of the individual(s) under Article 8 of the European Convention on Human Rights ("ECHR").

13. The Information Commissioner wished to correct any impression given in the Decision Notice that the information requested was of interest to a limited group of people only, and she accepted that there is a legitimate public interest in the information requested. Her arguments were therefore directed to the *incremental* benefit of disclosure, in the light of other information disclosed and weighed against the rights of the data subject(s).

14. UKLFI made a paragraph-by-paragraph Reply to the Information Commissioner's Response on 9 October 2017. Some new points were raised in this submission, as follows:

(1) that there was no evidence that the information requested constituted "data" within the meaning of the DPA;

(2) that conditions 3, 5(b) and 5 (d) of Schedule 2 DPA were applicable, as were conditions 6 (c) and 7 (1) (b) of Schedule 3 to the DPA;

(3) that the Article 8 rights of the individuals involved in the protest could not be said to be engaged in circumstances where they had indulged in publicly inappropriate and/or criminal behaviour.

15. The hearing proceeded by way of oral submissions only as, by agreement, the Tribunal did not need to hear live evidence from the witnesses who had provided statements. We are grateful to the witnesses for their contributions and to the parties' representatives for their comprehensive written skeleton arguments and clear oral submissions. The Tribunal was provided with open and closed bundles of documents. The closed bundle contained the withheld information and other documents which were revelatory of it, pursuant to directions made under rule 14 (6) of the Tribunal's Rules. Accordingly, this bundle was not disclosed to the Appellant or to the Second Respondent, although where possible they were provided with redacted copies of the closed documents in the open bundle.

The Law

16. Section 40 FOIA provides as follows:

"40 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).

(5) The duty to confirm or deny—

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either—

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

(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;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act."

17. "Personal Data" is defined in s.1 DPA, as follows:

"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;

18. "Sensitive Personal Data" is defined in s.2 DPA, (where relevant) as follows:

In this Act "sensitive personal data" means personal data consisting of information as to—

…

(b)his political opinions,

…

19. Recital 26 of the Preamble to Directive 95/46/EC states that:

(26) Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas, to determine whether a person is identifiable, 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; whereas the principles of protection shall not apply to data rendered anonymous in such a way that the data subject is no longer identifiable; whereas codes of conduct within the meaning of Article 27 may be a useful instrument for providing guidance as to the ways in which data may be rendered anonymous and retained in a form in which identification of the data subject is no longer possible;

20. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

"If on an appeal under section 57 the Tribunal considers -

(a) that the notice against which the appeal is brought is not in accordance with the law, or
(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

21. We note that the burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

Evidence

22. The Tribunal considered the two witness statements of Joseph Stoll (which appears to be the same statement signed on two different dates), who describes the event in January 2016, at which he was present.

23. We also received witness statements from Tamara Berens, who is a student and President of the KCL Israel Society. She does not say if she was present at the event but expresses the view that lack of information about the disciplinary sanctions imposed on the disruptive students is hampering the efforts of the KCL Israel Society to secure fair treatment and freedom of speech for Israeli speakers at KCL. She helpfully exhibits to her witness statement a copy of KCL's Misconduct Regulations (which we refer to below). She made a second (described as her third) witness statement in March 2018 to draw the Tribunal's attention to her concerns about some recent events at KCL.

24. At paragraph 8 of her first witness statement, Ms Berens says:

...I do not understand the argument that being granted the information of the number of people disciplined would allow us to identify them. Either no one was punished and therefore this would have no impact on identity. Or, in terms of the people who were punished, we know anyway that they would be among a group of people who we are aware acted aggressively at the Ayalon protest. We are already aware of this group and would have no way of distinguishing between people within it through an idea of the quantity of people disciplined.

25. The Tribunal considered the two witness statements of Jonathan Turner (who also appeared as the representative for the Second Respondent in this appeal), who had not been present at the event but had been involved on behalf of UKLFI in meetings with KCL to discuss its response. He exhibits newspaper reports of the event in January 2016 and of the conviction of a protester for assault, some twitter threads discussing the event, and some opinion pieces about free speech in universities.

26. Julian Hunt's witness statement also referred us to media reports of the incident and exhibited the results of his own Google searches about the disrupted event, from which he said he had been unable to identify any individuals.

27. Finally, we considered the witness statement of Baroness Deech of Cumnor, who is an eminent figure in the world of higher education and an honorary patron of UKLFI. She provides opinion evidence about the importance of universities imposing disciplinary sanctions in respect of incidents such as the one she has heard about at

KCL. She considers the information requested in this case to be of very considerable public interest.

28. We note that KCL's Misconduct Regulations provide (where relevant) as follows:

> *"2. General Provisions*
>
> *2.7 The College will do all in its power to limit the disclosure of information as is consistent with conducting an investigation and the provisions of The Human Rights Act 1998, the Data Protection Act 1998, the Freedom of Information Act 2000 and any other relevant legislation.*
>
> *2.8 All disciplinary proceedings will normally be held in private.*
>
> *6. Outcome of Hearings*
>
> *6.3 The finding(s) and order(s) of the Committee will be notified in writing, normally within seven days of the hearing. For assessment-related offences, these will be communicated to the student and Chairs of the relevant Assessment Board and Assessment Sub-Board, where appropriate to the relevant Executive Dean of Faculty. For non-assessment related offences, these will be communicated to the student, the relevant Executive Dean of Faculty, and any other interested parties…."*

29. The Tribunal had before it the redacted (open bundle) and unredacted (closed bundle) Investigation Report prepared by KCL's Head of Administration and College Secretary. We note that the Report concluded on page 9 with a recommendation that there should be a referral to the Disciplinary Committee in respect of the individual(s) whose conduct is discussed at paragraph 7.1 on page 9, but that no further action should be taken in respect of the individual(s) mentioned in paragraph 7.2 on page 10. The report also recommended KCL's co-operation with other institutions in respect of disciplinary proceedings against students from those institutions who had been involved and that those students should be banned from attending future events at KCL. Finally, the Report recommended measures aimed at working with the student body to make clear what constitutes appropriate behaviour in the context of protest and assembly.

30. The Tribunal's closed bundle contained unredacted copies of materials in the open bundle. Later, added to the closed bundle was some information provided by KCL to the Information Commissioner which was said to demonstrate how *"a motivated intruder"* (see paragraph 33 below) would be able to identify the relevant data subject(s), contrary to Mr Hunt's assertion in his witness statement.

Submissions

31. Daniel Lightman QC, on behalf of the Appellant, took the Tribunal to the evidence before it about the background facts and explained that the information request had been made in circumstances where the Israel Society was aware that

disciplinary measures had been recommended but had not been informed by KCL what happened next. He said that the other institutions whose students were involved in the incident had received a similar request and had answered it. He suggested that KCL had taken a contradictory approach by initially saying that it could not disclose the information requested because there was a risk of identification where the number of disciplined students was lower than five, but then admitting that it was lower than five. He asked the Tribunal not to accept KCL's word without proof.

32. Turning to the law, he accepted that the requested information is "*data"* within the meaning of the DPA, but he did not accept that it was "*personal data*" or "*sensitive personal data*" for the following reasons. Firstly, the definition of "*personal data*" (see paragraph 17 above) refers to an individual who "*can*" be identified from it, not one who "*could*" be so identified. He submitted that both KCL and the Decision Notice had failed to reflect this in their analysis of the data, referring broadly to a potential risk of identification. He submitted that the information would be personal data only if one could identify an individual from it with certainty.

33. Mr Lightman referred the Tribunal to the "*motivated intruder*" test[2], as discussed in the Upper Tribunal's Decision in *IC v Magherafelt District Council* [2012] UKUT 263(AAC). He submitted that, although Ms Berens had referred in her witness statement to "*knowing*" the group of students involved, the "*motivated intruder"* would in fact have no way of knowing what factors KCL had taken into account in deciding whether to discipline any particular individual, so it could not be assumed that action had been taken against those who were thought to have behaved the worst. He submitted that it was unsatisfactory that the Information Commissioner had not explained in the Decision Notice how it would be possible to identify individuals from the answers to the information request.

34. Mr Lightman reminded the Tribunal that it is only if the information is "*personal data*" that it can be "*sensitive personal data*". Referring to the Information Commissioner's concession that the political opinions of those involved is the only basis for suggesting that the withheld information is "*sensitive personal data*", he submitted that the test at s. 2 DPA relates to "*personal data consisting of information as to…(b) his political opinion"* so that it does not apply to information from which a person's political opinions can merely be guessed at. He submitted that the Decision Notice had applied the wrong test in this respect.

35. Mr Turner, on behalf of UKLFI, adopted Mr Lightman's submissions but addressed us on some points which he said we would only need to consider if we were against any of Mr Lightman's submissions, as follows. He reminded us that the test in s. 40 (3) FOIA was whether the disclosure of the information "*would*" contravene any of the data protection principles, and referred us to the concept of "*fair and lawful"* processing in the schedules to the DPA, noting that the Decision Notice considers lawfulness but not fairness. He submitted that the correct approach was to

[2] A "motivated intruder" is a person who starts without any prior knowledge but who wishes to identify the individual or individuals referred to in the purportedly anonymised information and will take all reasonable steps to do so".

be found in the House of Lords' judgment in *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47 and that anonymised data, such as that which had been requested, could fairly be disclosed.

36. Mr Turner submitted that the rights and expectations of the students who protested must be considered in the context that they did so in public (on the KCL campus, visible from the street, and in the street itself). He compared this to standing on a soapbox and making a speech then claiming a right to privacy about it. Referring us to the Misconduct Regulations, he submitted that in these circumstances the KCL Israel Society was an "interested party" under regulation 6.3 (see paragraph 28 above) so that those disciplined would have expected it to be informed.

37. Mr Turner referred us to two judgments of the Supreme Court in which Article 8 ECHR had been held not to be engaged or where interference was justified: *Regina (Catt) v ACPO and Others* [2015] UKSC 9; *South Lanarkshire Council v The Scottish Information Commissioner* [2013] UKSC 55. He submitted that Article 8 ECHR was only a relevant consideration if it was engaged o the facts. He referred us to the Supreme Court's judgment in *JR38* [2015] UKSC 42, in which Article 8 rights were held not to be engaged in circumstances of a photograph of the data subject taken at a public riot. (Although Mr Turner referred to the events in January 2016 as a "riot" throughout his submissions, we understood him to be using the term colloquially in the absence of any public order charges having been brought).

38. Taking us to schedule 2 to the DPA (the conditions relevant for the purposes of the first Data Protection Principle), Mr Turner submitted that paragraph 6(1), which refers to the processing of data which is "*necessary*" for the purposes of the legitimate interests of the data controller or a third party, could be relied on in this case. He submitted that disclosure was "*necessary*" in order to ensure that future meetings of the KCL Israel Society can proceed without further threat of disruption. He also referred us to Schedule 2 condition 3 and Schedule 3 condition 6 (c) which refer to processing being necessary to the compliance of legal obligations and the exercise of legal rights. He referred us in this context to KCL's obligations under Education law and Equality law to protect freedom of speech and not discriminate against Jewish students. He concluded that keeping the punishment a secret was cruel to the students who had wanted to hear the speaker.

39. Mr Hopkins, on behalf of the Information Commissioner, referred us to the definition of "*personal data*" in s. 1 DPA (see paragraph 17 above) and submitted that the Tribunal must consider whether identification can be made by *anyone* (including the public, students, family members) from the requested information *combined with* other information in the hands of the data controller (or likely to come into their hands). He submitted that this approach was established by the *Common Services Agency* judgement to which we had already been referred. On this basis, he submitted that the withheld information was clearly personal data.

40. Mr Hopkins also referred us to Recital 26 to the EC Directive (see paragraph 19 above) and asked us to consider all the reasonably likely means of identification. He referred the Tribunal to the CJEU's judgment in *Breyer v Federal Republic of*

Germany (C-582/14) in which computerised data which it would be possible to de-code on request was held to be personal data within the meaning of the Directive. In applying the "*motivated intruder*" test, he asked us to consider the high level of motivation that exists for identification in this case, as indicated by the press reports already before us, and he referred us to the Information Commissioner's Guidance on Anonymisation and Personal Data. He also referred us to the "pieces of the jigsaw" already available to a motivated intruder, including the redacted KCL Report, the press and social media reports, and Ms Berens' evidence that the students already know each other.

41. Turning to the question of "*sensitive personal data*" (see paragraph 18 above), Mr Hopkins submitted that the definition in s. 2 DPA refers to "*information as to …political opinions*" so was not, properly understood, to be interpreted as devoid of context. The context here is that the situation was clearly one that was politically driven.

42. On the question of whether disclosure of the personal data or sensitive personal data would be in accordance with the Data Processing Principles, Mr Hopkins reminded the Tribunal that we must consider whether disclosure as at September or October 2016 would have contravened the first Data Protection Principle (this being the time of KCL's internal review decision). He did not regard there being a significant distinction between the concepts of lawfulness and fairness as, in his submission, fairness includes the balancing of competing legal interests. In this regard, he submitted that the word "*necessary*" where it appears in the DPA schedules must be understood to involve a proportionate approach in order to achieve minimum interference with the data subject(s)' Article 8 rights. He referred us in support of this approach to the High Court's judgment in *Department of Health v Information Commissioner* [2011] EWHC 1430 (Admin) and the Upper Tribunal's Decision in *Goldsmith International Business School v the Information Commissioner and the Home Office* [2014] UKUT 0563 (AAC).

43. Mr Hopkins submitted that the facts of this case did not justify overriding the Article 8 rights of the individual(s) concerned, and it could not be said to be "*necessary*" for KCL to disclose the information requested in order to meet its statutory obligations, as there were a range of measures available to universities by which they could meet these statutory duties.

44. Referring us to the Supreme Court's approach in *Catt* (referred to above), Mr Hopkins submitted that there was a "*reasonable expectation in the relevant respect*" in this case. He said that the student(s) disciplined would not have had an expectation that any sanctions imposed would be made public, and that it was a red herring to consider that certain events took place in public because the question for the Tribunal is about the expectation of privacy in relation to the disciplinary process, not in respect of the protest. He submitted that regulation 6.3 referred to other persons at KCL and clearly did not envisage the unconstrained release of information to the public at large which results from a FOIA disclosure.

45. Mr Hopkins submitted that the only arguable basis for disclosure was condition 6(1) in Schedule 2 DPA. In this regard, he argued that as there has already been some disclosure by KCL, the question must be whether the additional disclosure sought through this appeal would have an incremental benefit such as to justify the interference with the rights of the data subject(s). In his submission, the Decision Notice had reached the right conclusion, that it did not.

46. We heard some additional short submissions from Mr Hopkins in closed session. He adopted the Information Commissioner's role of guardian of the legislation, as described by the Court of Appeal in *Browning v IC* [2014] EWCA Civ 1050 and raised two points in relation to the closed material that the Appellant would have made had he been present. Although the other parties and their representatives were required to leave the hearing room for that part of the hearing, the Tribunal gave them a "gist" of what had occurred in their absence when they returned.

47. The "gist" of the closed session given was that we considered the withheld information itself and heard Mr Hopkins' submissions as to how it supported what had been said in open session. We also looked at the information which is part of the "identification jigsaw" and heard Mr Hopkins' submissions about why it supported the argument that the withheld information is to be defined as personal data.

48. Mr Lightman and Mr Turner made submissions in reply to Mr Hopkins as follows. Mr Lightman submitted that Recital 26 did not affect the correct interpretation of s. 1 DPA. He submitted that there was a significant incremental benefit arising from disclosure because the Report which had been disclosed by KCL did not confirm what had happened as a result of the recommendations contained in it. Finally, he reminded the Tribunal that the information request with which we are concerned comprises three free-standing questions, and asked us to address each one separately and consider if any one of the questions could be answered.

49. Mr Turner submitted that the only people who would be motivated to piece together the identification jigsaw were those to whom the information should have been disclosed in the first place. He repeated that those involved in the protest should have no reasonable expectation of privacy. He wished to emphasise how worried he is and how important it is that something must be done.

Conclusion

50. The question for the Tribunal to answer, put simply, is whether the Information Commissioner's Decision Notice was wrong. The points of contention are: (i) whether the withheld information constitutes "*personal data*" (and if so, whether it is "*sensitive personal data*") within the meaning of the DPA and (ii) if the answer is yes, whether the disclosure of that personal data by KCL to Mr Hunt, in response to his information request, would contravene any of the data protection principles set out in the schedules to the DPA, so as to be exempt under s. 40 (2) FOIA. We note that, unlike some of the other exemptions under FOIA, s. 40 (2) is an absolute exemption, and not a qualified exemption to which we must apply a public interest test.

51. Our conclusion as to (i) is that the requested information does constitute personal data within the meaning of s. 1 DPA. For the reasons set out in the closed annexe to this Decision, and having considered the withheld material, we are satisfied by the evidence that it relates to a living individual or individuals who can be identified from piecing together the withheld information and other information in the possession of KCL. In reaching our conclusion, we have taken account, in accordance with Recital 26, of *all the means likely reasonably to be used either by the controller or by any other person to identify the said person.*

52. In reaching that conclusion we have applied the "*motivated intruder*" test and are satisfied that, within the particular context of a student body where people (as Ms Berens confirms) are known to each other, and taking into account the information already in the public domain, there would be a high level of motivation to undertake identification. We note Mr Hunt's evidence that he had been unable to do this, but we received evidence in the closed bundle which supported the contrary view.

53. As to "*sensitive personal data*", we were not persuaded that the withheld information may be regarded as satisfying the test at DPA s. 2. We considered that "*information as to*" a person's political opinions is to be found when there is a closer connection between the information held and a political opinion held than that which arises from the ability to draw an inference from the context. Although we disagree with the Decision Notice in this regard, it does not affect our overall conclusion.

54. Our conclusion as to (ii) is that, for the reasons advanced by Mr Hopkins in his submissions, the only arguable basis for fair and lawful processing by disclosure of the personal data is to be found in condition 6 (1) in schedule 2 DPA. This requires us to balance the legitimate interests of the third-party requester against the legitimate interests of the data subject(s).

55. Firstly, as did the Information Commissioner, we accept that there is a legitimate interest on the part of the requester, and the public in general, in knowing whether KCL followed its procedures and whether any disciplinary sanctions were imposed in respect of certain students' behaviour at the incident in January 2016. We find that this legitimate interest has, to a very substantial degree, been served by the disclosure of the redacted Report and the confirmation by KCL that a number of students more than zero but fewer than five were sanctioned as a result of the incident with which we are concerned. We consider that this information answers many of the concerns put to us in the witness evidence and argument in his case (and answers grounds of appeal 4, 5 and 6).

56. We also accept that there is a legitimate interest in the remaining requested information notwithstanding those disclosures, but we must proceed to balance the value of that information against the rights of the data subject(s).

57. In so doing, we are satisfied that there is a reasonable expectation of privacy on the part of the data subject(s) in this case. This arises from KCL's Misconduct Regulations, where Regulations 2.7 and 2.8 create, in our view, an expectation of privacy in relation to the disciplinary process itself. We accept that there is a limited

provision for disclosure at Regulation 6.3, but we are not persuaded that it provides for disclosure to the world at large as is the case with disclosure under FOIA. That is not to say that KCL could not choose to disclose information to those to whom it considers Regulation 6.3 applies, outside of the provisions of FOIA.

58. We agree with Mr Hopkins that the fact that the alleged misconduct took place in public makes no difference to the expectations of the data subject(s) in respect of the disciplinary process. As to Article 8 ECHR, we find that it is engaged in the context of internal disciplinary proceedings at a university. The authorities to which we were referred consider different contexts and may be readily distinguished.

59. Having balanced these competing interests carefully, we find are not persuaded that disclosure of the information requested in this case can be made in accordance with the Data Processing Principles. We reach this conclusion because the information already in the public domain answers the concern identified as to whether KCL did anything about the incident. None of the remaining questions can, in our view, be answered without unwarranted prejudice to the rights of the data subject(s). It follows we are satisfied that s. 40 (2) FOIA is engaged in this case and that provides an absolute exemption to the duty of disclosure.

60. Our overall conclusion is that there is no material error in the Information Commissioner's Decision Notice, and so we must dismiss this appeal.

Postscript

61. Some of the material originally supplied by the Information Commissioner was not included in the closed bundle at the direction of the Registrar. However, the index to the closed bundle was not amended to reflect this, so the Tribunal arrived at the hearing thinking that we had some pages missing from the closed bundle. We asked for these pages at the hearing and they were handed up. We subsequently discovered that the documents handed up by the Information Commissioner's representative were in fact the ones which had been ruled out of the closed bundle, so we did have a complete closed bundle but had been misled by the index. We confirm that we did not consider the documents that were handed up in making this Decision. We apologise for the confusion.

(Signed)

ALISON MCKENNA **DATE: 30 April 2018**

CHAMBER PRESIDENT

This decision is amended under Rule 40 on 18 May 2018