



Appeal number: EA/2017/0220/V

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

CYRIL BENNIS

Appellant

- and -

THE INFORMATION COMMISSIONER

**First
Respondent**

-and -

**STRATFORD ON AVON
DISTRICT COUNCIL**

**Second
Respondent**

Before:

**JUDGE MOIRA MACMILLAN
MR JOHN RANDALL
MR DAVE SIVERS**

Sitting in public on 10 February 2021

Appearances:

The Appellant represented himself

The First Respondent was not represented

The Second Respondent was represented by Mr Robin Hopkins

DECISION

1. The appeal is dismissed.

MODE OF HEARING

Remote oral hearing

2. The hearing was convened by CVP. Some parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

3. The Tribunal held the hearing in public, within the meaning of rule 35A (3)(c) of the Chamber's Procedure Rules¹.

Bundle

4. The Tribunal considered an agreed electronic bundle consisting of:

- (a) An open bundle of evidence comprising pages 1 to 146.
- (b) A closed bundle comprising pages 1 to 5.
- (c) Additional documents comprising pages 1 to 121.

REASONS

Background to Appeal

5. In September 2016 the Appellant made a complaint to the Second Respondent ('the Council') about the conduct of a District Councillor ('Councillor A'). The complaint was considered by the Council's Monitoring Officer, who sought the views of two Independent Persons ('IPs') appointed under the Localism Act 2011. Thereafter, on 13 January 2017, the Monitoring Officer informed the Appellant by letter that his complaint would not be investigated any further.

6. On 23 January 2017 the Appellant made a request to the Council for information in the following terms:

"I have requested under the Freedom of Information Act all correspondent [sic] relating to my complaint".

7. On 17 February 2017 the Council responded to the information request. It provided the majority of the information held but refused to provide the IPs' views on the complaint, relying on ss. 36(2)(b) & 36(2)(c), s. 40(2) and s. 40(3)(a)(i) of the Freedom of Information Act 2000 ('FOIA').

8. The Appellant complained to the First Respondent ('the Commissioner') pursuant to s. 50 FOIA. On 4 September 2017 the Commissioner issued Decision Notice FS50669439, upholding the Council's decision in relation to ss. 36(2)(b)(i) and 36(2)(c).

9. The Commissioner concluded that it was reasonable for the Council to have withheld information comprising the IPs' views on the complaint, on the basis that publication would be likely to inhibit the free and frank provision of future advice, and would be likely to be otherwise prejudicial the effective conduct of public affairs.

10. The Commissioner went on to apply the public interest test set out in s. 2(2) FOIA and decided that the public interest in the withheld information being disclosed was outweighed by the public interest in the exemption being maintained.

¹ <http://www.legislation.gov.uk/ukxi/2020/416/article/6/made>

11. The Commissioner was not required to consider whether the Council had been correct to rely on the other exemptions cited,² and did not require the Council to take any further steps.

Appeal to the Tribunal

12. The Appellant's Notice of Appeal dated 29 September 2019 focussed on the application of the s.2(2) public interest test. He submitted that (i) the importance of transparency in the context of local democracy was such there is a strong public interest in favour of publication of the withheld information and (ii) publication would not be prejudicial to the IPs' position of independence.

13. The Commissioner's Response dated 17 November 2017 maintained her analysis as set out in the Decision Notice.

14. The Council's Response dated 19 December 2017 explained the requirements of ss. 25 to 37 of the Localism Act 2011 in respect of the investigation of complaints, including the role and involvement of IPs. The Council maintained its reliance on the s. 36(2) and s. 40(2) exemptions, adopting the Commissioner's submissions in relation to the former.

15. The Appellant's Reply to the Commissioner dated 3 December 2017 and to the Council dated 8 January 2018 emphasised his view that disclosure of the requested information was necessary in order to maintain the electorate's confidence in the Council's integrity and procedures.

16. This appeal was previously considered by a differently constituted Tribunal, and a Decision promulgated on 18 May 2018. The previous Decision was set aside by the Upper Tribunal and the matter remitted for fresh consideration.

Law

17. The obligation of a public authority to disclose requested information, if held, is contained in s. 1(1)(b) FOIA. Part II FOIA sets out a number of exemptions to the obligation, some of which are subject to a public interest balancing exercise set out in s. 2(2)(b), namely whether "*in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*"

Section 36

18. The s. 36 exemption is subject to the s. 2(2)(b) public interest balancing exercise. The relevant parts of s. 36 are as follows:

36.— Prejudice to effective conduct of public affairs.

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

(a) ...

(b) would, or would be likely to, inhibit—

(i) the free and frank provision of advice, or

(ii) ...

² [IC v Malnick and ACOBA \[2018\] AACR 29](#) [2018 AACR 29ws.pdf \(publishing.service.gov.uk\)](#)

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

19. In *Information Commissioner v Malnick and ACOBA [2018] UKUT 72 (AAC)* the Upper Tribunal provided guidance on the application of s. 36(2). It confirmed that Parliament had conferred responsibility on the qualified person (“QP”) for making the primary judgement as to prejudice in this context, since the QP is well placed to do so by virtue of their seniority and knowledge of the workings of the relevant public authority. The Upper Tribunal described a 2-stage process:

“ 31.....first, there is the threshold in section 36 of whether there is a reasonable opinion of the QP that any of the listed prejudice or inhibition (“prejudice”) would or would be likely to occur; second, which only arises if the threshold is passed, whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing it.

32...The threshold question under section 36(2) does not require the Information Commissioner or the FTT [First Tier Tribunal] to determine whether prejudice will or is likely to occur, that being a matter for the QP. The threshold question is concerned only with whether the opinion of the QP as to prejudice is reasonable. The public interest is only relevant at the second stage, once the threshold has been crossed. That matter is decided by the public authority (and, following a complaint, by the Commissioner and on appeal thereafter by the tribunal).”

20. The Upper Tribunal decided that ‘reasonable’ for the purposes of section 36 is intended to mean substantively reasonable rather than procedurally reasonable (paragraph 57). The decision as to whether a QP’s opinion is ‘reasonable’ should be informed by the nature of the exercise the QP has performed (paragraph 28).

Section 40(2)

21. At the date of the Council’s response to the information request, s. 40(2) referred to the Data Protection Act 1998 (‘DPA’). The relevant sections read 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...

(4) ...

(5) ...

(6) ...

(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.

22. The definition of “personal data” in s. 1(1) is “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;”

23. The relevant principle in Part 1 of Schedule 1 DPA is the first data protection principle:

“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,...*”

24. Schedule 2 condition 6 provides:

“(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.”

25. In *South Lanarkshire Council v Scottish Information Commissioner [2013] UKSC 55* [18] the Supreme Court identified 3 questions that are relevant to the interpretation and application of condition 6(1):

(i) Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?

(ii) Is the processing involved necessary for the purposes of those interests?

(iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

26. The Court confirmed that the legitimate interest referred to in question (i) may be a purely private interest. In relation to question (ii):

a. Something may be necessary if it makes furthering the purposes of a legitimate interest more effective;

- b. If the processing would involve an interference with the data subject's right to respect for their private life, then European jurisprudence provides that the requirement for a 'pressing social need' set out in article 8(2) of the European Convention on Human Rights must be fulfilled; and
- c. If the processing does not involve an interference with article 8 rights, then community law has established that 'necessity' should be understood as part of the proportionality test, with 'necessary' meaning 'reasonably' rather than absolutely or strictly necessary.

27. The same three questions were considered and expanded upon by the Upper Tribunal in IC v Rodriguez-Noza and Foster [2015] UKUT 449 (AAC):

[29] The first stage is to consider whether 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 would be disclosed. If not, it is not necessary to proceed to the other stages...

The second stage only arises if the consideration passes the first stage. It is then necessary to identify the rights and freedoms or legitimate interests of the data subject. If there are none, it is not necessary to proceed to the third stage.

The third stage only arises if the consideration passes the first and second stages. It is then necessary to consider whether the processing is unwarranted, or overridden, in any particular case by reason of prejudice to the data subject's rights, freedoms or legitimate interests.

28. The powers of the Tribunal in determining this appeal are set out in s.58 FOIA:

"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."

29. 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. The standard of proof is the balance of probabilities.

Evidence

30. The Council relies on a witness statement by Philip Grafton, who is Head of Law and Governance. Mr Grafton is the Council's statutory Monitoring Officer, with responsibility for matters connected to the conduct of councillors and is also the 'qualified person' ('QP') for the purposes of s. 36 FOIA.

31. Mr Grafton states that the withheld information comprises one communication from each of two IPs, both of whom provided input to the Council in relation to a complaint by the Appellant against Councillor A. The complaint was considered in accordance with the Councillor's Code of Conduct,

which is regulated by Part 1, Chapter 6 of the Localism Act 2011, and with the procedure for dealing with members complaints, both of which are exhibited.

32. Mr Grafton summarises the complaint procedure as follows:

- a. the Monitoring Officer considers complaints, taking into account the views of the IPs.
- b. If the Monitoring Officer concludes that the complaint should be dismissed without formal investigation, the complainant and person to whom the complaint relates are informed of this, but the views of the IPs are not published.
- c. If, however, the complaint proceeds to formal investigation, the outcome of which is a public hearing before a sub-committee of the Council's Audit and Standards Committee, then the IPs' comments, together with all other relevant material, is made public

33. Mr Grafton states that the Council's procedure reflects the approach commonly taken by local authorities, and that where there is insufficient merit in a complaint for it to proceed to investigation, *"the general position is that it would be unfair to the member for confidential and candid 'internal' communications about them to be published"*. He goes on to say:

"...the IPs themselves expect their input to be confidential and not for publication unless the case itself is sufficiently serious. If so, IPs understand and expect that the confidentiality of their candid communications gives way to open justice considerations. But if that threshold is not met, they expect their input to be confidential. That is the long-established practice, and it applied in this case."

34. Mr Grafton's evidence is that there may be circumstances in which the Council would disclose IP communications, even though a complaint has not been taken forward, such as cases in which there has been a procedural failure or where there was objective evidence that the decision is unreasonable. However, he describes in general, full transparency in the Council's complaint process being delivered only when a case proceeds to public hearing.

35. In relation to the application of the s. 36 exemption, Mr Grafton states that the robustness and effectiveness of the complaint's procedure depends on the IPs being able to communicate candidly and without fear of publication, absent a case-specific reason such as the circumstances outlined above. He further states that the complaint investigation process would be damaged if the IPs' candour became constrained when expressing views about a complaint they consider should not be taken forward, and that a loss of candour is the likely outcome of disclosure in this case.

36. In Mr Grafton's view it would be equally problematic were the Council to adopt a process whereby it publishes the IPs' views when these are expressed in anodyne terms, and withholds from publication views that use more candid language, since this would lack consistency, is likely to lead to inappropriate inferences being drawn when views are not published and, ultimately, would undermine the confidence of the IPs in their ability to freely express of their views.

37. In relation to the s.40(2) exemption, Mr Grafton states that the withheld information comprises the personal data of both Councillor A and the IPs, and points out that the IPs' views have not been seen by the Councillor as is usual practice where a complaint is not taken further. His evidence is that *"[b]oth the IPs and the elected member expect that such data will not ordinarily be disclosed in a case like this...The Council's position is that it would be unfair and distressing for this personal data to be disclosed in this case, and that there would be risks to the reputations of elected members if IP communications about them were to be made public."*

Submissions

Appellant

38. The Appellant submits as follows:

- a. The key issue for consideration is the transparency and accountability of procedures involving elected members in Local Government.
- b. The principle of a local authority's accountability to the public, which includes demonstrating that its decisions, whatever the final conclusion, were reached in an open, fair and reasonable manner, is essential for an authority to maintain its integrity and to ensure the confidence of the local community.
- c. The local community is entitled to see how the decision on this complaint was arrived at. He describes as 'troubling' the suggestion that IPs would be less open if they believe their views will be made public.
- d. In response to a question by the Tribunal, the Appellant confirmed that, in his view, all information about complaints should be made public, irrespective of whether the complaint was found to be unsubstantiated or unwarranted.

39. The Appellant states that the purpose of his request is to find out, as a member of the public, how the Council reached its decision in relation to the complaint and how the IPs, whose role is to represent the community, arrived at their assessment.

First Respondent

40. The Commissioner maintains the analysis set out in her Decision Notice. She submits that:

- a. In relation to s. 36, it is common ground between the Parties that the opinion of the QP as to likely prejudice is reasonable.
- b. The Tribunal must therefore consider the balance of public interests, in which context the opinion of the QP as to prejudice must be given weight as an important piece of evidence.
- c. The risk of inhibition upon an individual's candour and willingness to speak or write openly has been repeatedly recognised as a category of prejudice to public interest that could result in a deterioration in the quality of decision making.
- d. Therefore, notwithstanding the important public interests in ensuring transparency and consistency in decision making, weight should be given to the QP's reasonable opinion that publication would inhibit the future provision of advice by IPs to the Council, and would be likely to prejudice the effective conduct of public affairs in the future.
- e. Further, although at the date of the Council's decision there was wider public interest in the planning decision being considered by Councillor A at the date of complaint, there was not a similar public interest in how the Council reached the decision not to investigate the complaint.
- f. On balance, therefore, the public interest favours the information being withheld in reliance on s. 36(2)(b)(i) and 36(2)(c).
- g. In relation to the s. 40(2) exemption, which was not considered in the Decision Notice, the Commissioner submits that the withheld information comprises the personal data of

both Councillor A and the IPs. She agrees with and adopts the Council's submissions on this issue.

Second Respondent

41. The Council submits as follows:

- a. In relation to s.36, the Appellant's dispute is with the balance of public interests, rather than whether the opinion of the QP is reasonable.
- b. The Appellant's interest in how his complaint was decided is a private interest, and therefore of no relevance in this context.
- c. Although there is a public interest in transparency about complaint decisions concerning elected members, this should be afforded only limited weight in circumstances where the complaint is dismissed on the basis that it lacks merit, unless there is an objective reason to doubt the soundness of that decision.
- d. The competing public interests against disclosure are weightier than those in favour. These include the importance to the proper functioning of the Council's complaints system of maintaining the ability of IPs to provide candid advice. Were IP advice to be disclosed without sufficient cause, candour is likely to be diminished, as the advice is likely to be tempered with an eye to public opinion.
- e. This would impede the frankness of the advice and thus the effectiveness of the complaints process.
- f. Although IP advice will be published if complaints proceed to a public hearing, this can be factored into the advice given without the IP becoming unduly guarded in every case.
- g. Further, the complaints process would become slower and less efficient if IPs become more reluctant to express their views in writing, or if they feel inclined to craft their advice in a way which is less likely to attract public criticism.
- h. These detriments could not be avoided by disclosing IP advice in "straightforward" cases, since this would lead to inferences being drawn in other cases and would again slow down the process.

42. In relation to s. 40(2) the Council submits:

- a. that the withheld information is exempt on the basis that it is the personal data of both Councillor A and the IPs.
- b. That Councillor A had a reasonable expectation of privacy, based on the Council's usual practice, and the practice of other local authorities in cases where a complaint is found to lack merit.
- c. Councillor A's rights under article 8 ECHR are therefore engaged. As a consequence, her data can only be disclosed if it is reasonably necessary to do so by reason of a pressing social need, and if disclosure is the least intrusive way of achieving that aim.
- d. That there is no pressing social need that would be served by public disclosure of Councillor A's data, and to do so would be a disproportionate interference with her rights.

- e. That Councillor A has not consented to disclosure and has not seen the withheld information. It would therefore be unfair to disclose it to the public as she would be unable to prepare herself for the consequences and would be at risk of reputational damage.
- f. The withheld information also comprises the personal data of the IPs because it expresses their personal opinions, provided as personal individuals rather than as employees or agents of the Council.
- g. The IPs have also not consented to disclosure and had a reasonable expectation that their opinions would not be published in these circumstances.

Conclusion

s. 36

43. Although the Appellant has described as “troubling” the suggestion that IP’s advice would be less candid if made public, we are satisfied that the focus of his grounds of appeal is the public interest balancing test (the second stage identified in *Malnick*) rather than the reasonableness of the QP’s opinion as to prejudice (the *Malnick* threshold question).

44. We note the generalised nature of the Appellant’s case, which relies on the important public interests of transparency, openness and accountability in relation to public sector activities. He submits that the weight to be afforded to these interests is such that s. 36 should have little or no application in the context of a complaint made against an elected official of a local authority, irrespective of whether the complaint has merit.

45. We agree that transparency, openness and accountability are always important public interests, but are satisfied that these should not be afforded especial weight in the context of local democracy. Rather, the weight afforded must always be fact dependant and varies according to context.

46. We note that the Council has provided the Appellant with most of the information held, and that Councillor A has already agreed to a degree of transparency in relation to her personal data, having agreed that the Appellant could see the comments she made in response to his complaint and in relation to her actions.

47. In the context of the investigation of a complaint found to be unwarranted, we accept that the complainant will have a particular interest in seeing all information that led to such a conclusion. However, this is a private interest, and is therefore irrelevant to the public interest balancing exercise.

48. We are satisfied from Mr Grafton’s evidence that Council takes a flexible approach to its assessment of the public interest in the publication of IP’s comments, although note in passing that the category of cases cited by him in which this might happen could be wider, for example to include complaints in relation to which there is a strong local interest.

49. Having considered his witness evidence and the Parties’ submissions, we are further satisfied that, notwithstanding this flexible approach, the Council’s usual practice, in line with that of other local authorities, is that IPs’ opinions will generally be treated as confidential and will only be published when a complaint proceeds to a public hearing.

50. We find that, in the context of this case, the IPs provided their opinions on the merit of the complaint with a reasonable expectation that these views would not be made public.

51. We have considered whether, in light of the Council’s flexible approach and the possibility of a public hearing, the candour with which IPs express their opinions might already be inhibited by the

possibility of publication. We conclude that it is not, noting Mr Grafton's evidence that an outcome that includes publication rarely arises, if at all.

52. We further conclude that there is a significant risk that the candour, and therefore the quality, of the IPs' advice to the Council would be diminished were it to become more likely that it will be made public. This is because we accept the Respondents' submissions as to the risk of self-censorship were an IP to become concerned that their views are likely to be made public. We find in addition that this risk is particularly acute in the context of local democratic activities, where the IPs are named and are members of the local community.

53. We are satisfied that the ability of the IPs to provide candid and uncensored advice to the Monitoring Officer is an important part of the Council's complaint system. We find that any inhibition of the IP's advice is likely to reduce the effectiveness of the complaints system overall and to have a negative impact on the quality of decisions taken. We find in addition that there is a strong public interest in avoiding detriment to the Council's process for dealing with complaints made against elected officials.

54. Having considered all of these factors, we conclude that the public interests of transparency, openness and accountability are outweighed in this case by the significant public interest in avoiding the risk of inhibition of the IPs' candid advice, and in maintaining the effectiveness of the Council's complaint process that might otherwise be undermined.

S. 40(2)

55. We are satisfied that the withheld information comprises the personal data of both Councillor A and the IPs, in accordance with the definition in s. 1(1) DPA.

56. Considering in turn the three questions identified by the Upper Tribunal in *IC v Rodriguez-Noza and Foster* in relation to Schedule 2 condition 6(1) of the DPA:

- a. We are satisfied that the Appellant has a private interest in seeing the comments that formed part of the determination of his complaint, and that this is capable of being a 'legitimate interest' for the purposes of the first question;
- b. Given our previously stated findings in relation to the Council's process for dealing with complaints, including the established precedent of IPs' advice to the Monitoring Officer being treated as confidential, we are further satisfied that both Councillor A and the IPs have a legitimate expectation of privacy in relation to the withheld material.
- c. Having then considered the third question, we find that the Appellant has failed to identify any consideration in favour of publication that amounts to a 'pressing social need' or any other reason capable of overriding Councillor A's right to respect for her private life.
- d. We reach this conclusion having noted that Councillor A has not seen the IP's comments. We are therefore satisfied that publication would be unfair to Councillor A for the reasons put forward by the Council. We find in addition that publication of an unsubstantiated complaint against an elected official gives rise to a risk of reputational damage.
- e. Although the Council submits that similar considerations apply to the IP's personal data, we note that the IPs' role is a formal appointment and appears, from submissions, to be public facing. It also appears that the names of the IPs in the case are already known. It is not immediately apparent how the Council's reliance on s40(2) distinguishes the personal data aspects of the IPs' advice to the Council from that of

senior civil servants, whose names are publicly known and whose advice on matters affecting central government policy are regularly the subject of information requests, where s. 40(2) is not relied upon.

- f. We conclude that there is insufficient information available to us about the role and function of the IPs for us to determine the third question in *IC v Rodriguez-Noza and Foster* in relation to their personal data, as it seems to us that a different balancing exercise may be required. However, a determination of the Council's reliance on s. 40(2) in relation to the IPs is not required for present purposes.

57. For the reasons given, the appeal is dismissed, and the Decision Notice of 4 September 2017 is upheld.

(Signed)

Judge Moira Macmillan

DATE: 22 June 2021
Promulgation Date: 23 June 2021

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