



**Appeal number: EA/2019/0372P**

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

**MICHELLE LOGAN**

**Appellant**

**- and -**

**THE INFORMATION COMMISSIONER  
HERTFORDSHIRE COUNTY COUNCIL**

**Respondents**

**TRIBUNAL: JUDGE ALISON MCKENNA (CP)**

**Determined on the papers, the Tribunal sitting in Chambers on 28 May 2020**

## MODE OF HEARING

1. This determination was conducted by a Judge, sitting alone. The Tribunal was satisfied that it was appropriate to compose the panel in this way, having regard to paragraph 6 (a) of the Senior President's Pilot Practice Direction dated 19 March 2020<sup>1</sup> and the desirability of determining all cases which are capable of determination by the most expeditious means possible during the pandemic.
2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.
3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 195. It also considered a closed bundle comprising 42 pages.

## DECISION

4. The appeal is dismissed.

## REASONS

### *Background to Appeal*

5. The Appellant appeals against the Information Commissioner's Decision Notice FS50805372 dated 4 September 2019.
6. The Appellant's information request was made on 14 March 2018 to Hertfordshire County Council ("the Council") and concerned communications between the Council and a school, during the period 1 September 2016 and 1 January 2018, *save for those related to the judicial review over which you assert legal privilege...where such documents cover any matters raised between my husband and I and the school, the schools policies and procedures or governance and the specific matters set out in this letter.*
7. The Council initially considered the matter as a subject access request under the Data Protection Act 1998, but the Appellant confirmed she was seeking information which fell under the Freedom of Information Act 2000 ("FOIA") rather than her own personal information. The Council later responded to the information request by disclosing some information but refusing to provide other information in reliance upon sections 40 (2) and 41 of FOIA. The Council upheld its position on internal review dated 16 October 2018.
8. The Appellant complained to the Information Commissioner, who conducted an investigation and issued the Decision Notice described at paragraph 1 above. The Information Commissioner found that the Council had been entitled to rely on the exemptions claimed and that it did not hold any additional information within the scope of the request. She also found

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<sup>1</sup> <https://www.judiciary.uk/publications/pilot-practice-direction-panel-composition-in-the-first-tier-tribunal-and-the-upper-tribunal/>

that the Council had breached s. 10 FOIA by virtue of its late response but required no steps to be taken. The Appellant appealed to the Tribunal.

### *Appeal to the Tribunal*

9. The Appellant's Notice of Appeal dated 30 September 2019 relied on grounds which may be summarised as follows:

- (i) in respect of s. 40 (2) FOIA, there is said to be a strong legitimate interest in the information she had requested so as to increase accountability and public trust in the school's safeguarding policies and procedures *relative to other schools within the community*. She submitted that this legitimate interest also extended to ensuring that public statements made by senior representatives of public bodies are balanced, fair, impartial, not misleading and supported by evidence. She submitted that there is a strong public interest in *allowing individuals to understand decisions made by public authorities affecting their lives and, in some cases, assisting individuals in challenging those decisions*. Moving to the test of necessity, she submitted that, having been refused permission to bring a judicial review against the school, *there is a clear benefit to the Appellant in having the data disclosed and understanding the evidential basis behind the school's and Council's statements*. The Appellant submits that the personal data of the children mentioned in the requested information should be protected by redaction of the disclosed information. In the Appellant's submission, the tests of legitimate interest and necessity are satisfied so that the balancing test should be undertaken by the Tribunal. She submits that where data subjects are public officials, the balance should favour disclosure, and that the information may be redacted to protect identifiable children.
- (ii) In respect of s. 41 FOIA, it is submitted that the information provided by the school to the Council should not be regarded as having been provided in confidence because there would be no actionable breach of confidence arising from disclosure. If there were an actionable breach, then it is submitted that the Council could rely on a public interest defence.
- (iii) The Appellant also submitted that there is additional information within the scope of the request which has not been disclosed or in respect of which no exemption has been claimed. The Decision Notice excluded from the scope of the request all information relating to her judicial review application, but in her grounds the Appellant submits that the Information Commissioner should have examined every document within the Council's judicial review file to ensure that legal professional privilege had rightly been claimed in respect of it.

10. The Information Commissioner's Response dated 19 November 2019 maintained the analysis as set out in the Decision Notice and responded to the grounds of appeal as follows:

- (i) As to s. 40 (2) FOIA, it is submitted that there is no lawful basis for disclosure of the withheld information. Whilst there is a recognised legitimate interest in transparency, disclosure is not reasonably necessary to achieve that aim as the Appellant's concerns about the school have been aired through other mechanisms over several years. In the circumstances, the balancing exercise is not required to be undertaken as a matter of law.

- (ii) As to s. 41 FOIA, it is noted that the school is a different legal entity to the Council and that the school voluntarily passed information about safeguarding to the Council for the purpose of a voluntary audit, following the Appellant's complaints. It is submitted that, on the balance of probabilities, a claim for breach of confidence could be brought by the school if the Council were to disclose such information. It is submitted that such information cannot be regarded as trivial and it was not, at the time of the request, in the public domain. It is submitted that information of this nature has the necessary quality of confidence and that the Council received it subject to an implied duty of confidence. It is submitted that disclosure of such information would be detrimental to the school in inhibiting the free and frank exchange of information and views by those involved in any future safeguarding audit. Finally, it is submitted that a public interest defence would not be available to the Council in these circumstances.
- (iii) The Commissioner had understood that the Council's Legal Services Department held all the information relating to the Appellant's application for judicial review in a single electronic file which the Appellant herself had removed from the scope of her request. It is submitted that the Appellant has impermissibly sought to widen the scope of her request in her grounds of appeal. The Information Commissioner invited the Tribunal to join the Council as a party to these proceedings so that the Tribunal could hear from the Council directly on this point.

11. The Council was added as a party to the appeal. The Council's Response dated 3 December 2019 supported the Information Commissioner's case. It responded to the grounds of appeal as follows:

- (i) The Council submits that the approach to s. 40 (2) FOIA taken in the Decision Notice is correct. The Council comments that the personal data within the scope of the request falls into two categories: the personal data of employees and of children at the school. The first category of personal data consisting of the names and contact details of relatively junior officers, which in the Council's submission has been appropriately redacted from the information disclosed. The job titles have not been redacted and it is submitted that this approach to disclosure meets the legitimate interests of public. In relation to the children whose personal data would be disclosed, it is submitted that the release of personal details about children and families in the context of a safeguarding audit is unwarranted and could place them in danger.
- (ii) The Council submits that the approach taken to s. 41 FOIA in the Decision notice is correct. The school is a separate legal entity which provided information to the Council subject to an implied duty of confidence. In these circumstances, there would be an actionable breach of confidence if the Council were to disclose this information. The Council agrees with the Information Commissioner that a public interest defence would not be available in these circumstances.
- (iii) The Council comments that the Appellant's judicial review application against the school was held by the Administrative Court to be totally without merit and that the Appellant was directed to pay the school's costs. The Council submits that, given the terms of the Appellant's information request, it had reasonably understood her to have removed from its scope all the information held within

its Legal Services Department's single electronic file relating to the judicial review proceedings. The Council comments that it would be prepared to review the contents of the file if a fresh FOIA request were made in respect of its contents, but it agrees with the Information Commissioner that the Appellant may not at this stage seek to widen the scope of her request.

12. The Appellant filed a Reply to the Council's Response only, dated 17 December 2019. This emphasised the Appellant's view that disclosure is reasonably necessary because her application for judicial review was refused, the school did not carry out an independent investigation into her complaints and its complaints process did not provide for disclosure or discovery. She submitted that no evidence had been presented for the Council's view that the disclosure of information about children and families could put them in danger. She submits that *Even if releasing the information would cause harm, the Appellant believes that the Tribunal still needs to consider whether the public interest favours disclosure.*

#### *The Law*

13. Section 40 FOIA was amended in May 2018 by the Data Protection Act 2018. The Appellant made her request in March 2018 but the relevant law to apply to this request is that which pertained as at the date the Council responded (the internal review response) – see Paragraph 52 (2) of schedule 20 to the Data Protection Act 2018<sup>2</sup>. As the Council's final response following its internal review was October 2018, I have applied the amended provisions.

14. Section 40 FOIA relevantly provides as follows:

#### *40 Personal information.*

*(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.*

*(2) Any information to which a request for information relates is also exempt information if—*

*(a) it constitutes personal data which does not fall within subsection (1), and*

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

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

*(a) would contravene any of the data protection principles, or*

*(b) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.*

*(3B) The second condition is that the disclosure of the information to a member of the public otherwise than under this Act would contravene Article 21 of the GDPR (general processing: right to object to processing).*

*(4A) The third condition is that—*

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<sup>2</sup> <http://www.legislation.gov.uk/ukpga/2018/12/schedule/20>

*(a) on a request under Article 15(1) of the GDPR (general processing: right of access by the data subject) for access to personal data, the information would be withheld in reliance on provision made by or under section 15, 16 or 26 of, or Schedule 2, 3 or 4 to, the Data Protection Act 2018, or*

*(b) on a request under section 45(1)(b) of that Act (law enforcement processing: right of access by the data subject), the information would be withheld in reliance on subsection (4) of that section.*

....

15. Section 41 FOIA relevantly provides as follows:

*41 Information provided in confidence.*

*(1) Information is exempt information if—*

*(a) it was obtained by the public authority from any other person (including another public authority), and*

*(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

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

*“If on an appeal under section 57 the Tribunal considers -*

*(a) that the notice against which the appeal is brought is not in accordance with the law, or*

*(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

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

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

17. First-tier Tribunals are bound as a matter of legal precedent by Decisions of the Upper Tribunal but not by Decisions of differently constituted First-tier Tribunals. See *O’Hanlon v Information Commissioner* [2019] UKUT 34 (AAC).<sup>3</sup>

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<sup>3</sup> [https://assets.publishing.service.gov.uk/media/5c7fb354e5274a3f8edc00cf/GIA\\_1680\\_2018-00.pdf](https://assets.publishing.service.gov.uk/media/5c7fb354e5274a3f8edc00cf/GIA_1680_2018-00.pdf)

18. The burden of proof in satisfying the Tribunal that the Commissioner's Decision Notice was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant. The standard of proof to be applied is the balance of probabilities.

#### *Evidence*

19. None of the parties relied on witness evidence.

20. I refer in the Closed Annexe to this Decision to the withheld information.

#### *Conclusions*

21. The Respondent drew my attention to the Upper Tribunal's endorsement of the three stage test applied by this Decision Notice, in *Goldsmith International Business School v Information Commissioner and Home Office* [2014] UKUT 563 (AAC)<sup>4</sup> at [35] to [42]. This was a reiteration of the Supreme Court's judgment in *South Lanarkshire Council v The Scottish Information Commissioner* [2013] UKSC 55<sup>5</sup> at [18].

22. In *Cox v IC and Home Office* [2018] UKUT 119 (AAC)<sup>6</sup> Upper Tribunal Judge Wikeley commented that:

*45. Also relevant in the present context is Judge Jacobs's warning in GR-N v Information Commissioner and Nursing and Midwifery Council (at paragraph 30) against over-generalised propositions: "is impossible to apply paragraph 6(1) without having regard to the identity of the applicant, the interest pursued by the request, and the extent to which information is already potentially available to the public."*

*46. Fourth, it follows from the above that the legitimate interests of an individual requester may, or may not, involve the disclosure of officials' names – but that is a context-specific and fact-sensitive question. Such a legitimate interest cannot be automatically assumed. To revert to a well-worn phrase, it all depends.*

23. The Appellant did not dispute that the information she requested involved processing personal data or the correctness of the approach taken in the Decision Notice of applying a three-stage test for considering whether there could be lawful processing of personal data under Article 6 (1) GDPR. Her challenge was to the conclusions reached in applying the test.

24. My conclusion in respect of s. 40 (2) FOIA is as follows:

25. I acknowledge, as did the Information Commissioner, the legitimate interest of the public in accountability and transparency in the actions of public bodies. However, the Appellant

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<sup>4</sup> <https://www.bailii.org/uk/cases/UKUT/AAC/2014/563.html>

<sup>5</sup> <https://www.supremecourt.uk/cases/docs/uksc-2012-0126-judgment.pdf>

<sup>6</sup> <https://www.gov.uk/administrative-appeals-tribunal-decisions/cox-v-information-commissioner-and-home-office-2018-ukut-119-aac>

suggests that there is also an interest in helping her to improve standards at the school in relation to other schools and to help her challenge decisions that have been made which affect her personally. I note here that considerable public resource has already been expended by the Court in considering her application for judicial review and by the school and Council in undertaking a voluntary safeguarding audit to address her complaints. The Appellant's concerns about the school have not been substantiated through either of these processes. I acknowledge the Appellant's continuing concerns, but I do not accept in these circumstances that there is an additional legitimate interest in seeking to go behind these processes in order to challenge the school or the Council further. I therefore conclude that the legitimate interest test is engaged, but this is on the basis of seeking transparency and accountability, not on the basis of an objective need to improve standards at the school or by a need to facilitate the Appellant's understanding or further challenge.

26. Taking a fact-specific approach to the issues in this case, I agree with the Information Commissioner's conclusion that the Appellant has not shown it to be reasonably necessary for the personal data of either category of third party to be disclosed in order to meet the legitimate interest of transparency and accountability in this case. She has not persuaded me that it is necessary to put the identity and contact details of relatively junior public servants into the public domain in order to pursue questions of accountability by their employer public bodies. She has also not persuaded me that redaction would be sufficient to avoid the risk of a jigsaw identification of children whose family circumstances are referred to in the withheld information. I find the comments in her Reply about an acceptance by the Tribunal of the harm that disclosure of information about children might cause to be concerning and I do not agree with her that such harm is warranted. In these circumstances, I agree with the conclusion in the Decision Notice that the necessity test was not met so it was unnecessary to move onto the third stage balancing exercise. I discern no error of law of inappropriate exercise in the Decision Notice in this respect.

27. My conclusion in respect of s. 41 FOIA is as follows:

28. The school is a separate legal entity to the Council. It provided highly sensitive information to the Council, in order to undergo a voluntary safeguarding audit, as a result of the Appellant's complaints. I am satisfied that the nature of such information is such that it was provided subject to an implied duty of confidence. It is information which has the necessary quality of confidence and I accept that it would be detrimental to the school if it were seen to disclose such sensitive information. I also accept that it would be likely to inhibit the frank participation of all parties in any future audit. I am satisfied that there would be an actionable breach of confidence by the school against the Council if it were to disclose this information. I conclude there is no basis for concluding that a public interest defence would be available to the Council in circumstances where the Appellant's criticisms of the school have not been substantiated. I discern no error of law or inappropriate exercise of discretion in the Decision Notice in this respect.

29. My conclusion as to the scope of the request is as follows:

30. The terms of the request seem to me on a reasonable interpretation to exclude the whole of the judicial review file from its scope. If the Appellant had requested any information from within the judicial review file where legal professional privilege was not claimed, then the scope of the request would have been as she now contends. However, she requested information save for those related to the judicial review, and on a plain reading of her



request I discern no error of law or inappropriate exercise of discretion in the approach taken by the Decision Notice to the scope of the request.

31. Having reached these conclusions, I discern no error of law or inappropriate exercise of discretion in the Decision Notice. Accordingly, I now dismiss this appeal.

**(Signed)**

**ALISON MCKENNA**

**DATE: 28 May 2020**

**CHAMBER PRESIDENT**