



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

EA/2016/0062

KEVIN BRIDGWOOD

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

And

THE CHIEF CONSTABLE OF STAFFORDSHIRE POLICE

Second Respondent

Hearing

Held on 14 September 2016 at Staffordshire Administration Centre by way of an oral hearing.

Before Henry Fitzhugh, Gareth Jones and Judge Taylor.

Decision

The appeal is dismissed.

Promulgation Date 7 February 2017

Reasons

Background

1. On 3 February 2015, Mouchel Business Services Limited ('Mouchel') contracted with the Chief Constable of the Staffordshire Police ('SP') to administer the Staffordshire police pension scheme. This followed a procurement exercise carried out under a national framework agreement, where Mouchel had been the sole tenderer.
2. Pension-holders were informed of the outsourcing arrangements by letter of 13 March 2015. This stated:

"... Following Lord Hutton's report into public sector pensions, significant legislative changes are being introduced to the police pension schemes. These statutory changes require major investment by the force as current systems are technically incompatible with the new 2015 Police Pension Scheme...."

These major changes have driven the need to review how we deliver a quality pensions service to all our serving, deferred and pensioner members.

The review looked at a number of options, and after consultation with member representatives, including the Police Federation, The Superintendents Association and NARPO, concluded that the most appropriate way to ensure legislative compliance and protect the future interests of all pension members, was to outsource this area of our business to a suitable, professional organization who specialize in this area of work.

Following a procurement process under a national framework agreement, Mouchel Limited, has been chosen to undertake both the pensions administration and pensioner payroll services of [SP]. By using the national framework agreement, Mouchel Limited will have undergone strict security checks to ensure your data is safe. However, please be assured that as an additional safeguard we have also instigated our own security checks to satisfy ourselves that everything is in order.

Mouchel [Limited] are a leading provider of Police Pensions Administration and currently administer almost half of the Police Pension Schemes in England and Wales. They have a far larger team than we could ever hope to employ and this provides the force with a great deal of security in the areas of technical knowledge, systems and most importantly, people. It also allows us to concentrate on the provision of our core front-line services...

Please note that the pension fund itself is not transferring and will remain with the Home Office..."

3. On 8 June 2015, Kier Group Plc purchased the Mouchel corporate group. On 20 July 2015 Mouchel changed its name to Kier Business Services Limited.¹
4. The Appellant, a retired police officer, holds a police pension under the scheme. He had concerns about the process, particularly the transfer of his personal data to Mouchel. He alleged that SP breached of various statutory requirements relating to pensions, and made several information requests.

¹ Nevertheless, for ease of reference it is referred to below as Mouchel.

The Request

5. On 1 June 2015 the Appellant requested from SP:

“In respect of Police Pension provision and the private company Mouchel. Staffordshire Police have/are spending public money to implement this policy and therefore under the provision of the above act I require you to provide full disclosure of all related documents and copies of:

*Written documents Electronically generated documents including e-mails.
Minutes/notes of meetings with any interested parties regarding this issue.*

*A copy of the ‘Legal Advice’ obtained by Mrs [B]. A copy of the contract and disclosure of the costs of the contract with Mouchel”.*²

6. On 21 August 2015, SP confirmed that it held requested information.

- a. It withheld requested legal advice, section 42(1) of the Freedom of Information Act 2000 (‘FOIA’ or the ‘Act’) (*legal professional privilege*).
- b. It provided a copy of the contract between SP and Mouchel, with parts redacted under section 43(2) FOIA (*prejudice to commercial interests*).
- c. It did not confirm or deny documents related to the Appellant’s personal information, relying on section 40(5)FOIA (*personal data*).
- d. It provided the minutes of a meeting with names of attendees redacted under s40(2) FOIA (*personal data*.)

7. At the stage of the Information Commissioner’s (“Commissioner”) investigation of the Appellant’s complaint, SP introduced reliance on s.14 FOIA (*vexatious requests*). In the Decision Notice (*Ref. FS50587942*) of 18 February 2016, the Commissioner concluded:

- a. *405 emails falling within the scope of the request*

SP had correctly relied on sections 14(1) such that this information should not be disclosed.

- b. *Two sets of email correspondence.*

- a. The first email exchange was outside the scope of the Appellant’s request and should not be disclosed. This was because it post-dated the request and as such was not held at the time of the request it.

- b. The second email exchange should not be disclosed under the FOIA request. This was because it constituted personal data of the requester.³

- c. *The redacted parts of the contract for a private sector contractor to provide pensions administration services.*

Disclosure of the redacted parts would be likely to prejudice the commercial interests of SP and should be withheld under s. 43(2) FOIA.

- d. *Names of individuals within meeting minutes:*

² The Appellant’s subject access requests for his personal data under the Data Protection Act 1998 (‘DPA’) are outside the scope of this appeal.

³ The Commissioner noted that public authorities were to handle requests for an individual’s personal data as a subject access request made under section 7 of the DPA. (*See paragraphs 40 to 43 of the Decision Notice.*)

SP had erred in relying on section 40(2) for part of the information. He ordered this Category 1 to be disclosed. These have now been disclosed and are not addressed further in this decision.

The Task of the Tribunal

8. The Appellant now appeals the Commissioner's decision. The Tribunal's remit is governed by s.58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the decision involved exercising discretion, whether it should have been exercised differently. Unless relevant to whether the SP correctly relied on sections of the FOIA so as to withhold the requested information, points raised by the Appellant (such as concerning SP's conduct - described as reprehensible or the Commissioner's handling of his complaint) are outside our remit.
9. The Tribunal is independent of the Commissioner, and considers afresh the Appellant's complaint. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact.
10. We have received extensive submissions and documents and have also had the benefit of hearing from the Appellant and SP in oral hearing and witness statements. We have considered all of this, even where not specifically referred to below. During the hearing, we had a closed session, where the Appellant and his witness was not present. This enabled us to thoroughly test the veracity of SP's arguments with specific reference to the disputed information.
11. We have not found it necessary to set out the Commissioner's submissions below. However, we have considered them and the Decision Notice.

The Law

12. Under s.1(1) FOIA, a person making an information request to a public authority is entitled to be informed in writing whether the public authority holds the requested information and to have it communicated to him, unless the Act provides otherwise. For instance, this may be due to the information being exempt from disclosure under the Act. SP relies on various exemptions so as to allow it to withhold the requested information.

Section 14: Vexatious request

13. Section 14 FOIA provides that a public authority is not obliged to comply with a request that is vexatious. It provides:

“(1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.”

14. We have the benefit of higher court decisions to instruct us in how to apply this section.⁴ These inform us that a request is vexatious if, having taken into account all the material circumstances of the case, it demonstrates a 'manifestly unjustified, inappropriate or improper use' of the FOIA procedure.⁵ The case law shows us that an important aspect of the balancing exercise may involve considering whether or not

⁴ This is known as case law.

⁵ See the Upper Tribunal decision in *Information Commissioner v Devon County Council and Dransfield* [2012] UKUT 440 (AAC) ('Dransfield'), para.43. This approach was upheld by the Court of Appeal in *Dransfield v Information Commissioner and Devon County Council* [2015] EWCA Civ 545 ('Dransfield CA').

there is an adequate or proper justification for the request, and whether or not it lacks proportionality, having borne in mind the context of a statute designed to ensure greater public access to official information and to increase accountability and transparency.

15. L.J. Arden stated in the Dransfield CA case:

"I consider ... that the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public. Parliament has chosen a strong word, which therefore means that the hurdle of satisfying it is a high one, and that is consistent with the constitutional nature of the right. The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious. If it happens that a relevant motive can be discerned with a sufficient degree of assurance, it may be evidence from which vexatiousness can be inferred..." (Dransfield CA, para. 68.)

"I note that the UT held that the purpose of section 14 was "to protect the resources (in the broadest sense of that word) of the authority from being squandered on disproportionate use of FOIA" (UT, Dransfield, Judgment, para. 10). For my own part, I would wish to qualify that aim as one only to be realised if the high standard set by vexatiousness is satisfied. This is one of the respects in which the public interest and the individual rights conferred by FOIA have, as Lord Sumption indicated in Kennedy (para. 2 above), been carefully calibrated." (Dransfield CA, para. 72.)

16. In the Upper Tribunal consideration of Dransfield, Judge Wikeley stated:

*"... It may be helpful to consider the question of whether a request is truly vexatious by considering four broad issues or themes – (1) the burden (on the public authority and its staff); (2) the motive (of the requester); (3) the value or serious purpose (of the request) and (4) any harassment or distress (of and to staff). However, these four considerations and the discussion that follows are not intended to be exhaustive, nor are they meant to create an alternative formulaic check-list..."*⁶

Section 43(2): Commercial Interests

17. Section 43(2) FOIA provides:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

18. Section 2(2) FOIA is of relevance to this exemption. This requires consideration of whether *"in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information"*.

Section 40(1): Personal data

19. Section 40(1) FOIA provides:

"(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."

20. 'Personal data' is defined under s.1(1) the Data Protection Act 1998 ('DPA') as:

"personal data" means data which relate to a living individual who can be identified-
(a) from those data, or

⁶ Information Commissioner v Devon CC and Dransfield [2012] UKUT 440 (AAC), at para. 28.

(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.”

21. We have the benefit of higher court decisions to help apply this section. In *Durant v FSA [2004] F.S.R. 28*, Auld LJ stated:

“28 ... Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject's involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person's or body's conduct that he may have instigated. In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity...” (See para. 28 – Emphasis added).

22. In the more recent case of *Edem v ICO and FSA [2014] EWCA Civ 92*, Moses LJ stated:

“6. It is important to remember that it is not always necessary to consider ‘biographical significance’ to determine whether data is personal data. In many cases data may be personal data simply because its content is such that it is ‘obviously about’ an individual. Alternatively, data may be personal data because it is clearly ‘linked to’ an individual because it is about his activities and is processed for the purpose of determining or influencing the way in which that person is treated. You need to consider ‘biographical significance’ only where information is not ‘obviously about’ an individual or clearly ‘linked to’ him.”

The Issues

23. The Issues for the Tribunal are:

1. For the emails⁷, is section 14(1) FOIA properly relied on? ('Issue 1')
2. For the redactions made to the contract, is section 43(2) properly relied on? Our consideration of this involves two stages:
 - a. First, would prejudice to commercial interests be at least likely to occur as a result of disclosure?
 - b. Second, in all circumstances of the case, does the public interest in maintaining the exemption outweighs the public interest in disclosure - thereby allowing the information to be withheld?

('Issue 2')

3. For the two sets of email exchanges is either of sections 42 or 40(1), properly relied on? ('Issue 3'.)

Evidence and Submissions

The Appellant

24. The Appellant's presented witness evidence:

- a. Testimony from a retired Staffordshire police officer who had made several FOIA requests of SP. His concerns included the transfer of medical data relating to injury on duty awards in relation to the outsourcing arrangements;
- b. Testimony from Mark Judson, Chairman of the Staffordshire Branch of the National Association of Retired Police Officers ('NARPO') and a member of the SP Pension Board. This included:

Based on persons nodding in agreement at a meeting and his experience of policing for over 41 years, he thought that there was an acceptance that SP have not got their act together over this issue and they may have questions to answer to not only yourselves but outside bodies.

He had emailed the Appellant stating: *"I was not aware that SP had obtained outside legal advice which might support a breach of Data Protection, until [KT] alluded to it at this meeting"*.

He explained: *"This statement arose out of the meeting on 9/7/2015, when the issue of data transfer was being discussed. The response was that Data Protection covers two areas. A. Confidential information such as bank accounts etc. and B. Personal Data. There was more concern over personal data because of the injury award that Mr Bridgwood was subject to. Solicitors advice at this time suggests that Mr Bridgwood may revoke this authority and ask the then company Mouchel to give him back his information."*

25. The Appellant provided minutes of a meeting held by SP on 9 July 2015, to discuss issues raised by the Appellant and Mr Barlow. The latter were not present, but Mark Judson of NARPO was. These recorded:

⁷ These are the 405 emails referred to above and not the two sets of email exchanges identified below.

"The pension administration side moved over to Mouchel in February. Early February a van was hired and the vast majority of files were taken and handed over to Mouchel. They scanned the files and destroyed the hard copy files..."

Mr Bridgwood and Mr Barlow wrote a succession of letters saying that [SP] had broken data protection, and were in breach of pensions regulations etc. There were also a number of FOI requests and Subject Access Requests...

Information Security Manager for [SP], was consulted for his opinion, which was that all the actions were legal and within regulations. However, [SP] sought additional legal advice from the force solicitors. They outsourced to Pinsent and Mason. One of the concerns that Mr Bridgwood had was regarding the possible transfer of medical detail because he receives an injury award... It is understood that Mr Bridgwood had put in for an injury award and in doing so had agreed to his processing his injury award. Solicitors advice suggests that he may revoke this authority and ask Mouchel to give back information. The issue here is how we could then process such Injury Award payments...

Mr Bridgwood had made an FOI request and part of that request was to see a copy of the contract between [SP] and Mouchel. Mouchel has supplied a copy of the contract which is heavily redacted. [JF] was concerned about the amount they have redacted and that if it went to a tribunal [SP] could possibly be fined for non-disclosure. However, this has to be weighed carefully against the commercial confidentiality of our [third] party suppliers.

...

Mark Judson then posed 10 questions to the meeting:

1. The company Kier have recently taken over Mouchel. Does this mean they are still operating under the name of Mouchel as opposed to Keir and are Staffordshire Police content with this arrangement in terms of Mouchel being able to provide a good service.

Response: *Mouchel Ltd. are still operating under the name of Mouchel Ltd. Mouchel are now providing this service to over 20 police forces and although we are still in a transitional phase are providing a good service which will continue to be monitored.*

2. Have ex officers medical files been transferred to Mouchel or they still held in house. If the full medical file has not been passed what information has been given to Mouchel.

Response: *All pension files have gone to Mouchel to process. These files have only ever contained the minimum of medical data; enough to enable the amount of the injury award to be calculated. Staffordshire Police Occupational Health department still have the confidential files containing medical/doctors notes/assessments. These notes have never been available to the pensions department.*

3. Have [SP] self-referred to the Information Commissions Office as I have requested on several occasions. As your own outside legal advice suggests that a breach of personal data may have occurred unless the parties have given their individual consent for medical issues to outside companies.

Response: *No*

....

5 Are [SP] commissioning an information document similar to the Leicestershire document, and will any information gleaned from this document be used in the future to review a new system of injury on duty awards.

Response: *This is part of the processing of normal day to day working. There is a requirement for any pensions administrator to know what related state benefits are being paid to an individual in order to correctly calculate the amounts payable. We are applying rules and regulations to what somebody is being paid. Solicitors are saying confidential information is okay, but suggest that personal injury is more problematic. Depending on the outcome of further advice, pensioners receiving injury awards may have a right to know that they do not have to have such personal information transferred, but as things stand we do not have an alternative solution for payment. We may therefore need to inform everyone that they can withdraw permission. If they want to withdraw consent, we would have to set up another payroll. The force comes under the Pensions Regulator. We*

would be happy to liaise with [JS] and refer ourselves to the Regulator to ensure we have done everything right and reassure individuals that it has been done correctly....

8. Have the complaints received by Staffordshire Police suggesting that criminal and conduct offences have taken place been dealt with fairly and robustly, and if so what is the rationale behind any decision to discontinue action in respect of them.

Response: We have a process to pay people, but haven't got a mechanism to pay without consent. If legal response is deemed to be insensitive there is going to be an apology. It should go through the Police Pensions Advisory Board in theory. The Pension Regulator is the right person to refer to.

9. Does the protected Status referred to in the Police Pension Regulations of 1987 and Police Pension Regulations of 2007 extended to preventing information from the PPR 1987 being passed to outside companies to administer the pension provision.

Response: Police Pensions Regulations of 2007 does not disallow data to be passed to outside administrators..."

26. The Appellant also provided a letter from the Minister for State for Policing, Fire, Criminal Justice and Victims to Sir William Cash MP of 26 January 2016. This stated:

"...It is the discretion of individual police pensions authorities to take any decisions they feel appropriate concerning their administration services, including outsourcing. They are required to consult pension scheme members only in instances where any decisions result in changes to member benefits..."

27. The Appellant provided extensive submissions. These include:

a. The information is required to determine if SP and the PCC have undertaken an illegal action in establishing the new contract and pension management changes. SP is not providing the documents because they failed to implement substantial changes in pension management lawfully. The outsourcing of police pensions was implemented without the knowledge or consent of pension stakeholders or the opportunity to make representations.

b. For example, he does not know the exact content and date of transfer of his personal information despite having requested this a long time ago.

c. He had requested the information to be able to:

"fully identify and prove unlawful process which includes breaches of the 1987 Police Pension Regulations including breaches of the 'Statutory Duties' of the Chief Constable. The Police Pensions Act 1976, the 'Gross Maladministration' of the Pension Scheme and the possible 'Misfeasance in Public Office' by placing the 'Public Purse' at risk through imposing Pension Scheme management changes without consultation."

d. SP had failed to provide information relating to due diligence. The obstruction experienced and the inability of SP to conduct an open fair and transparent process has led to the request that is the subject of this appeal. Pension rights have been altered and the lack of cooperation by SP is obstructing his ability to substantiate the extent of the changes made or future impact on pension administration.

- e. Management functions of the 1987 Police Pension Regulations and Scheme ('PPR/S') were transferred, where the administration of the regulations is the sole and statutory duty of the Staffordshire Police and Crime Commissioner (PCC). It had had no authority to transfer a statutory duty or sensitive personal data to Mouchel without consent or prior consultation.
- f. SP transferred this 'statutory duty' and the personal and confidential information surrounding this process to Mouchel who have no legal authority to hold, seek or process such information. The transfer was a change in the use of his data requiring new and mandatory consent which SP did not obtain. For instance, as industrial injuries benefit must be deducted from an injury award pension, each year the SP pension manager wrote to the pension recipient for authorisation for SP to approach the DWP to seek confirmation of the amount of benefit received. This action is a management function of the regulations and is a statutory obligation of the Chief Constable. No other party should be provided with the medical information without first obtaining explicit consent. In *Campbell v Mirror Group Newspapers*, the House of Lords recognised that medical information is 'obviously private' and should be protected under the European Convention on Human Rights, Article 8 (the right to respect for private and family life), which ultimately protects the dignity and autonomy of a person.
- g. The PCC and SP outsourced all aspects of police pensions and without the knowledge or consent of the pension stakeholders. Accordingly, a private contractor fully manages the pension provision. This resulted in the 1976 and 1987 PPR/S being cast aside. These are the single instruments governing the administration of Police Pensions. He has repeatedly asked SP to provide the legal mandate or prove they had the legal right to pass the management of the 1976 and 1987 PPR/S to a private company and disclose the exact detail surrounding the transfer of the medical information passed to the company. SP have prevaricated and issued false and misleading information to the Commissioner and him.
- h. SP's communication of 13 March 2015 informed pension stakeholders of 'substantial changes' in the management of pensions and described a process led by 'legislation'. However, this was misleading. There was no legislative requirement to contract out the services and they did not have a legal mandate to do so. The transfer was based on a commercial decision to cut costs and not because of a requirement from the Lord Hutton report where SP used the report as an excuse.
- i. SP failed to provide any opportunity for consultation or examination of the process, which was unlawful. The public cannot hold the PCC to account for his actions when spending public money if the process is secret. The public cannot know they are getting value for money. It is questionable how this would be assessed if only one company submitted a tender. The European Procurement Directive 2014 requires 'transparency'. It is difficult to see any in the selection process adopted by SP.
- j. Lord Hutton's Public Service Pension report required the 2015 Police Pension Scheme to have 'new' and separate management requirements but the 1976 and 1987 PPR/S encompasses entirely different benefits and pension conditions to that of the 2015 PPR/S. SP has placed the 1976 and 1987 PPR/S under the same umbrella. Because of the 2015 PPR/S, police forces have been required to form pension boards. This is an entirely new entity to deal with pension issues however the Pension Regulator providing oversight to the pension boards has stated it

cannot substantiate its legal position and mandate to deal with the 1976 and 1987 PPR/S.

- k. The PCC and SP have legal obligations to the pension stakeholders as data subjects to inform and provide any pension information required by a pension member under the 1987 PPR/S and the 1976 Police Pensions Act. Failing to comply is a gross maladministration.
- l. SP misled the Appellant and Commissioner by providing false and misleading information and breached the FOIA and DPA on a number of occasions as determined by Decision Notices FS50587942, RFA0604105 and RFA0578780.
- m. The deputy chief constable as chairman of the pension board, contributed to a blatant obstruction in the process when at the pension board meeting of 30 July 2015 he directed, instructed or encouraged his staff to withhold information.
- n. Significant indicators of unlawful activity are:
 - a. The minutes of the pension board meeting of 9 July 2015 appear to indicate that the legal advice obtained by SP in April/May was not entirely supportive of the process. It appears to have indicated the right to withdraw consent and have the 'HSPD' returned to SP. There may well have been a breach of the ECHR in the right to a private life.
 - b. The 'Breaches of Employment' document appears to condemn their actions.
 - c. The legal advice obtained by SP.
- o. Of concern, it is a matter of record that Mouchel holding other police pension contracts amassed debts of £83,000,000 and had to be bailed out by RBS and Lloyds Bank who obtained an 80% controlling share. Within weeks of obtaining the Staffordshire contract Kier Business Services took control of Mouchel.

Issue 1

- 28. With specific reference to the emails, the Appellant's submissions include the following.
 - a. He considered that the emails may contain information about what had been required of Mouchel and what they had been asked to do.
 - b. Although not accepting that this request was vexatious, to assist he attempted to revise his request, he submitted a further communication to them dated 3 January 2016. He had not received a response to this from SP or the Commissioner.
 - c. On 24 December 2015, both SP and the office of the PCC were issued with FOI requests related to this issue. Both parties have failed to respond and the Commissioner again failed to take meaningful action against SP despite being serial offenders where breaches of the FOIA are concerned. SP will not meet its obligations under any circumstances if it believes it will shed light on the method of the pension transfer. The lack of sanction by the Commissioner is disconcerting and only serves to encourage the obstructive conduct by SP.

- d. Private companies administrating police pensions are required to have been vetted by the Home Office. Kier cannot purchase this authority. Therefore the information required is entirely legitimate, specific and focussed within the 1987 PPR/S, Pensions Act and FOIA.

Issue 2

29. With specific reference to the contract, the Appellant's submissions include the following.
 - a. It is not accepted that the contract details would cause prejudice to future contract negotiation, particularly if it was sanitised in relation to specific commercial issues.
 - b. A counter-argument could be made that full disclosure might encourage more companies to seek Home Office approval and generate more competition breaking up what appears to be a Government authorised cartel.
 - c. As regards disclosure of the contract, he suspected that there has been no adequate due diligence as set out in the recommended process of public body tender/bid guidelines. There would then possibly have been illegal action where the financial consequences for pension stakeholders could be incalculable.
 - d. As regards harm to Mouchel, no harm would befall it on disclosure as the company no longer exists.
 - e. It is questioned why an organisation that promotes itself as being a champion of minority rights would disregard fundamental right of privacy to its disabled ex-officer. He questioned whether this is because it made the commercial decision without due diligence and could not alter the action without serious financial implications.
 - f. The contract disclosed was redacted to such a degree that the disclosure held no value.
 - g. The Commissioner's reasoning that non-disclosure was to enable SP to seek the best value for public money when negotiating contracts did not take into account the other legal issues including the transfer of the regulations, the extreme concerns over due diligence, the severely restricted ability to hold the PCC to account, and the possibility of unlawful implementation and risk to the public purse.
 - h. It is essential for the public to have confidence that the PCC is acting lawfully, he is accountable for his actions and the public purse has not been placed at risk. Therefore full disclosure of the contract document is essential to substantiate if the PCC and SP has acted lawfully or unlawfully.
 - i. The actions and conduct of the PCC and SP surrounding the award of this contract presented an overwhelming public interest for full disclosure which substantially outweighed the speculative opinion that future contracts might be prejudiced.
 - j. The increase in private companies receiving public funded contracts meant more accountability and oversight was required. It was difficult to accept there was genuine competition based on the facts. There are only three companies which provide the pension administration services. Only one company provided a tender in SP's case.

- k. The public interest in the contract was that it could be null and void. Where SP had acted unlawfully, the cost to the public purse could be enormous. SP showed a strong will to protect itself, where if it had nothing to hide, it should disclose the information. Further, he required to know what changes had been made.

Issue 3

30. With specific reference to the legal advice, the Appellant's submissions include the following.
 - a. The arguments for the disclosure of this document are also contained within the submissions made within the appeal document.
 - b. SP only obtained this advice as the direct result of the challenge being made to their process. It is notable that the 'Legal Advice' was obtained in April/May. Obviously SP had some doubt to its legal standing which gives further indication that due diligence was lacking from the start of the process. They outsourced this advice to a 'Specialist' Law Firm using public money. There is strong indication that this legal advice did not entirely support the actions of SP in the implementation of transferring highly sensitive personal information.
 - c. The content of this document may well have been the reason a very senior official within SP attempted to coerce consent by a threat to withhold payment of the Appellant's Injury Award Pension. This Act breached the EDPD, DPA, ECHR and their 'Statutory Duty' to pay Police Pensions. This is another issue the ICO has failed to acknowledge as a breach of the DPA.
 - d. The legal advice appears to involve direct 'Conversation' about the witness Mr Barlow and the Appellant. This may take the issue away from the mandate of the Tribunal by being designated as 'Personal Information' under the DPA. The ICO has provided a determination that the 'Legal Advice' documents he reviewed did constitute 'Personal Information'.
 - e. Based on the information disclosed within the minutes of the pension board meeting of 9 July 2015, the legal advice did not appear to entirely meet SP expectations. It does appear to identify possible unlawful activity and breaches of the DPA. This alone is justifiable reason for full disclosure of this document if only to prove his interpretation of the information is incorrect.
 - f. However it is now essential to establish the public purse has not been placed at risk and the PCC acted within law and is accountable for his actions. There is overwhelming public interest in the production of this document with the appropriate redaction under the FOIA.

Staffordshire Police

31. SP made various submissions. Within those made after the hearing, it explained that notwithstanding the outsourcing arrangements, SP retains responsibility for performing reviews of entitlement to injury awards. In compliance with the relevant legislation:
 - a. The initial assessment of an ex-officer for an Injury Award is arranged by SP with their Selected Medical Practitioner making the decision as to what Injury Award Band is allocated;

- b. Any review or reassessment of an Injury Award payable to any Staffordshire Police pensioner is always undertaken by SP itself and never by the company to whom pension payments has been outsourced; and
 - c. Mouchel only has responsibility for the timely payment of police pensions and injury pensions. It corresponds with pensioners on limited matters such as changes in circumstances and whether the pensioner is in receipt of deductible state benefits.
32. It also explained that Kier Business Services Ltd is the same legal entity as Mouchel Business Services Ltd, and continues (under its new name) to perform the same work that it did as Mouchel Business Services Ltd. There was no transfer or assignment of the contract to a different entity. The argument that Mouchel Business Services Ltd no longer exists, or is no longer permitted to perform this work, is wrong, there was no change of corporate structure and the company remained a separate entity. It is the same entity doing the same work. Its commercial interests have not altered.
33. It explained at the hearing that the Commissioner had concluded that the transfer of data to Mouchel had been the lawful processing of data within the meaning of the DPA.
34. As regards the issue raised concerning due diligence, SP's letter of 21 December 2015 explained that since the tender was conducted as a further competition exercise against a framework arrangement that had been tendered by Hampshire Constabulary, the question of due diligence in the selection of the applicants did not arise. It had already been completed by Hampshire Constabulary as part of its initial tender exercise in creating the framework arrangement.

Issue 1

35. Submissions in relation to Issue 1 regarding whether the request was vexatious within the meaning of s.14(1) FOIA, included:
- a. There are 1,693 pages consisting of 405 emails within the scope of the request. Some of this information would be the personal data of third parties (including salary information) or contractual information requiring redaction under sections 40(2) and s. 43 FOIA.
 - b. A significant amount of time would be required to redact the information because it is included within the body of emails is likely to be scattered throughout the information, rather than being possible to isolate easily.
 - c. That burden, in SP's submission, considerably outweighs any value in the request.
 - d. The Appellant's motives relate to concerns as to the legitimacy of SP's actions. He has repeatedly made allegations of serious impropriety, without providing a proper evidential basis for them. The tenor of his objections is seen in various documents submitted to the Tribunal. For instance, in his reply to the Commissioner's Response, he states:

"The following information sets out my reasons for the request of the documents from Staffordshire Police (SP) this is so I may fully identify and prove unlawful process which includes breaches of the 1987 Police Pension Regulations (1987 PPR/S) including breaches of the 'Statutory Duties' of the

Chief Constable. The Police Pensions Act 1976, the 'Gross Maladministration' of the Pension Scheme and the possible 'Misfeasance in Public Office' by placing the 'Public Purse' at risk through imposing Pension Scheme management changes without consultation".

(See page 43 of Open Bundle - Emphasis added)

- e. The Appellant requested all emails between SP and Mouchel in relation to the outsourcing. Although at one point seeking to refine his request by reference to time periods, he then confirmed that he “*will require all 1,693 emails to be fully disclosed*”, since “[*t*]his issue will not remain within the confines of your organisation it may well end up in a ‘Judicial Process’ (Civil and or Criminal) complaints have been made to other organisations which amount to a ‘Judicial Process’”. At best, this is a fishing expedition, in which the Appellant seeks to dredge up some material to support his concerns.
- f. Although SP predominantly relies on the burden of cost and time involved in application of redactions to protect exempt information, the Appellant’s *wider* approach to this dispute is worthy of note. A considerable proportion of the Open Bundle consists of the Appellant’s emails and letters to SP and to the Commissioner. (*For instance, pages 220, 249, 256, 259, 261, 263 of the Open Bundle*). In SP’s view, the disclosure of the disputed information would be likely to lead only to a further barrage of correspondence. SP submits that s. 14 FOIA applies.

Issue 2

36. As regards whether section 43(2) is properly relied on, SP’s submissions include the following:

Would prejudice to commercial interests be likely to occur as a result of disclosure?

- a. The contract is a commercial contract setting out the basis upon which services will be provided and payments made. The redactions are commercially sensitive, both for SP and for Mouchel. Redactions cover:
 - a. The levels of service which Mouchel have contracted to perform, the failure to achieve which may have consequences under the contract.
 - b. Prices and charging information for the contract.
 - c. Intellectual property, indemnities, insurance, termination provisions, and the detail of contractually stipulated sanctions.
- b. It constitutes the commercial terms setting out the bargain between SP and Mouchel and records the outcome of Mouchel’s successful tender for the work. It also shows to prospective tenderers what terms a police force are likely to be willing to accept, (including its pricing strategy), which would be to the authority’s detriment in its need to obtain the best deal.
- c. Mouchel was at the relevant time one of three entities approved to provide such services under a framework agreement (the others being Capital and Xafinity). Only Mouchel sought to tender for this opportunity. However, similar opportunities may well arise, either under the framework agreement or generally, in future. The disclosure of the contract would give Mouchel’s competitors a valuable insight into

its proposed commercial terms. It would also give (a) other public bodies (Mouchel's likely counterparties) an insight into the terms which Mouchel would be willing to accept, and (b) other private operators an insight into the terms which SP would be willing to accept. None of these would be in the interests of Mouchel, or of SP. Both would weaken Mouchel's and SP's commercial bargaining position.

- d. If disclosure is ordered, there is a real and significant risk of contractors being deterred from entering into tendering exercises with SP, and that this would be likely to adversely impact on the price required to be paid by SP to future contractors. If contractors cannot expect that their commercially sensitive information will not be exempt from FOIA disclosure, they will be more reluctant to contract with SP (and potentially with other public entities).
- e. Mouchel provided its view of the need for the redactions. This includes that the contract deals with a complex proposition which is particular to Mouchel's unique approach to providing the services to its clients. It outlines the service delivery methodology, performance standards, price and cost construction, implementation plans etc. There are a comparatively small number of significant players in the market some of whom being less experienced than Mouchel. Disclosure would reveal how to construct a successful tender proposal to competitors. The contract also sets out the commercial risk profile that it is prepared to accept such as indemnities, warranties, limitations etc. This would allow competitors to present their proposals in a more beneficial way, knowing Kier's commercial and risk profile.
- f. Where there were only three potential tenderers in the market, it was particularly important to protect its interests. Disclosing material might help another competitor beat its offer to the advantage of SP. However, it would be a slippery slope if competitors could not be confident that their confidential proposition would not remain so.
- g. Such a conclusion is in complete accordance with the case-law identified by SP, which whilst not binding may be persuasive by force of its reasoning.

In all circumstances of the case, does the public interest in maintaining section 43(2) outweigh the public interest in disclosure?

h. Interests in favour of disclosure, include:

- a. a generic interest in public authority transparency and accountability.
- b. the Appellant has concerns as to the legitimacy of SP's actions, and that there is some public interest in the disclosure of material which could answer his concerns. However, this of limited weight. The Appellant has repeatedly made such allegations, of serious impropriety, without providing a proper evidential basis for them. Large parts of the Contract have been disclosed and there is little objective public interest favouring disclosure.

i. Interests in the maintenance of the exemption include:

- a. The points made above in relation to the engagement of the exemption apply with equal force here. There is a real likelihood of commercial harm to SP, to Mouchel, and (potentially) to other public bodies if the information is disclosed.

- b. The contract was entered into only a few months before the request.
 - c. Police budgets are presently under considerable pressure and there is a considerable weight to the public interest in avoiding further costs.
 - d. There are also public interests in (a) the preservation of a fair and competitive market (where tenderers' commercial information is not made public to tenderers' competitors), and (b) to ensuring that public authorities are able to receive best value. If contracts containing the commercial terms submitted by successful tenderers are made public under FOIA, contractors will be dissuaded from contracting with public bodies and/or will seek a higher price in compensation for the risk. Private entities contract with public bodies aware that public bodies are subject to FOIA – but aware also that there is a scheme of exemptions designed inter alia to protect their commercial interests.
- j. The public interest falls in favour of the maintenance of the exemption.

Issue 3

37. SP's submissions in relation to whether sections 42 or 40(1) are properly relied on include the following:
- a. SP considered s. 42 FOIA to apply to two email chains of relevance to the Appellant's request was for a copy of the legal advice 'obtained by Mrs [B]'. The Commissioner found one to fall outside the temporal scope of the request, and the other to fall within s. 40(1) FOIA and so to be exempt from disclosure. The Appellant does not appear to object to the 'temporal scope' determination.
 - b. The Appellant contends that there is additional material within the scope of his request, namely "*a legal advice document [drafted by Pinsent Masons] as a direct consequence of my complaints*": This appears to be based on a note of a meeting in July 2015. (*See final paragraph of page 30 Open Bundle and the first paragraph of page 31, which set out a summary of some legal advice provided.*) Mr Judson, refers to this meeting in his statement. SP has repeatedly informed the Appellant that there is no additional documentation falling within the scope of his request. The advice provided at that stage of events was provided by telephone only and no record was made.
 - c. As regards the email chain that is the subject of this appeal, this is exempt pursuant to s. 40(1) FOIA, as the Appellant's personal data. In the alternative, SP relies on the requested material being exempt under s. 42 FOIA because it constitutes legal advice.
 - d. If the Tribunal considers that s. 40(1) applies, the Tribunal should not go on to consider other relevant exemptions. This is because the function of s. 40(1) is to delimit the boundary between two statutory schemes facilitating the disclosure of information: FOIA, and the subject access regime under the Data Protection Act 1998 ("DPA").⁸

⁸ See the Explanatory Notes to FOIA, para. 144 which having been written by the sponsoring Department are admissible insofar as they "*cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed*": *R (Westminster CC) v National Asylum Support Service* [2002] 1 WLR 2956. It states: "*144. Subsection (1) exempts, as a class, personal information relating to the applicant for the information. The right to know whether this information is held, and if so to have access to it, is covered instead by the provisions of the*

- e. The effect of s. 40(1) FOIA is not to say that the individual is not entitled to the requested information. It is to say that the information may not be obtained under FOIA, but may only be obtained under the DPA. A SAR⁹ under the DPA may be refused (since the DPA itself contains exemptions) – if so, the avenues for recourse are to the civil courts or by complaint to the ICO (from which an appeal does not lie to the Tribunal, though an individual remains free to pursue a claim through the civil courts).
- f. There are obvious practical reasons for that difference of approach. Most notably, disclosure under FOIA is to all the world, while disclosure pursuant to a DPA SAR is not. Disclosure to an individual of his/her own personal data under a SAR is therefore accompanied by a measure of privacy unavailable under FOIA.
- g. The fact that s. 40(1) demarcates the boundary between two statutory information rights, and between the two jurisdictions (of the Tribunal and the civil courts) competent to hear disputes arising out of each respective information right, renders it inappropriate (SP submits) for the Tribunal to go on and consider other exemptions if it concludes that the disputed information is exempt under s. 40(1) FOIA.
- h. The requested information was central to the Appellant where the material was created in response to his complaint and formulates an answer to this.

Our Findings

Issue 1

- 38. As regards Issue 1, which concerns 405 emails, we prefer and adopt the reasoning provided by SP set out in paragraph 35. Having reviewed what we consider to be a satisfactory sample of the material, we are satisfied that there is personal data within the body of the emails and that it would take a significant amount of time to redact that data under FOIA because it is included within the body of emails and likely to be scattered throughout the information. On balance, we find that the estimate of the burden that compliance would take as set out at page 188 to be reasonable. In our view, the burden is disproportionate to the value or serious purpose of the request by a considerable degree.
- 39. We have carefully considered the large amount of information provided by the parties, and have seen nothing to allow us to conclude that SP has acted unlawfully or improperly in the way that the Appellant appears to suggest. The Appellant made an extensive list of allegations, but without sufficient analysis or reasoning to justify them. For instance, we have seen no reason why the outsourcing of administration of police pensions is unlawful or why member benefits have been altered.¹⁰ Outsourcing seems to be a standard practice and cost effective measure. We have seen no reason why outsourcing would equate to the SPCC ‘transferring his statutory duty’ or responsibility or no longer being accountable for it.¹¹ SP has explained to the Appellant that there was no issue of due diligence as the tenderer has already been pre-vetted by the Home Office. We have no reason to consider

Data Protection Act 1998 (as amended by Part VII of the Act). This provision, in relation to such information, confers absolute exemption for the purposes of section 2.”

See also, *Oates v Information Commissioner EA/2013/0040*. In that decision (at para.s [22f] and 33-35).

⁹ Subject access request set out in s.7 DPA.

¹⁰ See for instance paragraph 28, the veracity of which we have no reason not to accept.

¹¹ We note, solely for the Appellant’s understanding, that as explained by SP, Mouchel would still be required to comply with the requirements in its handling and guarding of personal data.

that Mouchel being purchased by another company and changing its name affected the approval. We do not agree that SP's letter to pension holders of 13 March 2015 stated that there was a legislative requirement to contract out the administration of the pension scheme as alleged by the Appellant. We have been shown nothing to support the assertion that SP misled the Commissioner or Appellant.

40. The Appellant has stated in his most recent submissions that SP has failed to provide any legal authority for Mouchel to act 'independently' under Police Pension Regulations. We think this misunderstands the nature of outsourcing whereby Mouchel would be carrying out services under the specific terms of the contract on behalf of SP. We have seen no reason why the outsourcing arrangements would result in SP relinquishing its responsibilities under the regulations.
41. In any event, we do not find any serious value or purpose in the request. This is because it is not focused and seems to akin to a fishing expedition based on seemingly unfounded suspicion that the SP has done something wrong which might be found in the emails. From the material submitted, it is clear that SP have invested considerable time to properly consider the issues raised and address the Appellant's concerns.¹² The unfocused nature of the request lacks proportionality, even when considering the general interest in increasing accountability and transparency.
42. We note that in the minutes of the meeting of 9 July 2015, SP acknowledged that it had "*a process to pay people, but haven't got a mechanism to pay without consent*". The Appellant has expressed concern that SP has not complied with legal requirements, but on the basis of the information provided, on balance, we have not been persuaded that this is the case. The Appellant may be additionally concerned to that under the arrangements Mouchel as a contracted party holds sensitive personal data. We do not accept that the Appellant's concerns (even if justified) would equate to justify disclosing the particular (and substantial) material requested. Consequently there is importance to protecting the public purse.
43. We note that the Appellant refers to his having made further requests for information. These are outside the scope of this appeal, which solely concerns his request of 1 June 2015.

Issue 2

44. We find that section 43(2) was properly relied on. This is because we prefer SP's submissions. We adopt the reasoning set out in paragraph 36 with the exception of sub-paragraphs 36 (d) and (f). We consider that disclosure would be likely to prejudice Mouchel's commercial interests and that in itself is sufficient to engage the exemption set out in section 43(2). We think disclosure would be unlikely to make Mouchel less likely to tender in the future. Nevertheless, the terms may be less favourable to SP as a result.
45. As regards the points made by the Appellant:
 - a. We regard all redacted material to be of a commercial nature.
 - b. We do not find the argument that full disclosure could encourage more companies to seek Home Office approval and generate more competition compelling. In any

¹² See for instance, the minutes of the meeting of 9 July 2015.

event, as disclosure would be likely to cause commercial harm to Mouchel, his argument does not assist his case. This is because SP need only show that disclosure would be likely to prejudice the commercial interests of Mouchel for the purposes of section 43(2).

- c. The Appellant noted that he did not consider there to have genuine competition in relation to the outsourcing. We suspect there was a competitive process undertaken within the framework agreement. In any case, as correctly pointed out in the Commissioner's submissions, section 43(2) concerns prejudice to 'commercial interests' of any person, and as such is not restricted to 'competition' issues.
 - d. The Appellant alleging that Mouchel has ceased to exist seems to reflect a misunderstanding of the corporate status of the company. Where a company changes its name and has different ultimate owners it does not cease to exist. It simply exists under a different name and with different owners.
 - e. The Appellant alleges that if SP had nothing to hide, it would disclose the information. SP has stated that its concern is that disclosure of the full contract would be likely to prejudice the commercial interests of Mouchel and SP and that therefore it is relying on the exemption set out in section 43(2).
46. Having accepted that full disclosure of the contract would be likely to prejudice the commercial interests of Mouchel and SP, we then considered the balance of public interest.¹³ We have considered whether any of the Appellant's arguments may assist him at this stage. However:
- a. We have not been given satisfactory reasoning to accept that SP has disregarded fundamental rights of privacy of disabled officers or that if it had, this would indicate that the weight of public interest would then be to disclose the redacted parts of the contract.
 - b. It is not evident why there are risks to the public purse that would justify disclosing the full contract.
 - c. The Appellant has argued that disclosure might encourage greater competition, which would be in the interests of the public purse. Even if credible, we do not consider this would be a satisfactory reason to risk the likely prejudice to Mouchel as the contracting party.
 - d. For the reasons set out above, we do not accept that full disclosure is necessary to have confidence that the PCC and SP have acted lawfully. This is because (a) we do not accept the veracity of the 'legal issues' identified by the Appellant; and (b) we consider that the information already provided to the Appellant including that set out in the Open Bundle¹⁴ ought provide reasonable reassurance of this.
47. We accept the public interest in disclosure based on the interests in accountability, transparency, achieving value for money and proper spending of the public purse. This was identified by both SP and the Appellant. We accept and have taken into account further public interests in disclosure identified by the Commissioner. These were (a) that the outsourcing of pension services by SP has been a matter of

¹³ See paragraph 23(2)b above.

¹⁴ See minutes of 9 July 2015 and letter of 13 March 2015 set out above.

controversy. Therefore, there is public interest in disclosure of a full version of the contract in order that the full details of the arrangement with the contractor are publicly known; and (b) the disclosure of full details of dealings between public sector bodies and private sector service providers would enhance public knowledge and understanding of such arrangements. As stated by the Appellant, the increase in private companies receiving public funded contracts brings into focus the need for accountability and oversight. However, even having factored in these public interests in disclosure, we find that in all circumstances of the case, the public interest set out in the section 43(2) exemption outweighs the public interest in disclosure.

Issue 3

48. Again, we accept the submissions of SP on this issue. Having reviewed the material, we accept that it constitutes the personal data of the Appellant¹⁵ where the Appellant is the focus of this material. As stated by the Commissioner, the material concerns and partly consists of a draft letter to the Appellant.
49. We accept SP's analysis set out above, that accordingly the information may not be disclosed under FOIA, where under section 40(1) we have no further jurisdiction to consider the matter. It falls instead to be dealt with under the DPA and is not a matter that we have jurisdiction to consider.
50. We also accept that SP does not hold legal advice described in paragraph 37(b) because we can find no reason not to. The minutes of the meeting of 9 July 2015 did not refer to written advice.

Other

51. We note that at the hearing the Appellant objected to SP having handed a bundle of the cases relied on at the hearing. This is far from best practice, but does happen, and it is likely that it would have been possible to find these online in event. SP also provided its skeleton argument very shortly before the hearing. This was lengthy and introduced new points not made before by the SP. We considered this a concern. Consequently, we gave the Appellant the opportunity to make further submissions after the hearing. Since in this case the Appellant was not legally represented, the Tribunal also ask all questions of the SP that we considered a legal representative might have asked and did so to an extensive degree.
52. Our Decision is unanimous.

Judge Taylor

31 January 2017

¹⁵ See paragraph 20 above.