First-tier Tribunal

(General Regulatory Chamber)

Information Rights **Appeal Reference: EA/2019/0066V**

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50710245

Dated: 05 February 2019

Sitting Remotely (by video) on: 07 and 08 June 2021

Before

JUDGE ROBERT GOOD

TRIBUNAL MEMBER(S) MR PAUL TAYLOR AND MR DAVE SIVERS

Between

NICK MARTIN-CLARK

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

HOMES FOR HARINGEY

Second Respondent

Subject Matter:

Freedom of Information Act 2000 (FOIA)

S.1 (Information Held), S.21 (Information Accessible), S.40 (Personal Information), S.41 (Confidential Information).

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

The decision of the tribunal is that the Resident Scrutiny Panel's Audit Report is exempt from disclosure by Section 41and some is exempt under S. (40)(2) FOIA.

The information given to Homes for Haringey by the Residents Scrutiny Panel, identified as S.40/S41 documents in the closed bundle is exempt from disclosure by Section 41 and some is exempt under S.40(2) FOIA.

The information identified by Homes for Haringey as publicly available has now been provided and is no longer an issue in this appeal.

The tribunal agrees that the other information (74 documents), identified by Homes for Haringey is outside the scope of the request.

Background

1. This appeal relates to an audit, prepared on behalf of Homes for Haringey (HfH) by Haringey's Resident Scrutiny Panel (RSP) into Haringey Leaseholders' Association (HLA). The audit was completed in September 2014.

2. Initially, only a summary report was published. This had been the plan from the outset. Those who were interviewed for the report were told that the information they gave would be treated as given in confidence.

3. Mr Martin-Clark requested that the recommendations of the RSP report should be disclosed. At one point, during that request he also requested the full report but later agreed to limit the request to the recommendations. There was

a complaint to the Information Commissioner (ICO). Following investigations and advice from the ICO, HfH disclosed the recommendations in June 2017.

The Request

4. On 26 July 2017, Mr Martin-Clark requested disclosure of the full report and the documents and notes relating to the interviews that were conducted in the preparation of the report. He wrote [1] "We note that you have said you believe the rest of the report (and the evidence on which it was based) is exempt under Section 30 and/or 40 of FIOA. Can we ask for this to be reviewed? Without going into details at this stage could we ask that some compromise, for instance the redaction of names, be considered? The HLA has emphatically never sought to intimidate anyone. Of course there have been some difficult situations all round. [2] I would also like to ask you to give special consideration to releasing the documents and notes relating to the interviews I took part in myself (as well as those of other committee members as I think these are not subject to the same confidentiality concerns."

5. HfH refused to disclose the requested information. This was confirmed to be on the basis of Section 41 and Section 40 and on the grounds that it did not hold some of the requested notes because they had been destroyed.

6. Mr Martin-Clark complained to the ICO on 9 November 2017. The decision of the ICO of 5 February 2019 was that request [1] the full audit report was exempt under Section 41(1); that HfH does not hold the full written notes associated with the interviews; that some of the information which falls within the scope of request [2] is exempt under Section 21(1) as it is accessible by other means; and the remainder of the information that HfH holds relating to request [2] – emails, letters, financial information and summaries of notes of interviews with third persons is exempt information under Section 41(1).

7. In respect of request [2], Mr Martin-Clark confirmed that he was seeking the notes of the interviews and the documents used to prepare the line of questioning that was then followed in the interviews. This mirrors HfH's approach to request [2], which identified the documents considered by the RSP in its work preparing for the interviews.

8. The IC suspended the investigation for a period at Mr Martin-Clark's request re-opening it in May 2018.

The Appeal

9. Mr Martin-Clark appealed to this tribunal. In his grounds of appeal, he states that the ICO was wrong to hold that S.41 applied to the full report when she had never received this report, and that the report must contain information which was not from interviewees and therefore not confidential and that the ICO should have considered the full report and whether there were sections which should be disclosed and that the ICO was wrong to conclude that the 'Coco' test was satisfied. This test has three limbs: the information must have the necessary quality of confidence; the information must have been imparted in circumstances importing an obligation of confidence; and there must be an unauthorised use of the information to the detriment of the person communicating it. In addition, the ICO had identified the public interest in disclosure too narrowly.

10. The appeal stated that the information sought under request [2] did not have the necessary quality of confidence to bring it within S.41. Again, it was stated that this was, in part, because the ICO had not seen all the material but only a sample provided by HfH and was wrong to conclude that it was covered by

S.41 simply because this material was passed to HfH in confidence. Consideration of the actual material was necessary.

11. The ICO response was that there is no requirement on the ICO to see all the material and the relevant test for the tribunal is to consider whether the Decision Notice is in accordance with the law. The tribunal conducts a complete re-hearing and may consider evidence and submissions not before the ICO. Subsequently, having seen the full report the ICO maintained her position that, while it may be possible to identify some non-confidential elements these are "peripheral or trivial" and that a line by line exercise is not justified and would produce "unconnected scraps of information that are either trivial, or are merely part of the architecture of the document, or are already known to the requester and the public".

12. In respect of Request [2], the ICO maintains that considering the classes of documents (letters and emails from individual members of the HLA provided to RSP in confidence; bank details and financial transactions; interview notes and summaries; extracts from a draft of the full report) it is clear the documents are confidential by their very nature and they were provided to the RSP on the basis of confidentiality.

The hearing on 12 September 2019

13. The ICO stated that it was not a good use of her limited resources to attend the hearing and HfH had not sought to be added as a second respondent. Consequently, only the appellant attended the first hearing on 12/09/2019. Mr Martin-Clark was represented by counsel, Mr James Cornwell. Mr Martin-Clark, Ms Sue Brown and Mr Roger John gave evidence.

14. In response to submissions by counsel concerning the redaction of parts of two letters dated, 27/07/18 and 29/01/19, the tribunal provided the following gist.

"The redacted passages in the two letters of 27/07/18 and 29/01/19 do not disclose information which is materially different from that included in the HfH submission of 06/06/19. However, these are passages from which it would be possible to discern the identity of individuals".

15. The submissions made at the hearing on 12/09/2019 were that it was wrong for HfH and the ICO to have taken a blanket approach over whether the report is confidential, that it is clear from reading the recommendations that some parts of the report cannot be confidential. In addition, HfH has only provided representative items of the other information requested to the ICO, so that the ICO cannot be confident that all the information meets the S40 or S41 exemption. The submission also argued that there was insufficient information provided in relation to the S.21 information.

16. The tribunal decided that it could not fairly determine the appeal without the assistance of HfH and without further information. The hearing was adjourned with the following directions.
    a. Homes for Haringey (HfH) is joined as a party to this appeal.
    b. HfH is to provide to the Tribunal, within 28 days of the issue of this decision, the following information:
        i. A copy of all the information withheld under S40 and/or S41, not already sent to the ICO.
        ii. A list and either a copy or a URL address or other address of all the information which HfH states is available through other sources.
        iii. A list of the information withheld under S40 and/or S41 and an explanation as to why the documents are exempt. It will be sufficient for the information to be grouped together with an explanation as to why the group of documents is exempt. In relation to the report, it is sufficient for appropriate sections to be grouped with an explanation for the exemption. It may assist

HfH in the preparation of these explanations if it first considers the ICO guidance on confidentiality which may assist it in both deciding and explaining whether and how the exemption applies.

iv. On receipt of this information, the tribunal will consider how best to proceed. The information received from HfH is to be held, pursuant to Rule 14(6), on the basis that it will not be disclosed to anyone except the Information Commissioner. To do otherwise would defeat the purpose of the proceedings.

17. In reply, HfH re-iterated its responses to the ICO and its submission to the tribunal of 06/06/2019 and stated that the RSP report and the related information, documents and interviews were exempt under Section 41 and the personal data was also exempt under Section 40. HfH provided an open schedule identifying where information is to be found in the public domain and a closed schedule of additional material withheld. HfH submitted that the information withheld cannot be meaningfully separated "as, for example, the analysis contained in the Report would not exist were it not for the confidential information which was provided to the Scrutiny Panel." HfH also provided a witness statement from Mr Puneet Rajput.

18. Following from this submission, Mr Martin-Clark provided a response, a further submission and a second and third witness statement. The ICO provided a further response.

<u>The hearing on 7and 8 June 2021</u>

19. The appeal was first listed for 2 days on 17 and 18 September 2020. The hearing was scheduled to be conducted by video because of restrictions in relation to the Covid-19 pandemic. This hearing was then postponed due to a stay in relation to an issue concerning territoriality. This has now been

resolved so that there was no legal impediment to the appeal being determined.

20. This hearing was conducted by video over two days. The parties were represented by counsel. Mr Martin-Clark was represented by Mr Sam Fowles. HfH was represented by Mr Julian Blake. Both Mr Fowles and Mr Blake provided skeleton arguments and an agreed list of issues in dispute and a list of authorities.

21. The documents were provided digitally. However, some of the documents have three numbers identifying them. The original bundle was in a paper format and numbered. Subsequently, solicitors for Mr Martin-Clark produced a digital bundle, which was of great assistance to the hearing. However, that has a different numbering system. Furthermore, it is divided into different sections (A-F) and within each section there is a third numbering system. The digital bundle is identified as "Complete Consolidated Open Bundle Recd 02.06.21". However, as well as the 6 sections of this bundle, there are a further 12 separate sections reflecting additional documents submitted later or during the course of the hearing. There is also a closed bundle which has 8 sections. These comprise the full report, the related documents used and gathered in the compilation of the report (Section 40/41 documents), a redacted full report with other correspondence which was part of a Rule 14 application made on 4/06/2021 and agreed to on 6 June 2021 at the hearing.

Submissions and Findings

22. The tribunal had heard oral evidence from Mr Martin-Clark, Ms Sue Brown and Mr Roger John at the previous hearing. It was agreed that it was not necessary to hear further evidence from these witnesses. Mr Martin-Clark submitted two further written witness statements from Mr Charles Howard and Mr Peter Gilbert, stating that they now consented to the release of all the

material relating to their interviews by the RSP. Mr Gilbert was asked some questions by Mr Blake. Mr Gilbert stated that he had no objection to disclosure of information relating to him, but he could not now recollect what he had said or recall any related documents because it was such a long time ago.

23. Mr Rajput gave evidence in both the open session and the closed session. His evidence was that he had received documents relating to the audit of HLA from the RSP, the 'S40/41 documents', and that he had been informed that any handwritten notes had been destroyed. He was not clear when this had happened. His evidence was that the RSP, whose role was as an independent assessor of the performance of HfH from the point of view of the users of their services did not have, as far as he was aware, an information retention schedule. His evidence was that there were no other documents and notes other than those given to him by the RSP and contained in the closed bundle. On further questioning, he accepted that Haringey Council's document retention policy applied to HfH, and that it also applied the RSP in regard to this audit.

24. The gist of the closed session is as follows. "The tribunal were taken through the bundle of withheld information. The general content of the bundle was discussed to assist the Tribunal in navigating and understanding how it is put together. They were provided with further examples of documents that fall within the following categories: (i) letters and emails from individual leaseholders and former members of the HLA which contain personal and sensitive information and which were provided to the scrutiny panel in confidence; (ii) bank details and financial transactions; (iii) interview summaries (described as interview notes); (iv) extracts from the draft scrutiny panel report. They were also taken to documents which HfH submits are outside of scope. The Tribunal were then taken to the newly highlighted version of the RSP audit report and explanations were given as to why particular information was highlighted (disclosing direct quotations,

summarising evidence that it is said was in confidence or identifying confidential participants). It was explained that whilst HfH, acting in the interests of those who have raised concerns, maintains that the full report should not be disclosed, the highlighted bundle identified what – at the very least – HfH considered to be in particular need of protection."

25. Mr Fowles's submissions are set out in his skeleton argument. He offered and the tribunal agreed that he would send to the tribunal and Mr Blake his prepared speaking notes. Mr Fowles confirmed that these would only contain the submission he had made. This document was received after the conclusion of the hearing.

26. He said that there were factual errors made by HfH and unfounded allegations made against Mr Martin-Clark based on these factual errors. Mr Fowles argued that HfH should not be seen as a neutral 'honest broker' in this appeal as they have portrayed themselves. They should be correctly seen as an active participant in attempting to achieve their own goals, one of which was to de-recognise HLA. Mr Fowles highlighted a number of factual issues which he suggested showed that HfH misrepresented the true situation. He also made the observation that the RSP should never have been asked to provide the report and that the request was outside their remit. One of the consequences of this was that the report contained factual errors and that these errors contributed to the decision by HfH to derecognise HLA. These errors resulted in incorrect allegations against Mr Martin-Clark. This is relevant to the consideration of the public interest in disclosure.

27. In respect of Section 41, Mr Fowles submitted that not all the information was obtained from a third party and this information could not come within Section 41. He also submitted that it was not clear that those taking part in the audit had in fact been told that the information given would be confidential. No written statement to this effect had been produced and Ms Brown's

evidence was that she had no recollection of confidentiality being assured and Mr Martin-Clark's evidence was that it was only touched on. On an objective test, a claim for breach of confidence would not necessarily succeed.

28. Mr Fowles criticised the application by HfH of the S.41 exemption 'en bloc'. This was contrary to guidance given by the ICO, and was not, in any event, applied consistently by HfH because the Summary Report, which was published, was derived from confidential information.

29. Mr Fowles accepted that the Section 41 exemption was absolute. However, because a public interest defence is available against a claim for a breach of confidence, it is necessary for the tribunal to consider the public interest in disclosure. In this regard, Mr Fowles argued that both Article 6 and Article 8 of the ECHR were relevant; it was in the public interest to hold the public body to account; that it was in the public interest to expose inequity; and that the vindication of Mr Martin-Clark's reputation and his ability to do this was also a public interest.

30. In Mr Blake's submission, on behalf of HfH, if the tribunal accepted that the Section 41 exemption applied to the withheld material, then the exclusion was absolute and the public interest which could override such an exclusion was required to be a significant and important public interest. Whether or not, the report contained errors, or the importance of disclosure to the appellant, neither came close to meeting the required standard for public interest disclosure.

31. Mr Blake submitted that the evidence showed that the audit was conducted with an undertaking of confidentiality, as demonstrated in the documents and by implication in the two witness statements from Mr Howard and Mr Gilbert, who both now state that they are happy to waive this confidence. Furthermore, the witness statement of Ms Brown, while stating that she could not recall

being advised of confidentiality, recorded earlier in the statement that the audit would be conducted in confidence and that confidence extends to anything that can identify the person, and therefore covered the material obtained from participants on the basis of confidence. It was not that all the contents of the documents were necessarily confidential but also disclosure of them would enable the identification of the provider and breach confidence.

32. The relevant time for consideration is the time of the public authorities' response to the request. The request for information was made on 26/07/2017, the ICO in it her decision, identified the date of 25/10/2018 as the date HfH effectively conducted a review by confirming that it was maintaining its reliance on exclusions, information not held and information publicly available to withhold the disputed information.

33. Mr Blake identified two letters from Mr Martin-Clark, one dated 16/02/2018 (F-57) and the other 30/10/2018 (F-158). In both letters Mr Martin-Clark indicated that further legal proceedings against individuals were being considered.

34. Mr Blake submitted that the public interest was in non-disclosure because it was important to respect assurances of confidence given, there was evidence of distress at the prospect that disclosure might be ordered; that it was important to maintain confidence in the public authority; that if Mr Martin-Clark perceived a wrong there were other avenues he could pursue; and that the arguments concerning Article 6 and Article 8 did not displace the importance of maintaining confidentiality. Article 8 rights apply equally to the leaseholders as to Mr Martin-Clark and, in respect of Article 6, the process of a closed session has been long established as providing a fair hearing if a gist of that closed session is disclosed. That requirement has been satisfied.

35. In respect of the other issues, Mr Blake submitted that the request for the additional 74 documents was outside the scope of the request, that notes of interviews had been destroyed and that HfH had provided the Section 21 documents to assist Mr Martin-Clark. His final submission was that, in any event, Section 40 also applied to the information withheld.

36. The tribunal finds that the handwritten notes of interviews no longer exist. The interviews were carried out by the RSP, a voluntary organisation, at the request of HfH. It is accepted that the RSP was acting in this audit on behalf of HfH. This results in the actions of the RSP being those of HfH for the purposes of FOI. When this became apparent, all the documents in the possession of RSP in relation to the audit (the S40/41 documents) were handed over to Mr Rajput. The tribunal find that these were all the documents in the possession of the members of the RSP. Mr Rajput stated that there was no retention of documents schedule. He then agreed that this was not correct, and the rules required there to be one. He was able to identify that HfH relied on Haringey Council's schedule for retention of documents and provided this during the course of the hearing. However, it is clear to the tribunal that the RSP were not, at the time, aware of this document retention schedule, and that at some stage the handwritten notes were destroyed. Mr Rajput cannot say when this happened, but he stated that it took place before he was handed the S40/41 documents and the tribunal accepts his evidence, which is consistent with the other documents. There is no reference to the existence of other documents and in particular to handwritten notes.

37. The documents identified by HfH as publicly available under Section 21 have now been provided, thereby resolving this issue. However, Mr Fowles submitted that, in respect of one document, Mr Martin-Clark wanted to see the date it was created. It appears that the document has been scanned and therefore it is likely that the date of creation would be this date. In any event,

the tribunal find that the provision of the information is sufficient to satisfy the requirement of the Act.

38. The tribunal find that the 47 documents, identified by HfH, and now included in Mr Martin -Clark's submissions for disclosure are not within the scope of his request and not part of this appeal. They were all created after the report was completed. Mr Martin-Clark both in his request and then in clarification of that request stated, "the documents we were seeking were those used to prepare the questions for our interviews as well as the notes of what took place during them". HfH have identified this period as between June and September 2014. There are a further 27 documents, which it is submitted fall outside the scope of the request because they were not considered by RSP in the preparation of questions for interview. The tribunal accepts that these documents are outside the scope of the request and were not used to prepare the question for interview. It would appear that Mr Martin-Clark seeks these documents because they were revealed as existing during a trawl through all possible relevant documents conducted by HfH. Although identified, these documents are outside the scope of the request and therefore the scope of this appeal.

39. The Section 40/41 documents have been withheld by HfH because disclosure could lead to the identification of individuals and these documents were provided to the RSP on condition of confidentiality. The tribunal considered these in the closed session. These were all documents provided to HfH by RSP at their request. They are all documents provided during the audit as part of the interview and audit process. There is some repetition of these documents. The documents are as they were given to Mr Rajput. These comprise 100 documents and run to 859 pages although there are a significant number of blank pages and some repeated documents.

40. Having considered these documents, the tribunal finds that the description that HfH gave to the ICO is accurate. The documents are letters and emails from leaseholders, bank statements, interview notes and summaries and extracts from the draft RSP audit. The tribunal find that these documents were given to the RSP by individuals on condition of confidentiality. Most of these documents were available to a limited number of people and disclosure would also allow identification of the person who provided that document. It is suggested that an exercise of redaction or selection may elicit some documents or parts of documents that should not be excluded under Section 40 or Section 41. However, having looked at the documents, it is not proportionate to undertake such an exercise. The tribunal agree with the IC and her reasoning that these documents are properly withheld under S.41 and S40.

41. In preparation for the hearing HfH provided as part of the closed bundle a copy of the report in redacted form. In submission, it was argued that all of the report should be withheld, however, if the tribunal was going to order disclosure it should order disclosure only of the report as redacted by HfH and provided in the closed bundle. This was a helpful and pragmatic approach by HfH. The tribunal in adjourning the hearing in September 2019 and adding HfH as a second respondent had accepted Mr Martin-Clark's submission to the effect that it was necessary for the tribunal to consider whether at least some of the report should be disclosed. The submission at the first hearing referred to the some of the published recommendations which, it was argued, could not be related to any confidential information. It was submitted that the parts of the report relating to those recommendations should, as a minimum, be disclosed.

42. The tribunal finds that in conducting interviews and gathering information, the RSP gave assurances that information would be in given in confidence. Mr Fowles has argued that the absence of a specific written script of

confidentiality and the evidence of Ms Brown and Mr Martin-Clark, showed that it was either not mentioned or not emphasised.

43. It is clear from the terms of reference and other documents that there was an undertaking by HfH that information given to the RSP would be given in confidence. Ms Brown states she cannot recall what was said. Mr Martin-Clark states that confidentiality was not emphasised. The statement provided for the reconvened hearing from Mr Howard states that "I like others made a submission to the RSP in confidence and in good faith." As set out in Mr Blake's written submission, court proceedings have set out that confidentiality was a key element in the conduct of this audit, and this is also confirmed by Mr Rajput in his statement. The tribunal is in no doubt from the documents and statements that those who contributed to the audit did so on a confidential basis.

44. It is accepted that the test for breach of confidence is that set out by Megarry J in Coco v AN Clark (Engineers) Ltd [1968] FSR 415 at 419 – "three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, MR in the Saltman case…must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it."

45. The tribunal find that this test is satisfied in respect of the documents referred to as 'S40/S41' documents and in respect of the full report. Those who took part in the audit did so on a promise of confidentiality and they expected the information they provided to remain private. The tribunal also accepts that the participants would not have provided the information if they thought it would be disclosed. The tribunal find that the participants had a real fear of being litigated against by Mr Martin-Clark. It has been submitted that this fear

was unfounded, and that Mr Martin-Clark has no intention of pursuing individuals and his focus is on HfH. It is also suggested that pursuing legitimate grievances through the courts should not be regarded as a threat. This is unrealistic. Many people are frightened of litigation. It is a world they are unfamiliar with and are fearful both of the process and the potential cost implications. The tribunal are satisfied that there was a genuine fear of litigation and that participants would not have spoken and provided documents if this information was not going to remain confidential. These findings are consistent with the findings of the ICO as set out in her decision.

46. Mr Rajput described in his second witness statement an attempt to meet with participants to discuss the possibility of disclosing parts of the full report. He states "Unfortunately, my request was met with significant opposition. In one case, I received a letter from solicitors acting for a leaseholder, objecting to the meeting taking place and stating we must refrain from any disclosure and confirm that a redacted version will not be released to the Appellant. This meeting was abandoned. The tribunal accept that there are still concerns that further disclosure of information may result in a legal risk to those who provided information on conditions of confidence.

47. In the decision adjourning the hearing on 12/09/2019, the tribunal commented that Mr Martin-Clark "evidence is not consistent with his actions." In this hearing, it appears Mr Martin-Clark took exception to Mr Blake's closing submission prompting a suggestion from Mr Fowles that there should be an adjournment so that Mr Martin-Clark could give further evidence to refute what he perceived as attacks on his reputation. The tribunal did not agree to this course of action or agree that Mr Blake had made any allegations that needed further evidence to correct.

48. Section 41 only applies to information obtained from a third party. It was submitted by Mr Fowles that information given to the RSP under condition of

confidentiality by employees of HfH was not information from a third party and so could not be exempt under Section 41. This is an unusual situation. The RSP is independent of HfH. Its role is to independently examine and report on the performance of HfH. However, in this matter, it was acting on behalf of HfH. HfH staff who co-operated with the RSP did not do so under the assurance of confidentiality save for that provided by HFH's 'whistle blowing policy'; the fact remains however that HFH staff are not third parties. The tribunal find that such information is not covered by S.41(1) for this reason.

49. Section 41 is an absolute exemption. However, as set out by Mr Fowles, there are circumstances where public interest will be such as to override this exemption. It is suggested that the restoration of Mr Martin-Clark's reputation and the exposure of iniquity are sufficiently compelling public interest reasons for there to be disclosure. Secondly, that the factual errors in the Report and perpetuated by HfH represent an iniquity which is such that public interest should override the Section 41 exemption. The tribunal are not persuaded that this argument has merit. Mr Martin-Clark is pursuing a personal interest and the evidence does not suggest iniquity on the part of HfH. There remains significant public interest in confidences being respected and trust in a public body such as HfH. Similarly, any Article 8 rights Mr Martin-Clark wishes to rely on, apply also to the right to privacy of the participants.

50. HfH have provided, in the closed material, a redacted report, which allows disclosure of some parts of the report. This was provided as a possible compromise. Mr Blake's submission, supporting the view of the ICO, is that the full report was derived from information imparted under conditions of confidence and that this provides an exemption from disclosure under S.41 which applies to all the report. A publicly available summary report was published and HfH has since also published the recommendations.

51. The tribunal accept this submission. Having considered the full report, and the redacted full report, the tribunal agrees with the submissions of HfH and the ICO. The report was compiled from interviews and information provided by people in confidence. That duty of confidence attaches to the report. The tribunal agree with the submission by the ICO that the non-confidential elements are peripheral and that a line by line exercise of filleting the report would result in unconnected bits of the report or parts of the necessary architecture of a report. A summary report is already available which has, in essence, conducted this exercise.

52. HfH has conducted its version of filleting the report. The ICO has indicated some bits of the report which could be considered as potentially not confidential and the tribunal has itself looked in detail at the report. There is no complete consensus from these exercises. It is the tribunals conclusion that the exercise is not proportionate, that the report was compiled from information given in confidence and that any attempt to provide a redacted report would not add anything to the information available in the summary report and the recommendations.

53. HfH claim in the alternative to Section 41 that information given by HfH employees is covered by Section 40 (personal data) because they can be identified from it, either directly or indirectly.

54. At the time of the initial request (26/7/17) the Data Protection Act 1998 was in force; however, at the time of internal review (25/10/18) the Data Protection Act 2018 had replaced it along with the provisions of the General Data Protection Regulation ('GDPR') and modifications to s.40 FOIA.

55. Section 40 (as amended) provides that:

(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 does not fall within subsection (1), and

(b) the first, second or third condition below is satisfied.

(3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act –

(a) Would contravene any of the data protection principles…

56. Personal data is defined in s.3(2) of the DPA 2018 as "*any information relating to an identified or identifiable living individual*".

57. The relevant data protection principle which we must consider is Article 5(1)(a) of the GDPR. This provides that personal data shall be "processed lawfully, fairly and in a transparent manner in relation to the data subject"

58. At paragraph 100 of his skeleton argument, the appellant asserts that: "*(a) For the same reasons as those set out above, the public interest weighs in favour of disclosure. Much information that falls within section 40 can be disclosed on a public interest basis*". Although s.40(2) is absolute and thus no public interest test applies, we understand this to be an argument that the Appellant's legitimate interests outweigh those of the data subjects and their fundamental rights and freedoms, as set out under Article 6(1)(f) GDPR.

59. The Appellant has further argued that: "*(b) in any event, Section 40 applies only to personal data. The Tribunal can ensure that no personal data is disclosed by*

ordering that the identifying information in the Withheld Information is redacted. In practice this is likely to be limited to just the names of those involved."

60. In their skeleton argument at paragraph 79, HfH argue that: "*This exemption can be put simply. It would not be lawful to disclose to the Appellant the personal data of third parties, both those who directly participated in the RSP audit and any other third parties who are identifiable from information that was provided to the RSP by those individuals*"

61. HfH further argue at paragraph 80: "*None of those third parties have consented to such disclosure and, in the case of those who participated in the audit, real concerns have been expressed about such disclosure. Any weighing up of the alleged legitimate interest against the rights of those individuals would undoubtedly come down on the side of the third parties for the reasons already explained when addressing the public interest under s.41 of FOIA. The provision of such information would further be unfair to those individuals*." They add that: "*It is well established that anonymisation alone may not be sufficient to prevent identification: see eg. IC v Miller [2018] UKUT 229 (AAC) at §§10-16. In the present case, in light of the small number of possible contributors to the RSP audit, even anonymised quotations or summaries would lead to the identification of those individuals*." (paragraph 81).

62. The Tribunal accepts that it would likely be possible to identify employees from this personal data, even if names and job titles were redacted.

63. For processing to be lawful then, it is necessary to satisfy a condition set out under Article 6 GDPR. As HfH observed, none of the persons interviewed have consented to disclosure. The only remaining condition is set out at Article 6(1)(f), which states: "*processing is necessary for the purpose of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data…*".

64. The Tribunal finds that HfH's argument in relation to legitimate interests has some force. We set out our conclusions in relation to the public interest defence under S.41 at paragraph 49 and these are relevant to the balancing exercise required here. Mr Martin-Clark is pursuing a personal interest, though there is public interest in the ability of an individual to be able to seek redress where he or she feels that there has been iniquity. However, as we have observed, the evidence does not suggest iniquity on the part of HfH. There is a significant legitimate interest in not disclosing personal data obtained in circumstances where an individual has been encouraged to speak freely and openly. Even though not exempt by virtue of confidentiality, staff will no doubt have held a legitimate expectation that their personal data would not be disclosed, and this is an important factor to take into account. Any Article 8 rights which Mr Martin-Clark wishes to rely on apply equally to the participants.

65. For the above reasons we find that information from which staff can be identified is exempt by virtue of S.40(2).

66. In the same way, the personal data of the Appellant is exempt from disclosure under Section 40(1) because it is his personal data. This is an absolute exemption.

Signed

R Good
Judge of the First-tier Tribunal

Date of Decision: 30 June 2021
Date Promulgated: 02 July 2021