



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

EA/2011/0173

ON APPEAL FROM:

**The Information Commissioner's Decisions
No: FS50371039**

Appellant: John Morley
Respondent: Information Commissioner
Second Respondent: Surrey Heath Borough Council
Determined: On the papers
Date of decision: 31 May 2012

Before

**Anisa Dhanji
Judge**

and

**Michael Jones and Paul Taylor
Panel Members**

Subject matter:

Freedom of Information Act 2000 – personal data – whether the first data protection principle is breached.

Cases:

A v Information Commissioner (EA/2006/0012)

Commons Services Agency v. Scottish Information Commissioner [2008]

UKHL 47; 1 WLR 1550

Corporate Officer of the House of Commons v Information Commissioner
(EA/2007/0060)

Guardian News & Media Limited v Information Commissioner (EA/2008/0084)

Johnson v Medical Defence Union (2007) EWCA Civ 262

London Borough of Camden v Information Commissioner (EA/2007/0021)

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DECISION

The Tribunal by a majority, allows the appeal in part and substitutes the following Decision Notice in place of the Decision Notice dated 19 July 2011.

**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

EA/2011/0173

SUBSTITUTED DECISION NOTICE

Dated: 31 May 2012

Public Authority: Surrey Heath Borough Council

Address of Public Authority: Surrey Heath House
Knoll Road
Camberley
Surrey
BU15 3HD

Name of Complainant: Mr John Morley

The Substituted Decision:

By a majority, we allow the appeal in part and substitute the following Decision Notice in place of the Commissioner's Decision Notice dated 19 July 2011.

The Tribunal finds that the information specified in paragraph 84 of the Tribunal's determination is not exempt under section 40(2) of the Freedom of Information Act 2000 ("FOIA").

Except as set out above, the Commissioner's Decision Notice shall remain in effect.

Action Required

The Tribunal defers making any order to give effect to its decision until directions made further to paragraph 84 of the determination, have been dealt with.

Signed

**Anisa Dhanji
Tribunal Judge
31 May 2012**

**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

EA/2011/0173

REASONS FOR DECISION

Introduction

1. In 2010, planning application number 2010-647 made by the Surrey Heath Borough Council (the "Council"), was granted. It related to the development of the Heatherside Recreation Area.
2. John Morley (the "Appellant"), is a resident of Heatherside and had been opposed to the planning application. After it was granted, he made a request for information to the Council for the names of members of the Surrey Heath Youth Council (the "Youth Council") and their places of residence. The request arose from the Appellant's concern about the extent of the involvement of the members of the Youth Council (the "Youth Councillors"), in the planning application.
3. The Council refused to provide the names, relying on the exemption in section 40(2) of the Freedom of Information Act 2000 ("FOIA") (personal data of third parties). As regards the places of residence, the Council provided the Appellant with a chart setting out seven Surrey Heath Borough Wards where the Youth Councillors lived and the number of Youth Councillors in each of those areas.
4. At the Appellant's request, the Council undertook an internal review of its refusal to provide the Youth Councillors' names, but it maintained its position.

The Commissioner's Decision

5. The Appellant complained to the Information Commissioner (the "Commissioner"). The Commissioner noted that the Council had interpreted the Appellant's request for the Youth Councillors' "places of residence" as meaning the areas where they lived, rather than their specific addresses, which the Appellant said is what he meant. However, following inquiries with the Council, the Commissioner accepted that the Council did not in fact hold their addresses.
6. As regards the Council's refusal to disclose the names of the Youth Councillors, the Commissioner accepted that the information was exempt under section 40(2) of FOIA.
7. The Commissioner found that the Council had breached section 10(1) of FOIA by not informing the Appellant, within the statutory time period, that it did not hold the addresses. However, the Council had breached section 10(1) only because of the way in which it had interpreted that part of the request. The Commissioner did not require any steps to be taken in relation to this breach.

The Appeal to the Tribunal

8. The Appellant appealed to the Tribunal against the Decision Notice. The Council was joined as a Second Respondent.
9. The parties requested that the appeal be determined on the papers without an oral hearing. Having regard to the nature of the issues raised, and the nature of the evidence, the Tribunal was satisfied that the appeals could properly be determined without an oral hearing.
10. In determining the appeals, we have considered all the documents and written submissions received from the parties (even if not specifically referred to in this determination). The documents are contained primarily in an open bundle agreed between the parties. We have also considered the disputed information, as well as further evidence and submissions lodged by the Council and the Appellant following further directions by the Tribunal.
11. The disputed information comprises certain Minutes of meetings of the Youth Council. These list (though not in all cases), the names of the attendees and those who had sent in their apologies for their absence. The disputed information has not, of course, been provided to the Appellant because to do so, would defeat the purpose of this appeal.

The Tribunal's Jurisdiction

12. The Tribunal's jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the notice is not in accordance with the law, or to the extent the notice involved an exercise of discretion by the Commissioner, he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.
13. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, the Tribunal will often receive evidence that was not before the Commissioner.

Legal Framework

14. Under section 1 of FOIA, any person who makes a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with that information.
15. The duty on a public authority to provide the information requested does not arise if the information sought is exempt under Part II of FOIA. The exemptions under Part II are either qualified exemptions or absolute exemptions. Information that is subject to a qualified exemption is only exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Where, however, the

information requested is subject to an absolute exemption, then, as the term suggests, it is exempt regardless of the public interest considerations.

16. In the present case, the Council has relied on the exemption in section 40(2) of FOIA under which personal data of third parties is exempt if disclosure would breach any of the data protection principles set out in Part 1 of Schedule 1 of the Data Protection Act 1998 ("DPA"). The exemption it attracts is absolute.
17. As the Tribunal has observed in other cases (see for example **London Borough of Camden v Information Commissioner** and **A v Information Commissioner**), there is an inherent tension between the objective of freedom of information on the one hand, and the protection of personal data on the other. Section 40(2) seeks to ensure that the interests of those requesting information from a public authority do not undermine, unnecessarily, the interest of those individuals whose personal data might find its way into the public domain as a result of the public authority complying with such a request. When section 40(2) is engaged, the Tribunal is required to undertake quite a different task from when it deals with other FOIA exemptions. FOIA promotes the right to information, but when section 40(2) is under consideration, the DPA determines the proper approach, and the interest of data subjects receives a high degree of protection.
18. The data protection principles set out in the DPA regulate the way in which a "data controller" (in this case the Council), must "process" personal data. The word "process" is defined in section 1(1) of the DPA to include disclosure to a third party or to the public at large.
19. On the facts of this case, only the first data protection principle has been relied on. This provides that personal data shall be processed fairly and lawfully, and in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met. The test of fairness is a general one and not confined to a consideration of whether any of the Schedule 2 conditions is met. Even where the Schedule 2 conditions are met, disclosure may still be unfair.
20. It has not been argued that processing the personal data in the present case would be unlawful. The issue is whether disclosing it would be fair. Fairness is a broad concept, capable of embracing a range of considerations. There is nothing in the wordings of the statute that requires fairness to be considered from the point of view of the data subject alone. Rather, it is entirely proper to have regard to the interests of the data user (here, the Appellant), and where relevant, the wider considerations of accountability and transparency implicit in FOIA.
21. This wide approach to fairness is endorsed by the observations of Arden LJ in **Johnson v Medical Defence Union** (at paragraph 141):
"Recital (28) [of Directive 95/46] states that "any processing of personal data must be lawful and fair to the individuals concerned". I do not consider that this excludes from consideration the interests of the data user. Indeed the very word "fairness" suggests a balancing of interests. In this case the interests to be taken into account would be

those of the data subject and the data user, and perhaps, in an appropriate case, any other data subject affected by the operation in question.”

22. This does not mean, however, that one starts with the scales evenly balanced. Although a consideration of fairness requires other interests to be taken into account, where section 40(2) is engaged, the data subject’s interests are clearly paramount. We note that the continued primacy of the DPA, notwithstanding the passage and implementation of freedom of information legislation, was strongly emphasised by Lords Hope and Rodger in **Commons Services Agency v Scottish Information Commissioner** (paragraph 7). Although that case concerned the provisions of the Freedom of Information (Scotland) Act 2002, it applies equally in relation to FOIA.
23. If disclosure would not be fair or lawful, the matter ends there. The information cannot be disclosed. However, if disclosure would amount to fair and lawful processing, then there is a further hurdle to overcome. Before the information can be disclosed, processing must meet the conditions in Schedule 2. The Commissioner found that disclosure would not be fair and did not go on, therefore, to consider the Schedule 2 conditions.
24. Schedule 2 contains 6 conditions which are applicable to the processing of any personal data. The only relevant condition in the present case is condition 6 which requires that:

“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. Condition 6 involves a three-part test. First, is there a legitimate interest in disclosure? Second, is such disclosure necessary to promote that public interest? In **Corporate Officer of the House of Commons v Information Commissioner**, “necessary” in the context of condition 6, was taken to reflect the meaning attributed by the European Court of Human Rights when justifying an interference with a Convention right, namely, that there should be a “pressing social need” and the interference should be “both proportionate as to means and fairly balanced as to ends”. Third, would such disclosure cause unwarranted interference with the interests of the individual whose data is in issue? Even where disclosure is necessary, it is only permissible if it would not cause such interference.
26. Some of the data subjects in the present case may be minors. We have not been referred to any case law or legislation relevant to the application of section 40(2) where the data subject is a child. We consider, however, that the Tribunal, like any other decision maker, is obliged to consider the child’s best interests and we have done so.

Issues

27. We do not need to consider whether the Council holds the addresses of the Youth Councillors. The Appellant is not disputing that the information is not held, and he is no longer seeking that information.
28. There is also no issue about whether the names of the Youth Councillors comprise their personal data. The Appellant accepts that they do.
29. He says, however, that disclosure of the information would be fair and meets condition 6 of Schedule 2 because there is a legitimate public interest in disclosure. The respondents take the opposite view. The only issue before the Tribunal, therefore, is to decide which of them is right.

Evidence

30. The Appellant could not attend the planning meeting in which the development of the Heatherside Recreation Area was discussed, and he nominated a representative to present arguments against the proposed development. There was also a presentation, at the planning meeting, by a Youth Councillor who spoke in support of the application. His name was disclosed to the Appellant in November 2010 in response to a separate request for information. The vote was carried in favour of the development. No Youth Councillor had a vote.
31. The Council has lodged three Witness Statements, from Geraldine Sharman, Rita Hall and Jayne Boitout, respectively.
32. Geraldine Sharman is employed as the Records Manager of the Council. So far as is relevant to the issues in this appeal, she says that she obtained the information about the Youth Councillors' places of residence from the Surrey County Council ("SCC"). The Youth Council is not a public authority under the Local Government Act 1972. Minutes of their meetings do not form part of the Council's own committee minutes, they are not published on the Council's website and to her knowledge, they are not published on the internet. They are only provided to individual Youth Councillors, the Council's Community Development Officer and the SCC. On this basis, she considers that the names of the Youth Councillors are not in the public domain.
33. Ms Sharman says that Youth Councillors may be between 13 and 19 years old. The Council does not hold their guardians' permission to release their names, nor their guardians' contact details in order to request such permission. She also says that the Council does not, in fact, hold a list of the Youth Councillors, but it has the names of those who either attended meetings or gave apologies for their absence. Giving out such names as the Council holds would not be fair as the Youth Councillors concerned had not given their permission to publish their names, nor had their guardians. For those who are minors, there should be greater protection for their privacy, but the Council have no way of being able to tell from the information they hold which of the members are minors.

34. On the basis that the Youth Council is not a formal Council body, and the request was for information potentially about minors, she considers that the public interest in withholding the information outweighs any public interest in disclosure.
35. Finally, she says that at the time she decided to refuse the Appellant's request, she did not know about the Youth Council's Facebook page and only learnt of this following the Appellant's complaint to the Commissioner. (Her Witness Statement is silent as to whether the Council would have decided the matter differently had she known of this sooner.)
36. Rita Hall is the Head of Corporate Resources for the Council. She dealt with the internal review following the Council's initial refusal of the Appellant's request. She is not aware of an actual list of Youth Councillors. The Council's Community Development Officer holds Minutes of Youth Council meetings which may or may not contain the names of all members. She made a number of enquiries, following which she was satisfied that the Youth Council Minutes are not published on the Council's website and it is not recognised as holding formal meetings of the Council under the Local Government Act 1972. On this basis, she took the view that the Minutes were not in the public domain
37. She says that the Council does not have the permission of the Youth Councillors nor of their parents/guardians to release their names, and it is not possible for the Council to ask for such consent as the Council does not have the addresses or telephone numbers of the Youth Councillors, nor of their parents/guardians. On this basis, disclosing the information would not be in compliance with the first data protection principle. There was a real possibility that distress may be caused to the individuals if details of their names are released and this outweighs any public interest there may be in disclosure.
38. Jayne Boitout is the Council's Community Development Officer. She says that the Youth Council is funded by the SCC. Her role in the partnership is to provide a meeting place to host meetings of the partnership and for meetings of the Youth Council.
39. The purpose of the Youth Council is to promote and embed the democratic process to young people at an early age, and to provide an opportunity for practical experience external to the school environment. It also enables greater dialogue between youth and adult Borough Councillors and has mutual benefits for both consultation and decisions which affect young people in the Borough of Surrey Heath.
40. She has attended approximately 3 Youth Council meetings. The Agendas appear not to be fixed. They are set by the Youth Councillors themselves. The intention is that they should be in control. The membership ages range from 13 – 19 years. The meetings are supported by 2 officers who are both employed by SCC whose aim is to encourage debate.
41. She has access to some of the Minutes of the Youth Council meetings which show only the names of those members who attend a particular meeting. They do not contain any other personal contact details. The

meetings are not open to the public. Young people can come to the meeting if they know about it or want to join, but this is normally instigated by the Youth Coordinator of the SCC Development Service.

42. The Council has provided the Tribunal with Minutes of Youth Council meetings for the following dates:
- 6 January
 - 3 February
 - 3 March
 - 7 April
 - 19 May
 - 9 September
 - 4 November 2010
 - 2 December

The years are not stated (save for the Minutes dated 4th November). The Council has said it does not know the years to which the Minutes relate and that it would have to match the content with events to ascertain the dates. It says that this would involve creating new information and it considers that it is not required, by FOIA, to do so.

43. Most Minutes give the names of those Youth Councillors who attended and those who were absent and had conveyed their apologies. In some cases, only initials are given rather than full names. There is no indication whether any of the Minutes, taken individually or collectively, comprise a full list of Youth Council members at the relevant time.
44. During the course of its deliberations, the Tribunal asked the Council about *inter alia*, the role, rights and responsibilities of each partner responsible for the Youth Council, how Youth Councillors are recruited, how the Youth Council is funded, and the role of the Youth Council (or the role of any individual Youth Councillor) in the planning matter of concern to the Appellant.
45. In response, the Council has said:
- The SCC is responsible for the provision of services for children and young people and employs and funds the Youth Co-ordinator. The Council's role is as an enabler. The Council is supportive of giving young people a chance to express their views on matters that affect them, for instance, as regards the provision of skate parks and playgrounds. Occasionally, Youth Council representatives are invited to attend meetings of the Surrey Heath Partnership (a multi-agency group who meet to discuss issues such as community safety, health and transport in the Borough). However, Youth Councillors do not take part in the decision making process of the Council.
 - SCC funds and employs a Youth Co-ordinator. The Council says it does not know how else funding from SCC may be given. Youth Councillors are encouraged to become self-sufficient in funding the projects they wish to be involved in.
 - The Heatherside Recreation Ground is owned and managed by the Council and the planning application was made by the Council on behalf of the Surrey Heath Partnership. A number of public

meetings were held as part of an extensive consultation process. The Youth Council were not official consultees but were included in the Council's consultation on the planning application in order to obtain the views of those most likely to use the proposed facilities. A number of people had requested to speak at the Planning Committee meeting which was to determine the application. The Appellant was due to speak, but was unable to attend and somebody else spoke on his behalf. Another individual, DS, was also due to speak but was unable to attend and the Youth Councillor, JA, spoke on his behalf. The Council is not clear whether JA was speaking in his capacity as a Youth Councillor or merely as an individual on behalf of DS. Either way, he took no part in the decision making of the planning application.

46. The Tribunal has also been provided with a copy of the Youth Council's Constitution. The objectives include the following:

- to express a view on behalf of young people in Surrey Heath;
- to campaign on local issues that young people care about; and
- to act as sounding board for local authorities on various issues.

The Constitution also provides that Minutes of the meetings are to be maintained by the Youth Council Co-ordinator appointed by Surrey Youth Development Service.

47. The Appellant has not put forward any witness statements. However, he has provided a link to pages of the social networking website Facebook, which gives the names and photographs of 21 Youth Councillors and identifies the group as the Surrey Heath Youth Council. The Commissioner has said (and it has not been disputed by Council), that it is possible, by simply registering on Facebook (which does not require payment), to locate the pages containing the names and photographs of the Youth Councillors. Anyone can see the group and who is in it, although only members of the group can see postings. In short, any member of the public can register on Facebook and see the names and photographs of any of the Youth Councillors who have chosen to put their names on the Facebook site. It is not possible to tell from the Facebook page whether the names it displays are a partial or complete list of the Youth Councillors. It is also not possible to tell from the Facebook page whether those named were Youth Councillors as at the date of the request or whether and to what extent membership may have changed since then.

48. By comparing the Minutes to the Facebook page included in the open bundle, the panel has noted that there is considerable overlap of names. Indeed, it appeared that only 2 members whose names appeared in the Minutes did not also appear on the Facebook page.

Arguments

The Appellant:

The Appellant makes, *inter alia*, the following arguments.

49. No part of either DPA or FOIA gives any individual or group the right to anonymity. Information about minors is not exempt from disclosure.
50. It is fundamental in any democratic process that individuals cannot hide behind closed doors and make decisions concerning the quality of life of others.
51. The Youth Council was a major influence on the planning decision. The proposal involved the disbursements of £160,000 of public funds, and there is a legitimate public interest therefore, in the decision making process. The fact that Youth Councillors do not make decisions on behalf of the Council does not mean that the Council or the Planning Committee are not directly influenced by the wants of the Youth Council.
52. The site in question is a central park of a suburban housing estate. The closest dwellings are less than 15 metres from the site and activities on the site have a substantial impact, therefore, on the quality of life of the residential community.
53. The reasonable expectations of the Youth Councillors is not a relevant consideration. Where actions of individuals acting in camera have a substantial impact on the quality of life of others, then the rights of the individuals concerned or their expectations should not obscure the rights of the individuals affected.
54. The Council has failed to show what harm or distress would be caused by disclosing the names of the Youth Councillors. The Youth Councillors have already made their identities known to the public through Facebook.
55. If the refusal to disclose the names of Youth Councillors is to be based on the argument that they took no part in the decision making on the planning application and only the Planning Committee members vote, then it would follow that the Council would refuse to disclose the names of all non-voting people who make representations to the Planning Committee or who are involved in a proposal placed before the Planning Committee. The proposed plan was instigated through the involvement of the Youth Council. The instigators of the proposed scheme should not be able to hide from public view.
56. If the Council believes that involving minors in adult matters could cause these individuals harm or distress if their identities were known, then they should not have been involved in the first place. The Council's position does not explain the anomaly of allowing one of these individuals to speak at a planning meeting where he would have been required to make known his name and address.
57. Since the Youth Council has a budget funded by the public, the Council has a duty to make public the disbursement of funds related to the Youth Council's activities.

The Commissioner

58. The Commissioner says that the only names of the Youth Councillors held by the Council at the time of the request were those names contained in such Minutes of the Youth Council's meetings as the

Council holds. The Council does not hold a specific list of the Youth Councillors, as such.

59. Disclosure of the names of the Youth Councillors would be a breach of the first data protection principle. Having regard to the reasonable expectation of the data subjects, the consequences of disclosure, and the legitimate interests of the public, disclosure would not be fair.
60. At the time he issued his Decision Notice, the Commissioner was not aware that the names of the Youth Councillors could be found on Facebook. However, in the absence of evidence as to whether the members listed on Facebook were members at the time of the request, it is not appropriate to take the Facebook page into account when considering the reasonable expectation of the relevant members of the Youth Council at the time of the request. It is also possible that members whose names appear on the Facebook page do not, in any event, represent the total number of Youth Councillors and there may be other members who have chosen not to allow their names and photographs to be on Facebook.
61. In considering whether the data subjects would have a reasonable expectation that their names would be disclosed, one important question is what information was given to the individual Youth Councillors when they joined. There is no evidence to suggest that members were advised that their names may be disclosed in response to a request under FOIA. On this basis, and taking into account the possible ages of Youth Councillors, it is reasonable to conclude that they would not have expected their names to be disclosed.
62. There is a very real possibility that disclosure of the names of the Youth Councillors would cause distress to the individuals concerned by the intrusion into their privacy that this would entail. In this regard, age is a relevant consideration. The Council does not hold information relating to the ages of the individual Youth Councillors. Therefore, it cannot be known whether the relevant members are towards the younger or older end of the age scale. In the absence of such information, it is appropriate to err on the side of caution.
63. As regards the public interest in disclosure, the question is not whether there is a legitimate public interest in the planning development and resulting expenditure of public funds, but whether there is a public interest in the disclosure of the specific disputed information. Whilst the Youth Council may have had some involvement at an earlier stage, in the planning application, the Youth Councillors were not involved with the voting or decision making. For this reason, there is no legitimate public interest in discovering the names of the Youth Councillors.
64. If the Tribunal finds that disclosure of the disputed information would be fair, then it would be necessary to consider whether one of the conditions of Schedule 2 of the DPA is met. The Council has already provided the Appellant with the name of the Youth Councillor who spoke at the Planning Committee meeting. That disclosure would meet any legitimate interest in the involvement of the Youth Councillors in this particular planning application. Names of other Youth Councillors

would not be necessary for the purposes of any legitimate interest the public or the Appellant may have.

The Council

65. The Council's arguments have been put forward largely through the Witness Statements. In addition, the Council says that there is no overriding public interest in disclosure. The Appellant's request has arisen from the contribution of one Youth Councillor who spoke in support of the planning application, but neither he, nor any other Youth Councillor was able to vote on that planning application and did not play a significant part in the democratic process.
66. It is also the Council's view that just because members of the Youth Council appear on Facebook does not mean the names appearing on the minutes of the Youth Council should be disclosed. It says that the Youth Council is not a public meeting and the minutes are not published. It is not open for the public to attend except for other young people. This implies that the members seek to restrict the information available to the public in respect of who attends a meeting.

Findings

Findings of fact

67. Before considering whether disclosure would breach the first data protection principle, it may be helpful if we set out certain findings of fact.
68. The Appellant's request was for the names of the Youth Councillors. We take his request to mean that he was seeking this information as at the date of his request.
69. We accept that the Council does not in fact hold a list of all the Youth Councillors, and does not hold information about the ages of the individual Youth Councillors. It may be that the SCC has this information. We do not know if the Appellant has made a request to the SCC. That is not in any event relevant to how his request to the Council is treated.
70. We find that the Council does hold the names of those Youth Councillors whose names appear on the Minutes in its possession. The Council says, and we accept that it does not hold all the Minutes.
71. We also accept that the Council does not know whether the names in the Minutes it holds comprise a full list of all the Youth Councillors. The Minutes only give the names of those who attended the meetings in question or who conveyed apologies for their absence. Clearly, there may be some who were neither present, nor had conveyed their apologies.
72. As already noted, all but one of the Minutes are undated in the sense that although the date and month of the meetings are given, the years have not been stated. However, we find it likely that the Council would be able easily to ascertain the dates of the Minutes. We note from the evidence before us that the Youth Council had been dissolved in September 2005. A Motion was approved by the Council on 16 July 2008 to re-instate it. It seems likely that the Minutes the Council holds

relate to the period after reinstatement and that the first Youth Council meeting would have taken place sometime after that Motion was approved. It is also likely that the Council would know when that meeting took place since it is a partner in the project. We also note from the evidence of Jayne Boitoult that one of the roles of the Council is to arrange the venue for the meetings. The venues are clearly given on the Minutes and it seems likely that it would be a simple matter to match the date and month with the venues booked. We do not consider that this is creating new information. The Appellant has not asked for the dates of the meetings. It would be no more than identifying the information requested by the Appellant.

73. There is one unresolved evidentiary matter. The Appellant says that the Youth Council was responsible for putting forward the plans that led to the development in issue. He says that majority of the funding came from a grant allocated for a development which did not receive planning permission and that the Youth Council was subsequently asked how it wanted to use the grant monies and that this is how the development in question came about. The Council, as noted in paragraph 45 above, does not dispute that the Youth Council had a role, but says that the Youth Council was simply an unofficial consultee. It is also clear from the Youth Council Minutes before us that the proposed plans were discussed in some detail by the Youth Council and action points agreed. We do not consider that we need to make a finding as to the precise role the Youth Council had in this development. We find that it had a role.

Findings of law

74. The first question we must address is whether disclosure would be fair. The main arguments that have been put forward for why it would not be fair are the following:
- that some of the Youth Councillors may be minors;
 - that they have not consented to their names being disclosed (and cannot be contacted for their consent);
 - the Youth Councillors did not participate in the decision making on the planning application and therefore disclosure would not be fair even from the point of view of the Appellant's interest because it does not further his interests; and
 - that there would have been no reasonable expectation on their part that their names would be disclosed.
75. The Appellant's arguments for why disclosure would not be unfair may be summarised as follows:
- minors are not excluded under the DPA or FOIA;
 - the Youth Councillors are participating in a democratic process and should be accountable;
 - no evidence has been put forward that disclosure would cause the data subjects distress; and

- there cannot be a reasonable expectation of privacy when the data subjects have themselves put their names (and photographs) into the public domain.
76. In our view, a distinction must be drawn between those Councillors whose names appear on Facebook and those whose names do not.
 77. As regards the former, we consider that their decision to put their names and photographs into the public domain considerably diminishes the strength of the respondent's arguments for why disclosure of their names would not be fair. In particular, arguments that they may not have expected that the information would be disclosed, that they have not consented to their names being disclosed, and that disclosure would cause them distress, rapidly fall away, in our view, where the Youth Councilors have themselves chosen to make the information available in a widely used and easily accessible social networking site, without placing any restrictions on access. In our view, it cannot be said to be unfair to disclose the names of the Youth Councilors whose names appear on Facebook.
 78. The arguments put forward by the respondents as to why disclosure would not be fair, notwithstanding the publication of the information on Facebook, do not engage with the principle of what we have said above, but are based instead on certain factual problems that arise. The Commissioner, who acknowledges that before he issued his Decision Notice, he was not aware of the Facebook page, says that he does not consider it appropriate to take it into account, when considering the reasonable expectation of the Youth Councillors because although it may have been known which Youth Councillors were listed on Facebook as at 24 July 2011 (which is the date the Appellant referred the Commissioner to that evidence), this may not fully correspond with the list of those who were members as at the time of the request.
 79. The Council acknowledges that at the time it refused the Appellant's application, it too, was unaware of the information on Facebook. It still objects to disclosure of the names, however, because it says that it does not have a copy of the Facebook page from the date of the request and cannot be certain, therefore, which Youth Councillors were listed on Facebook at that time. It also says that the Minutes it holds do not necessarily mirror the Facebook page unless they reflect the exact time the Facebook page appears.
 80. However, while we acknowledge the problems identified by the Council and Commissioner, FOIA does not require a public authority to comply with a request only when the information it holds precisely matches what the requester has asked for. A requester will often have the disadvantage of not knowing exactly what the public authority holds. What the public authority must do in this situation is to engage with the requester, pursuant to its obligations under section 16 (obligation to provide advice and assistance), to explore whether the information it does hold, even if imperfect, can satisfy the request. The Council has not done this. We do not criticise it. We are mindful that the Council was not aware of the Facebook page at the time that it refused the

request, and in any event has taken the position that the information is exempt. However, the mismatch between what the Appellant has requested and what the Council can provide is not itself a reason for refusing to disclose the information under section 40(2), nor is it a basis on which disclosure can be said to be unfair.

81. We should say, for completeness, that it has not been argued before us that the individuals concerned might be unaware that their names and photographs are accessible to the public on Facebook. There is, in any event, no evidence to support such a position. More importantly, the information is available in the public domain, whatever the precise circumstances in which it came to become available.
82. Even if, as we find, disclosure would be fair, we must go on to consider condition 6 of Schedule 2. Is there a legitimate interest in disclosure? As already noted, we find that the Youth Council did have a role to play in the development in question. At a minimum, it was consulted and it put forward its views. It did this as the Youth Council (whether or not members also did anything individually). Indeed, this is in line with one of the express objectives of the Youth Council's Constitution that it should be available as a sounding board to the Council.
83. The Appellant says, and we agree, that an open and accountable democratic process involves transparency, not just about who has actually made a decision, but also who has been in a position to influence a decision. We accept that the interests of transparency would be furthered by knowing which individuals comprise the body that did play a role in the application. The Appellant is amongst a group of people who has been affected by the planning consent and we consider that he has a legitimate interest, therefore, in knowing the history of the application and who may have influenced it. We also agree with the Appellant that although the Council has asserted that harm and distress would be caused, they have provided no evidence to support this assertion, nor explained how they think that it would cause harm and distress. In any event, if disclosure is limited to those Youth Councillors who have chosen to put their names and photographs on Facebook, we cannot see how disclosure can be said to be unwarranted, even bearing in mind the possible young age of some of the Youth Councillors.
84. We find, in short, that condition 6 is met. It follows that we find that the names of the Youth Councilors whose names appear on Facebook and whose names also appear in the Minutes in the possession of the Council, should be disclosed. Because of the issues referred to in paragraphs 78 and 79 above, this will necessitate discussion between the parties and the Tribunal will give further directions in this regard.
85. There are three further points we would make for completeness. First, we are mindful that it could be argued (although it has not been), that disclosure would provide some information in addition to what has been put into the public domain via Facebook. In particular, it would disclose that the individuals concerned are not just Youth Councilors as at the date of the Facebook page relied on, but were also members at some point in the past and had attended one or more Youth Council meetings. We consider that this is only marginally more information

than is already in the public domain and does not support a different finding from what we have set out above. There would be no need, of course, in order to respond to the request, for the Council to disclose which meeting any particular Youth Councilor attended, nor the place, time, or agenda of that meeting.

86. Second, we note that some of the Minutes list the members by their initials. In some cases, the attendees are identified as members and at other times, simply as attendees. The disclosure that we consider the Council should make relates only to those individuals who are clearly identified as members in the Minutes and whose names are given sufficiently clearly for there to be no reasonable room for doubt that they correspond to the names published on Facebook.
87. Third, the Council could perhaps have refused at least part of the request on the basis of section 21 of FOIA (information accessible to applicant by other means). We offer no opinion as to whether it would have been justified in doing so. It is not an exemption which it has sought to rely on, and we have not considered it as part of this appeal.
88. This leaves us with having to decide about whether the names of those Youth Councillors whose names appear in the Minutes but not on Facebook, should be disclosed. As already noted, at the time that the panel was considering the evidence, only 2 of the Youth Councillors whose names appear in the Minutes were absent from the Facebook page we were given. We accept that that correlation is likely not to remain constant, but what it does indicate is that at any given time, there are likely to be at least some names that are in the Minutes but not on Facebook.
89. There may be various explanations for this. It may be, for instance, that some individuals ceased to be members or have chosen not to make their information public. As will be clear from what we have already said, our findings that disclosure would be fair are based on the individual Youth Councillors having made their membership in the Youth Council public. If they have chosen not to do so, then we accept that disclosure would not be fair, for all the reasons put forward by the respondents. The Appellant's argument that those participating in any form of democratic process must be accountable is a point we have sympathy with, but bearing in mind the potentially young age of some Councillors, and that the Council does not know the ages of the individuals, we do not consider that it follows that they would have expected their names to be made public. In the absence of the consent implied by putting their names into the public domain, and in the absence of evidence of the involvement of those particular Youth Councilors in the planning matter in question and their ages, we do not consider that disclosure can be said to be fair, nor if fair, that disclosure would meet the condition 6 test.
90. There are of course, other arguments that might have been made for and against disclosure. However, we have to decide the appeal on the basis of the arguments that have been made and the evidence before us.

Decision

91. For all the reasons set out above, this appeal is allowed by a majority, and to the extent set out in the Substituted Decision Notice.
92. The Tribunal will now make directions as indicated in paragraph 84 above. These will be communicated to the parties separately, including the time period within which the directions must be complied with. Thereafter, the Tribunal will make such further order as is needed to give effect to its decision.

Signed

Dated: 31 May 2012

Anisa Dhanji

Tribunal Judge

Dissenting Opinion

93. I do not agree with the majority findings in this case for the following reasons, in particular:
94. I do not consider that the decision by some Youth Council members to put their names and photographs into the public domain (via a closed group in Facebook), materially diminishes the strength of the respondent's arguments for why disclosure of their names would not be fair. This would be true if it was certain that those members were aware of the consequences of their actions (i.e. that the creation of a "closed group" still meant that member names are visible publicly). However, none of the members have been consulted on this point. It is not even clear whether the group was set up by an adult or by a Youth Councillor. It is known, however, that they chose to set up a closed group, suggesting that they had some desire to keep the contents of the group private. I prefer therefore to err on the side of caution in view of the fact that the names to be disclosed relate to children (as defined by the Children Act, s.65(1)).
95. I disagree that an open and accountable democratic process ought to involve transparency about who has been in a position to influence a decision when those influencing a decision are members of the public rather than public servants. Unless there are strong and compelling reasons to disclose their identity (for example, reasons of impropriety, which is not the case here), it ought to be sufficient to see the detail of their argument alone. I do not see what is to be gained through disclosure of the names of children and young people supporting the development. They are not "councillors" in the sense of publicly elected officials, they have no decision making powers. They are only so in connection with a local youth development activity, aimed at a better understanding of local democratic processes. Such an activity, it can be said, takes place in their private lives thus ordinarily beyond scrutiny, save for any actions taken in public, such as the presentation given in support of the development at the planning meeting (the facts

of which have been disclosed to the Appellant). In my view, it should suffice that it was the “Youth Council” as a whole that either put forward or supported the proposed development.

96. In their letter of response to the Appellant’s request, the Council stated that they had a duty to protect the personal data of the Youth Councillors given that they are “minors” and that disclosure must not cause unwarranted harm to their interests. The Commissioner has supported this approach. Whilst it is true to say that there is no proven harm, there does exist the potential, however remote, for confrontation arising from their support of the development in question. The Council is under a duty, as a partner of SCC, to co-operate to improve the well-being of children under the requirements of the Children Act 2004 (s.10 in particular). Although the Council has not explicitly raised this argument, the stance which they took is rooted in their obligations under that Act, whether explicitly or otherwise, and must carry some weight against disclosure.
97. For condition 6 to be satisfied, disclosure must be “*necessary*” for the purposes of a legitimate interest pursued by the Appellant or indeed the world at large (disclosure being acknowledged as disclosure to the general public rather than the requesting individual alone). Even if disclosure is necessary, the Appellant has demonstrated that he already has the names of the Youth Councillors because they are publicly available via Facebook. Therefore it cannot be said to be necessary to provide them to him again.
98. It is not possible to determine whether disclosure would cause prejudice to the rights and freedoms or legitimate interests of the Youth Councillors. First, the Council does not hold their contact details so cannot ask whether this would be the case. Second, there is no evidence that any information required to satisfy fair processing requirements has been imparted to them. As a result, they have had no information through which to exercise their rights, such as the right to object to the processing of their personal data under s.10 of the DPA.

Signed

Date: 31 May 2012

Paul Taylor

Tribunal Member