IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

Case No. EA/2009/0047

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FS50203810
Dated: 19 May 2009

Appellant: Magherafelt District Council

Respondent: Information Commissioner

Heard at: The Court House, Belfast and on the papers

Date of hearing: 16th November 2009 and 11th January 2010

Date of decision: 3 February 2010

Before

Melanie Carter (Judge)
Tony Stoller
and
Pieter de Waal

Attendances:

For the Appellant: Jason Coppel

For the Respondent: Joanne Clement

Subject matter: FOIA s. 17 Refusal of request
s. 40 Personal data
DPA s.1(1) Personal data

Cases:

Common Services Agency v Scottish IC [2008] UKHL 47; [2008] 1 WLR 1550

Campbell v MGN [2002] EWCA Civ 1373, [2003] QB 633. [2003] 1 All ER 224

Department of Health v IC EA/2008/0074

Corporate Officer of the House of Commons v IC EA/2006/15 & 16

Bowbrick v IC EA/2005/0006

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 19 May 2009.

SUBSTITUTED DECISION NOTICE

Dated 3 February 2010

Public authority: Magherafelt District Council

Address of Public authority: 50 Ballyronan Road, Magherafelt, County Londonderry, Northern Ireland

Name of Complainant: Mr Connla Young

The Substituted Decision

For the reasons set out in the Tribunal's determination, the substituted decision is as follows.

a) The disputed information consisting of the summarised schedule constitutes personal data pursuant to section 1(1)(b) of the Data Protection Act 1998.

b) The summarised schedule is exempt from disclosure under section 40(2) of the Freedom of Information Act 2000 (FOIA) on the grounds that disclosure would breach the First Data Protection Principle of the Data Protection Act 1998.

c) The Magherafelt District Council was not in breach of section 17 FOIA in failing to cite section 38 FOIA as an applicable exemption in the letter of refusal.

d) The Council was however in breach of section 17 FOIA in failing to explain why the section 40(2) FOIA exemption applied to the summarised schedule.

Action Required

No steps are required to be taken.

Dated this 3rd day of February 2010

Signed

Melanie Carter
Judge

REASONS FOR DECISION

Introduction

1. This appeal concerns a request under the Freedom of Information Act 2000 (FOIA) to the Appellant, Magherafelt District Council (the Council) for information on the disciplinary records of Council employees. The Council has appealed the Information Commissioner's (IC) decision requiring it to disclose certain information.

The request for information

2. By email dated 22 February 2008 the complainant, a local journalist, made a request for information to the Council in the following terms –

> *"How many members of council staff have been disciplined in the last three years?*
>
> *Give details of the discipline.*
>
> *How many members of council staff have been suspended from their posts in the last three years?*
>
> *List the reasons why the person was suspended.*
>
> *How many members of staff have been dismissed from their posts in the last three years?*
>
> *Give reasons why the person was dismissed.*
>
> *Personal information about any individual is not required. "*

3. The Council replied to the requester by email dated 19 March 2008 as follows –

> *"1. 15 members of staff, currently employed, were disciplined during the period 1 April 2003 – 31 March 2007.*
>
> *3. No members of staff were suspended during the above period.*
>
> *5. 3 members were dismissed."*

4. The Council further advised the requester that it would not disclose details of the disciplinary action taken against the 15 members of staff or the reasons for the 3 dismissals in accordance with section 40 FOIA (absolute exemption with regard to personal data).

5. The requester asked for an internal review of the Council's decision by email dated 19 March 2008. The Council responded on 16 April 2008

upholding its decision to withhold the disputed information under section 40(2) FOIA. In addition, the Council asserted that the disputed information was also exempt under section 38 FOIA (qualified exemption in relation to health & safety).

The complaint to the IC

6. The requester complained to the Respondent, the IC, by email dated 5 June 2008.

7. By letter dated 13 November 2008 the Council provided the IC with a document consisting of details of the disciplinary action taken against the 15 employees. This is referred to in the Decision Notice and throughout this Tribunal's decision as "the original schedule". The original schedule contained the following information: the date of the disciplinary action; the gender, job title and department of the employee concerned; the penalty issued and the reason for the action taken.

8. Shortly afterwards, the Council provided the IC with a revised schedule containing details of the disciplinary action taken against the 15 employees which, at that time, it said it was prepared to release to the requester. This schedule is referred to in the Decision Notice and throughout this Tribunal's decision as "the summarised schedule". The summarised schedule contained only the penalty issued and reason for the action taken. It did not include the date of the disciplinary action or the gender, job title and department of the employee concerned.

9. Shortly thereafter the Council became aware of a House of Lords authority, *Common Services Agency v Scottish Information IC* [2008] UKHL 47; [2008] 1 WLR 1550 ("the CSA case") and, after taking legal advice and in light of this case, it decided that it was no longer prepared to release the summarised schedule.

10. The IC served a Decision Notice dated 19 May 2009 in accordance with section 50 FOIA. The IC decided that the information contained in the original schedule was personal data. Further, the IC considered that disclosure of the original schedule would contravene the First Data Protection principle and that it was therefore exempt under section 40(2) FOIA.

11. However, the IC decided that the information contained in the summarised schedule was "fully anonymous" and did not therefore amount to personal data. He therefore found that the summarised schedule was not exempt under section 40(2) FOIA.

12. The IC went on to consider whether the summarised schedule was exempt under section 38(1) FOIA; he concluded that it was not.

13. In addition the IC found that in failing to cite the specific subsection of section 40 FOIA relied upon or to explain why the exemption applied

the Council had contravened sections 17(1)(b) and 17(1)(c) FOIA respectively. Further, in failing to cite section 38 FOIA in its refusal notice, the Council had contravened section 10(1) FOIA.

14. In light of the above, the IC ordered the Council to disclose a copy of the summarised schedule to the requester.

The appeal to the Tribunal

15. The Council's grounds of appeal are appended to a Notice of Appeal dated 16 June 2009. Those grounds may be summarised as follows –

    1. The IC erred in deciding that the summarised schedule did not contain personal data.

    2. The summarised schedule did not fall within the scope of the request.

    3. The IC erred in criticising the Council for failing to disclose the summarised schedule by way of informal resolution.

    4. The IC erred in deciding that the Council had contravened section 17 FOIA by failing to specify which subsection of section 40 FOIA it relied upon.

    5. The IC erred in deciding that the Council had contravened section 17(1) FOIA by failing to cite section 38 FOIA in its refusal notice.

    6. The IC erred in concluding that the Council had contravened section 10(1) FOIA.

16. The Tribunal adopted the above as the questions for it to address, adding only that, if it decided under ground 1 that the summarised schedule did contain personal data, it would need to proceed to consider whether disclosure would breach the Data Protection Principles and thereby fall within the absolute exemption in section 40(2) of FOIA.

The Tribunal's powers and relevant law

17. The Tribunal's jurisdiction on appeal is governed by section 58 of FOIA. As it applies to this matter it entitles the Tribunal to allow the Appeal if it considers that the Decision Notice is not in accordance with the law or, to the extent that it involved an exercise of discretion, the IC ought to have exercised his discretion differently.

18. The starting point for the Tribunal is the Decision Notice of the IC but the Tribunal also receives evidence, which is not limited to the material that was before the IC. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the IC and come to the conclusion that the

Decision Notice is not in accordance with the law because of those different facts.

19. Under section 1 of FOIA, any person who has made 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. Under section 2, the duty on the public authority to provide the information requested does not arise if the information is exempt under Part II of FOIA.

20. 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 from disclosure.

21. Section 40 FOIA, an absolute exemption, provides in the relevant parts:

> *"(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.*
>
> *(2) Any information to which a request for information relates is also exempt information if -*
>
> > *(a) it constitutes personal data which do not all within subsection (1), and*
> >
> > *(b) either the first or the second condition below is satisfied.*
>
> *(3) The first condition is –*
>
> > *(a) in a case where the information falls within any of the paragraphs (a) to (d) of the definition of 'data' in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene –*
> >
> > *(i) any of the data protection principles*
> >
> > *…*
>
> *(7) In this section—*
>
> > *...*
> >
> > *'data subject' has the same meaning as in section 1(1) of [the Data Protection Act 1998];*

'personal data' has the same meaning as in section 1(1) of that Act."

Evidence

22. The documentary evidence before the Tribunal consisted of the original and the summarised schedules, the correspondence between the parties and a witness statement from Mr Tohill, the Director of Finance and Administration of the Council. The summarised schedule, being the disputed information, was not part of the open bundle or considered in the public part of the hearing. Mr Tohill gave his evidence in public, save for the parts in which he was questioned on the contents of the disputed information.

23. Mr Tohill told the Tribunal that the Council was a small authority with only 150 employees. All staff were known to each other and, he said, to a significant proportion of the local population. Magherafelt District Council has a population of 39,500.

24. Mr Tohill told the Tribunal that staff were generally aware of what disciplinary action was being taken and against whom, such that it would be easy for a journalist armed with the summarised schedule to approach employees and former employees, to ask questions with a view to identifying the people who committed the disciplinary offences on the list in the summarised schedule. The nature of some of the offences on the list would be such as to lead to an easy identification given the restricted number of persons carrying out each role in the authority.

25. Whilst the individuals themselves would be unlikely to divulge the information that they had been disciplined, it was likely that close working colleagues would be aware of a sanction where this involved a removal or temporary suspension from duties. In some circumstances, the person being disciplined would have asked a work colleague to support them through the process.

26. He claimed that as a result of the small size of the Council, there was a high level of knowledge amongst staff as to each others' affairs. He likened it to a 'family'. In such a small working environment, Mr Tohill claimed, it would be easy for a journalist, such as the requester, to make enquiries based on the summarised schedule and to find out the identities of the individuals involved.

Legal submissions and analysis

Did the summarised schedule consist of "personal data"?

27. The Council had refused to disclose the summarised schedule on the basis that it was personal data and that disclosure would breach the First Data Protection Principle. Thus, it was relying upon the absolute exemption in section 40(2) of FOIA. Under section 40(2), personal data of third parties is exempt if disclosure would breach any of the Data Protection Principles set out in Part I of Schedule 1 of the DPA (as interpreted in accordance with Part II of Schedule 1).

28. Clearly, if the summarised schedule did not consist of personal data then this exemption could not apply and as found by the IC in the Decision Notice, it would (subject to being within the scope of the request) need to be disclosed to the requester.

29. The Council's primary submission was that the IC had erred in finding that the summarised schedule was not personal data, arguing that the information in that document fell within limb (b) of the definition of "personal data" in the DPA. Section 1(1) of the Data Protection Act 1998 ("DPA") states –

> *"'Personal data' means data which relate to a living individual who can be identified –*
>
> *(a) from those data, or*
>
> *(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller ."*

Thus the Council argued that, as the data controller, it had in its possession "other information" (the original schedule) which, read with "those data" (the summarised schedule), would enable the identification of the individuals who had committed the offences on the list in the summarised schedule.

30. The IC submitted in contrast that it was only where "those data" (the summarised schedule) played an operative role in the identification of the individuals that it would amount to "personal data" under limb (b) of the definition. In other words, if the summarised schedule was "fully anonymised" when read on its own and therefore added nothing to the process of identification when taken with the original schedule, then it was not "personal data". The Tribunal understood this submission, in effect, to be that the summarised schedule would only be "personal data" within limb (b) of the definition if it was like a piece of the jigsaw without which identification from either set of information could not be made. Also, where "those data" was in effect a subset of "the other information" the former would never be "personal data" within the meaning of the DPA. The Tribunal noted that this was a particularly narrow interpretation of the scope of "personal data" and thereby the application of the DPA as a whole.

31. Both parties drew support from the CSA case claiming that their interpretation was the true effect of this House of Lords authority. The differing interpretations of the CSA case and indeed the same point of law had arisen in a recent Tribunal case, the *Department of Health v Information IC* [EA/2008/0074], which is on appeal to the High Court. That case concerned statistics held by the Department of Health about abortions. The statistics were derived from information contained upon so-called forms HSA4 containing detailed information about the doctors and patients involved. The Department published annual abortion statistics and in the year in question certain statistics had been suppressed. The appeal in that case concerned the suppressed statistics which the IC had ordered to be disclosed on the basis that it was not "personal data" even when read with the forms HSA4. The Tribunal in that case found that limb (b) operated in such a way as to render the suppressed statistics "personal data" within the meaning of the DPA. It considered in detail the effect of the CSA case.

The Tribunal in this appeal listened carefully to the submissions of both parties and found itself in agreement with the differently constituted Tribunal in the *Department of Health* case. This Tribunal adopts the reasoning put forward in the *Department of Health* case (substituting in the extract below the summarised schedule and original schedule for the statistics and the forms HSA4 respectively).

> *"33. Both parties rely upon the Common Services Agency v Scottish Information Commissioner [2008] UKHL 47 (CSA case) in support of their arguments. This was a case where a request was made for the incidences of childhood leukemia by year for the Dumfries and Galloway postal area by census ward. The Scottish Information Commissioner had ordered the disclosure of the data in "Barnardised" form to prevent identification. This involved adjusting low cell count figures that were not 0 by + / – 1 or 2.*
>
> *34. In the leading judgment Lord Hope of Craighead noted that the Scottish Commissioner "did not ask himself whether the Barnardised data would be personal data within the meaning of section 1(1) of the 1998 Act and if so, whether its disclosure ... would satisfy the disclosure principles". For this reason the case was remitted back to the Scottish Commissioner to enable him to undertake that exercise.*
>
> *35. Lord Hope found that the Scottish Commissioner had made an error in law in ordering the disclosure in Barnardised form:*
>
> > *"18. ...Its release would only have been appropriate if he was satisfied that it was not personal data in the hands of the agency to which the [section 40(2) equivalent] applied or, if it was that disclosure of the information in this form would not contravene any of the data protection principles"*

36. When considering the duty of the data controller Lord Hope said at paragraph 22:

> *"He cannot exclude personal data from the duty to comply with the data protection principles simply by editing the data so that, if the edited part were to be disclosed to a third party, the third party would not find it possible from that part alone without the assistance of other information to identify a living individual. Paragraph (b) of the definition of "personal data" prevents this. It requires account to be taken of other information which is in, or is likely to come into, the possession of the data controller."*

37. The Information Commissioner argues that rendering the disputed information anonymous to a third party would enable the information to be released without having to apply the data protection principles. He relies upon paragraphs 24 and 25 of Lord Hope's judgment. Paragraph 24 considers the definition of 1(1)(b) DPA and concludes that "The formula which this part of the definition uses indicates that each of these two components must have a contribution to make to the result." He then outlines 2 scenarios:

> *1. "... Clearly, if the "other information" is incapable of adding anything and "those data" by themselves cannot lead to identification, the definition will not be satisfied. The "other information" will have no part to play in the identification."*

The Tribunal is satisfied that this scenario does not apply here since the "other information" (the HSA4 forms) would add something to the data (the statistics), at the least, the identity of the data subjects.

> *2. " The same result would seem to follow if "those data" have been put into a form from which the individual or individuals to whom they relate cannot be identified at all, even with the assistance of the other information from which they were derived."*

The Tribunal is satisfied that this scenario does not apply here, since, with the assistance of the HSA4 forms, the data subjects can be identified.

38. Lord Hope goes on to add that in relation to the second scenario:

> *"In that situation a person who has access to both sets of information will find nothing in "those data" that will enable him to make the identification. It will be the other*

> *information only, and not anything in "those data", that will lead him to this result."*
>
> *The Commissioner argues that if the statistics are anonymous to a third party, there is nothing in "those data" to lead to identification and it is the other information only which would lead to identification. The Tribunal is satisfied that what is being referred to here is a situation where the statistical information can no longer be cross referenced to the other information by the data controller, and not a situation where the data is anonymous to a third party but can still be cross referenced using the forms retained by the DOH.*

39. Lord Hope relied upon the wording of recital 26 of the preamble to the Directive [95/46/EC] in support of his approach. Recital 26 provides:

> *"Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas, to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person; whereas the principles of protection shall not apply to data rendered anonymous in such a way that the data subject is no longer identifiable."*

40. In paragraph 25 of his judgment he notes that section 1(1)(a) and (b) DPA gives effect to the first 2 phrases of recital 26.

> *"The third phrase casts further light on what Member States were expected to achieve when implementing the Directive. Rendering data anonymous in such a way that the individual to whom the information from which they are derived refers is no longer identifiable would enable the information to be released without having to apply the principles of protection. Read in the light of the Directive, therefore, the definition in section 1(1) DPA 1998 must be taken to permit the release of information which meets this test without having to subject the process to the rigour of the data protection principles".*

41. The Commissioner argues that this is authority for the release of information which is anonymised in the hands of a third party without recourse to the DPA. However, this could only apply in the context which recital 26 permits: where there are no means by which the data controller or another person may identify the data subject.

> *42. Lord Hope did not decide whether Barnardisation would make the information anonymous in the hands of the data controller. He stated:*
>
> > *"23. ... Barnardisation is a method of rendering the information so far as it is possible to do so, anonymous. ...*
> >
> > *27. In this case it is not disputed that the Agency itself holds the key to identifying the children that the Barnardised information would relate to, as it holds or has access to all the statistical information about the incidence of the disease in the Health Board's area from which the Barnardised information would be derived. But in my opinion the fact that the Agency has access to this information does not disable it from processing it in such a way, consistently with recital 26 of the Directive, that it becomes data from which a living individual can no longer be identified. If Barnardisation can achieve this, the way will be then open for the information to be released in that form because it will no longer be personal data. Whether it can do this is a question of fact for the respondent on which he must make a finding.*
>
> *43. The Commissioner argues that what is being envisaged here is the question of whether the statistics are anonymous to a third party. The Tribunal is satisfied however that the question of fact for the Scottish Commissioner was whether the process of Barnardisation would mean that the data could not be reconstituted to its original form by the Agency, in which case it could be released without further reference to the DPA. Consequently the Tribunal is satisfied that for the purposes of section 40(2)(a) FOIA, the statistics derived from the HSA4 forms constitute personal data pursuant to section 1(1)(b) DPA in the hands of the DOH, because the data relate to individuals who may be identified from those data and other information held in the HSA4 forms.".*

32. It was argued before this Tribunal that the previously constituted Tribunal in the *Department of Health* case had misunderstood the question of fact that had been remitted by the House of Lords in the CSA case back to the Scottish Information Commissioner. It was argued that the reference in paragraph 27 by Lord Hope to "*the Agency itself holds the key to identifying the children that the Barnardised information would relate to"* made it clear that the question being remitted back could not be the one identified by the Tribunal in the *Department of Health* case in the last paragraph of the quotation above. It was not, the IC submitted, whether the process of Barnardisation would mean that the data could not be reconstituted to its original form by the Agency. The IC argued that the fact that the Agency held "the key" made it clear that the data could be so

reconstituted. The correct question was whether it is the "other information" only that leads to the identification, or whether there is anything in "those data" that will enable the identification.

33. The Tribunal, however, was not persuaded by this submission as it appeared from the terms of the House of Lords judgment that the Barnadisation of the statistics had not yet actually taken place and as such the actual Barnadised data was not before the House of Lords. Thus, the House of Lords was not in a position to conclude that post-Barnadisation the Agency would still hold "the key" in the way suggested. There would have been no evidence before it for the House of Lords so to conclude. There had moreover been some suggestion that the process of Barnadisation could be carried out in such a way as to indeed render the data "fully anonymous" both in the hands of third parties and the data controller (ie: once barnadised the public authority would not be able to trace back to the original data and to thereby unlock the identities of the individuals from the statistics).

34. The Tribunal agrees with the Tribunal in the *Department of Health* case, that the question remitted back in the CSA case was whether Barnadisation would render it impossible for the Common Services Agency, subsequently, to identify the individuals to which the statistics related, even when read with other information held by the Agency. This conclusion as to the finding of fact remitted back to the Scottish IC was consistent with the broader interpretation of limb (b) of the definition of "personal data" being argued for by the Council in this case.

35. The Tribunal was moreover mindful of the potential absurdity of the consequences that might flow from an interpretation of "personal data" and limb (b) of the definition as argued by the IC. In this appeal, it would mean that the Council had only to comply with the Data Protection Principles in relation to the original schedule and not the summarised schedule. Thus, whilst the Council would be fully aware of the individuals to whom the summarised schedule related and would hold other information which, if read together with the summarised schedule would identify the particular individuals, it would not have to provide the equivalent level of data protection to the two different documents. So, for example, the Council would be obliged under the Data Protection Principles not to keep the information in the original schedule for a disproportionate amount of time and to maintain certain levels of security, but none of these safeguards would apply to the summarised schedule despite the fact that the data controller could identify the individuals from that document. This appeared anomalous and difficult to defend given that in reality the two sets of information taken together would enable anyone to identify the data subjects.

36. The Tribunal was mindful that FOIA did not create a presumption in favour of disclosure when dealing with the personal data of individuals. As Lord Hope said in paragraphs 4 and 7 of the CSA case :

> *"4.There is much force in Lord Marnoch's observation in the Inner House, 2007 SC, para 32 that, as the whole purpose of the 2002 Act [the Scottish equivalent of FOIA] is the release of information , it should be construed in as liberal a manner as possible. But that proposition must not be applied too widely, without regard to the way the Act was designed to operate in conjunction with the 1998 Act.*
>
> *……..*
>
> *7.In my opinion there is no presumption in favour of the release of personal data under the general obligation that the 2002 Act lays down. The references which that Act makes to provisions of the 1998 Act must be understood in the light of the legislative purpose of that Act, which was to implement Council Directive 95/46/EC. The guiding principle is the protection of the fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data: see recital 2 of the preamble to, and article 1(1) of the Directive."*

37. The Tribunal reminded itself that given that the DPA was implementing an EC Directive aimed at the protection of the privacy of data subjects' personal information, it was appropriate to adopt a purposive approach to construction. As Lord Phillips of Worth Matravers, MR, said at para. 96 of *Campbell v MGN* [2002] EWCA Civ 1373, [2003] QB 633, [2003] 1 All ER 224, CA,:

> *"In interpreting the Act it is appropriate to look to the Directive for assistance. The Act should, if possible, be interpreted in a manner that is consistent with the Directive. Furthermore, because the Act has, in large measure, adopted the wording of the Directive, it is not appropriate to look for the precision in the use of language that is usually to be expected from the parliamentary draftsman. A purposive approach to making sense of the provisions is called for."*

38. Following the CSA authority and taking a purposive interpretation of section 1(1)(b) the Tribunal concluded that the summarised schedule did consist of "personal data" in the hands of the Council under limb (b) of the definition. As the IC had found to the contrary in the Decision Notice, it followed that, in the Tribunal's view, it had not been in accordance with law.

39. The Council argued that if the Tribunal was not minded to find the summarised schedule to be "personal data" under limb (b) of the definition, it should, in the alternative, so find on account of the direct identifiability of the individual employees from that document alone. In other words the summarised schedule was "personal data" under limb (a) of the definition. The Tribunal was of the view however that no individual could be identified by members of the public from the limited

information in the summarised schedule alone. It would need to be linked with other information. There was no evidence before the Tribunal that any of the disciplinary offences referred to in the summarised schedule and which might have amounted to criminal offences had led to convictions in the courts (let alone any evidence that there had been any publicity following any such conviction). Nor was there any evidence before the Tribunal of any other wide spread public knowledge of particular disciplinary offences such that identification of the individuals to which the summarised schedule related would be possible. Whilst individual employees of the Council and indeed members of the public (e.g. friends and family of the disciplined staff) may have sufficient private knowledge to enable identification, the Tribunal was of the view that this was not the correct way to approach this issue. The information in the summarised schedule had to be viewed in the light of widespread public knowledge. In the absence of any evidence other than conjecture on the part of Mr Tohill as to the ease by which further investigations would uncover the identities, the Tribunal did not find itself able to find that there was a direct risk of identifiability from the summarised schedule alone. It followed that, in the Tribunal's view, limb (a) of the definition of "personal data" did not apply.

40. Given however the finding that limb (b) did, the next logical step in considering whether the section 40(2) exemption applied, would have been to ask whether disclosure of the summarised schedule would breach any of the Data Protection Principles. Before doing so however, the Tribunal was obliged to turn to what was a live issue in this appeal, namely whether the summarised schedule, being personal data, was within the scope of the request. If not, section 40(2) would not apply but the Council would not need to make disclosure in any event.

Was the summarised schedule within the scope of request?

41. It was argued by the Council that if the Tribunal found the summarised schedule to be personal data (which it has) then the correct approach would be to find that this information fell outside of the scope of the request. It was pointed out to the Tribunal that the letter of request had stated that "*personal information about any individual is not required"* and then subsequently the letter of complaint to the IC had stated *"Given that the paper has no interest in obtaining personal information or the identities of those involved it becomes less relevant".* Thus, the Council submitted that the Tribunal should go on to determine that the requester was not seeking anything that amounted to "personal data" within the scope of the DPA and that the request therefore did not include the summarised schedule. In support of this, the Council suggested that as the requester was a journalist he would be a knowledgeable and sophisticated user of FOIA and could be taken to have intended this to be the scope of his request.

42. As the IC had found in his Decision Notice that the summarised schedule was not personal data, it was perhaps not surprising that he did not consider this aspect of the appeal. The IC representative submitted at the hearing however that given the complexities and indeed difficulties of interpreting the definition of "personal data" and the effect of the CSA case, it would be wrong to read the request as being this technical in intent. The IC also invited the Tribunal to read the words from the subsequent letter in the paragraph above to mean that the requester's reference to both *"personal information"* and *"the identities of those involved"* must be taken to have meant that his intention was to differentiate between the two and that "personal information" was intended to have a wider meaning than the direct identification of persons.

43. The Tribunal was initially attracted by the Council's argument. Reading the letter of request objectively, it was open to an interpretation that the request sought only relevant information not excluded under section 40(2). The requester was, after all, a journalist, who belongs to a profession which in the Tribunal's experience generally has a detailed and technical understanding of FOIA. It was however mindful of the legal issues behind the definition of "personal data" and was of the view that even the most sophisticated user of FOIA, if not a lawyer versed in information law, would be perplexed and possibly lost by such a technical analysis of the request.

44. As the Tribunal had some doubt on this point it considered that the fair way to proceed would be to give the letter of request a broader interpretation to include the summarised schedule within its scope. Thus, being personal data and within the scope of the request, the Tribunal proceeded to the next step, that is, to consider whether disclosure would breach any of the Data Protection Principles.

Would disclosure of the summarised schedule contravene any of the Data Protection Principles?

45. The Council argued that the two Data Protection Principles relevant to this question were the first and second. The first data protection principle (which is found in Schedule 1 of the DPA) states:

> *"(1) Personal data shall be processed fairly and lawfully, and in particular, shall not be processed unless –*
>
> *a) at least one of the conditions in Schedule 2 is met, and*
>
> *b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met, ……"*

46. The parties agreed that the only condition in Schedule 2 relevant to this appeal would be paragraph 6(1) which provides:

> *"6.(1)The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or*

> *parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."*

47. In considering first whether the disclosure would be fair, the Tribunal had regard to the expectations of the employees who were subject to the disciplinary processes. Mr Tohill had told the Tribunal that the Council employees and indeed the Council would have had an expectation that their disciplinary record details would be kept confidential. Integral to the question whether disclosure despite this expectation was fair, was the related question whether there was a real risk of identification by the public if the summarised schedule were to be disclosed. If not, then despite the reasonable expectation that disciplinary details would remain confidential, it might have been fair to disclose the summarised schedule.

48. It was argued by the Council that it would be easy for a journalist, speaking to other members of the Council's staff, to identify the individuals referred to in the summarised schedule. The Tribunal, whilst clear that read on its own the summarised schedule would not identify particular individuals, did accept (given the small size of the authority and indeed the local population) that it would not be hard for a journalist to take steps to identify the individuals in question. This could then lead to wide spread publication of the names of the individuals, the disciplinary offences they had committed and the sanctions received. This was not the same as concluding that the summarised schedule on its own enabled identification (which would bring the information within limb (a) of the definition of "personal data"). Further investigative steps would need to be taken, but given that these did not appear to be onerous or unlikely, it would be artificial for the Tribunal to ignore what appeared to be a very real risk.

49. The Tribunal concluded therefore that public disclosure of the summarised schedule would be unfair to the data subjects (the employees in question) such that disclosure would be in breach of the First Data Protection Principle. For completeness, the Tribunal also considered whether the conditions for processing (public disclosure in this case), would meet the tests in paragraph 6, Schedule 2 to the DPA.

50. The first part of condition 6 can only be satisfied where the disclosure is 'necessary' for the purposes identified. The second part of condition 6 is an exception: even where the disclosure is necessary, the Tribunal must still go on to consider whether the processing is unwarranted in the particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects.

51. In relation to the first part of condition 6, whether disclosure is "*necessary for the purposes of legitimate interests*" of the requester, the test described in the case of *Corporate Officer of the House of*

Commons v Information Commissioner EA/2006/15 & 16 , adopted by this Tribunal and applied to this case, is:

> a. Whether the legitimate aims pursued by the requester could be achieved by means that interfere less with the privacy of the employees in question; and
>
> b. If the aims could not be achieved by means that involved less interference, whether the disclosure would have an excessive or disproportionate adverse effect on the legitimate interests of those employees.

52. With regard to the enquiry under subparagraph (a), the Tribunal considered the possible "legitimate aims" of the requester. They could include accountability in relation to the Council's handling of disciplinary matters and enhancing transparency in decision making. The Tribunal noted that the requester had already received certain information with regard to the disciplinary offences of the Council employees in the relevant period (see paragraph 3 above). In the Tribunal's view, the "legitimate aims" of the requester could thereby be said to have been reasonably achieved by a means that interfered less with the privacy of the employees. In this regard, the Tribunal was of the view that the degree of accountability called for in these circumstances was limited on the basis that the primary need for accountability in staff disciplinary matters was a matter between employees and the employer, the Council. The public interest in these matters could be met by information at a lower level of detail than was to be found in the summarised schedule. Further, the Tribunal did not consider that provision of the further details contained in the summarised schedule, being only a partial part of the picture (there was no information as to failed disciplinary proceedings or circumstances in which there had been transgressions but no disciplinary action taken), would greatly enhance public understanding beyond that which could already be gained from the information made available.

53. Given these considerations, the Tribunal concluded that it was not "necessary" within the terms of paragraph 6 of Schedule 2 for there to be disclosure of the summarised schedule. The legitimate interests in disclosure of information about disciplinary offences, such as they were, had already been met by a means that interfered less with the data subjects' interests, that is, by the previous release of information about numbers and types of offences and sanctions.

54. In light of the above, the Tribunal concluded that disclosure of the summarised schedule would be in breach of the First Data Protection Principle and that the absolute exemption under section 40(2) FOIA applied.

55. Having come to this view, it was not necessary for the Tribunal to consider the second limb of the test in paragraph 6, Schedule 2 or whether disclosure would be in breach of the Second Data Protection Principle. It was also not strictly necessary for the Tribunal to consider the claim by the Council that the information contained within the summarised schedule was "sensitive personal data".

Whether the Council had contravened section 17 FOIA by failing to specify which subsection of section 40 FOIA it relied upon

56. The Council argued that the IC had erred in finding that it had breached section 17 FOIA in failing to specify that it was relying specifically upon subsection (2) of section 40. In the letter of refusal, the Council had only referred to section 40. The Tribunal noted however that it would have been abundantly clear from the request (and therefore to the requester) that he was not seeking his own personal data and that this could not have been a refusal under section 40 subsection (2). Moreover, it would have been clear that the request related to third party individuals. The Tribunal took into account also that the Council had referred to subsection (2) in the letter following the internal review.

57. The Tribunal was concerned however that the Council had made no mention whatsoever of the Data Protection Principles or how they might be breached in this case, thereby justifying in their eyes the refusal under section 40(2). Section 17 requires the public authority to specify in the letter of refusal any exemption relied upon and why it applies. The Council ought to have made reference to the First Data Protection Principle (and possibly the Second), the fact that this did not, in their view, satisfy the paragraph 6, Schedule 2 test and, as they believed it was sensitive personal data, that none of the conditions in Schedule 3 applied. This would have gone some way to explaining why the Council was saying the exemption applied. The Council failed to do so and the IC had been correct in finding this to be a breach of section 17 of FOIA.

Whether the Council had contravened section 17(1) FOIA by failing to cite section 38 FOIA in its refusal notice

58. The Council argued that the IC had erred in finding against it on the grounds that it had failed to cite the section 38 exemption at the time of the letter of refusal. In particular the Council pointed to the terms of section 17 which applies where *"a public authority, which in relation to any request for information,* ***is to any extent relying on a claim****….that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which…(b) specifies the exemption in question"* [emphasis supplied]. The Council's point is a simple one – the Council was not relying upon section 38(1) when it issued the original refusal notice, but decided to do so subsequently.

59. The Tribunal was mindful of the decision in *Bowbrick v IC (*EA/2005/0006) in which a previously constituted Tribunal did find that

reliance upon an exemption late in the process amounted to a breach of section 17. This Tribunal noted however that this had been an early decision in the life of the Tribunal and subsequent appeals had not always found there to be such a breach. The jurisprudence of the Tribunal had developed to allow the reliance upon late exemptions subject always to there being good cause for so doing.

60. In this case, the Council decided to seek to rely upon section 38 FOIA on internal review. In many ways, this showed that the internal review had been a proper one, and not just a 'rubber stamping exercise'. The internal review, if carried out properly should identify any mistakes made, including having overlooked a relevant exemption on which the public authority considered on reflection it should seek to rely. The Tribunal did not consider that Parliament would have intended to impose an automatic breach and thereby castigate an authority for so acting. To interpret section 17 in this way, could in fact, provide a disincentive to public authorities to be as thorough as possible in the way in which it carried out its internal reviews.

61. The plain English meaning of the words in section 17 allowed an interpretation that the exemptions to be cited in the section 17 notice were the ones relied upon at the time of the original refusal. To find a breach in this case would be to find a hollow technical breach, an approach which the Tribunal considered inappropriate.

62. The Tribunal reminded itself that it only allowed late exemptions to be claimed with good cause. Moreover a public authority would not be able to comply with section 17 by an empty reference to any exemption, simply as a 'holding position'. The authority had to comply with the substantive requirements of section 17, that is and as illustrated above, the provision of an explanation of why the exemption applied in the particular case.

Whether the Council had contravened section 10(1) FOIA

63. In light of the Tribunal's conclusion that the Council did fail to explain how the section 40(2) exemption applied in its section 17 notice, it followed that the Council had contravened the time limit in section 10(1) FOIA. The Act required a letter of refusal that met the requirements of section 17 to be provided to the requester within the time limit of 20 days.

The IC's criticisms of the Council

64. The Council's remaining ground of appeal had been with regard to the criticisms made by the IC in the Decision Notice for not agreeing to release the summarised schedule. This was not a matter strictly within the jurisdiction of the Tribunal. However, given the difficulties and complexity in interpreting the exact effect of the CSA decision, the Tribunal was of the view that the Council had been fully entitled to take the stance it had.

Conclusion

65. The Tribunal finds that the summarised schedule consists of personal data and that its release would breach the First Data Protection Principle. As such, the section 40(2) exemption applies and the Council is entitled to refuse disclosure. As this is contrary to the findings of the IC, the Decision Notice is not in accordance with law.

66. The Tribunal orders that the Substituted Decision Notice at the beginning of this decision stand in place of the Decision Notice dated 19 May 2009.

67. Our decision is unanimous.

Signed

Melanie Carter
Judge
3 February 2010

IN THE FIRST TIER TRIBUNAL
(INFORMATION RIGHTS)

RULING on an APPLICATION for PERMISSION to APPEAL
By

INFORMATION COMMISSIONER

1. This is an application dated 2 March 2010 by the Information Commissioner ("IC") for permission to appeal part of the decision of the First Tier Tribunal (Information Rights) ("FTT") dated 3 February 2010. That decision largely upheld the appeal of Magherafelt District Council and substituted a new Decision Notice for the IC's Decision Notice dated 19 May 2009.
2. The right to appeal against a decision of the FTT is restricted to those cases which raise a point of law. The FTT accepts that this is a valid application for permission to appeal under rule 42 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 as amended ("the Rules").
3. The FTT has considered whether to review its decision under rule 43(1) of the Rules, taking into account the overriding objective in rule 2, and has decided not to review its decision because the grounds of the application raise important points of law which can be more appropriately dealt with in the Upper Tribunal.
4. In this case the grounds of appeal advanced are clearly set out by the IC in its application and the FTT gives permission for the IC to appeal to the Administrative Appeals Chamber of the Upper Tribunal on the grounds advanced.
5. Under rule 23(2) the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended the IC has one month from the date this Ruling was sent to it to lodge the appeal with:

   Upper Tribunal (Administrative Appeals Chamber)
   3rd Floor, Bedford House
   16 – 22 Bedford Street
   Belfast
   BT2 7FD

6. Any application for the appeal to be stayed should be made to the Administrative Appeals Chamber of the Upper Tribunal at the same address.

Melanie Carter
Judge
First-tier Tribunal (Information Rights)
4 March 2010