HM Courts & Tribunals Service

IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Appeal No. EA/2012/0160

BETWEEN:

DEBORAH CLARK

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

EAST HERTFORDSHIRE DISTRICT COUNCIL

Second Respondent

APPEAL DETERMINED ON THE PAPERS ALONE

BEFORE

DAVID MARKS QC
Tribunal Judge

ANNE CHAFER
MICHAEL HAKE

Subject Matter:

Freedom of Information Act 2000: Personal Data: section 40

DECISION

The Tribunal dismisses the Appellant's appeal against the Decision Notice of the Information Commissioner (the Commissioner) dated 3 July 2010 (Reference No. FS50440114) and upholds the Commissioner's decision as set out in the said Decision Notice.

Reasons for Decision

General and background

1. This appeal concerns various matters originally arising out of the application of two exemptions under the Freedom of Information Act 2000 (FOIA). The two exemptions relate to personal data, section 40 and the second to section 42 which relates to legal professional privilege. This appeal concerns an appeal made solely against the application of the first exemption, there being no grounds of appeal either expressly or impliedly taking issue with the application of section 42. However, as will be indicated at the end of this judgment, insofar as any grounds of appeal can be said to apply to the application by the Commissioner of section 42, any appeal based on such grounds is dismissed.

2. By a request in writing dated 6 February 2011 the Appellant who is a former Councillor of the relevant public authority namely the East Hertfordshire District Council (the Council), here the Second Respondent, made the following request, namely:

> "Under the Freedom of Information Act could you please provide me with any and all correspondence relating to my original complaints, made on 10th August 2010 against the Chief Executive and the subsequent investigation, including but not limited to correspondence between [named councillor], [named officer], [named employee of Eversheds], [named officer], and named officer]."

3. Before turning to the material events which transpired in the wake of that request it is important to set out some background. The reference to complaints against the Chief Executive concerns an investigation into certain activities carried out by the then Chief Executive of the Council, conducted in a period leading up to a report prepared by Messrs Eversheds, a well known firm of solicitors, in early October 2010. The report relates to those activities and in effect determined that no misconduct had occurred. That report will be called in this judgment "the Report".

4. The Report was prepared at the instance of the Council. There were two complaints. It is not necessary to set out its contents given the terms of this judgment.

5. The resultant Report by Eversheds was produced in the wake of interviews conducted by a member of that firm being a legally qualified representative. The individual included an interview with the Appellant itself, two other related Directors of the Council and the Chief Executive in person, principally it seems by telephone.

6. The Report contained summaries of the interviews. There is no need to set out what could be called the substantive part of the Report. It was found in the circumstances that no action needed to be taken in relation to the Chief Executive with regard to either complaint. The Report, as can be seen, pre-dates the request which is now in issue in this appeal. The Tribunal notes that the investigator expressly acknowledged that the complainant had a proper interest in the work of the Audit Committee.

7. The Tribunal pauses here to note that from its review of the open bundle in this appeal that by early November 2010 the Appellant took issue with various parts set out in , and conclusions of, the Report. For the simple reason which will be restated later in further details, the Tribunal clearly has no jurisdiction to review or pass judgment on the Report and notes that the Appellant appears not to disagree with that conclusion. The Tribunal proposes to say nothing further about the substance of the original complaints made by the Appellant or about any additional detail or material comprised in the Report, save what has been said already. All that should be confirmed at this stage is that it is clear from the Report that no further action was taken in the wake of its production.

The Report and subsequent events in relation to the Appeal

8. The request in question has been set out at paragraph 2 above. On 23 March 2011 the Council responded. It claimed that section 14 of FOIA was engaged. Section 14 which is headed "Vexatious or repeated requests" provides a general term that section 1(1) of FOIA does not oblige a public authority to comply with a request for information if the request is vexatious. By subsection (2) it is provided that where a public authority has previously complied with the request for information which was made by any person, it is not to comply with the subsequent identical or substantively similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of a current request.

9. The Council contended that there was no duty to disclose the information sought in the request. On 23 March 2011 the Appellant sought an internal review. She claimed that she had right to the information under the Data Protection Act 1998 (DPA).

10. On 4 May 2011 and in the light of the latter claim made by the Appellant, the Council issued a subject access request response. In it, it disclosed some information. In due

course, following upon a data protection assessment by the Commissioner of 31 October 2011 under reference RFA0408078, two further documents were disclosed.

11. On 16 November 2011 the Commissioner issued a Decision Notice under reference number FS50364930. This will be called the November 2011 Notice. The November 2011 Notice is not the subject to the present appeal. However, something should be said about the November 2011 Notice.

12. Prior to the November 2011 Notice, the Appellant had made 16 requests for information relating to financial propriety and governance to the Council. In the November 2011 Notice the Commissioner determined that the Council had not dealt with the requests in question in accordance with FOIA or with the Environmental Information Regulations 2004 (EIR). In particular, he determined that the Council had incorrectly withheld information relying on section 14 or the EIR equivalent which deals with matters which are manifestly unreasonable and the Commissioner decided overall that the Council had taken too long to respond. The Commissioner therefore directed the Council to reconsider the requests and either provide the information requested or issue a suitably valid refusal notice which complied with FOIA (see in particular section 17) or with the EIR.

13. In the wake of the November 2011 Notice the Council responded to the Appellant by stating that the requests which were the basis of the November 2011 Notice had been dealt with as a subject access request or series of requests which was the subject of complaint to the Commissioner under reference RFA0408078. It added that all the information to which the Appellant was entitled had been released.

14. The Appellant then sought a review of that response by the Council. The Appellant claimed that yet more correspondence should be available under FOIA. In particular she claimed in a letter of 31 January 2012 that she sought additional correspondence between certain named officers of the Council and the responsible representative of Messrs Eversheds who had written the Report. This is because, she said and as noted above, the Report made specific reference to interviews that the Eversheds representative had conducted with amongst others the Appellant itself, the Chief Executive and other named parties referred to above and finding expression in the Appellant's request of 6 February 2011.

15. On 21 February 2012 the Council provided its response by way of an internal review which addressed the request the Appellant had made for sight of this additional correspondence relating to the various interviews that had been conducted. The Council stated that it did not hold any record of such interviews. In any event, the Council claimed that such information would constitute personal information, in particular the personal data of the parties who gave it. As such, it would therefore be exempt from

disclosure under section 40 of FOIA. It however confirmed that a copy of a relevant witness statement was sent to each party by the responsible representative at Eversheds shortly after each interview had taken place. The said statements constitute part of the information which has been requested and which is in dispute.

16. On 16 May 2012 after a further intervention by the Commissioner, the Council issued a further response in which further information was released albeit subject to redaction to reflect the operation in effect of both section 40 and section 42.

The Appellant's exchanges with the Commissioner

17. The Tribunal has read the exchanges between the Appellant and the Commissioner after May 2012. The Appellant's complaints are summarised in the Decision Notice in issue in this appeal particularly at paragraph 11. They need not be set out here in full since they will be addressed in connection with the Grounds of Appeal below. At least two of her complaints disputed the applicability of both section 40 and section 42. The Appellant also considered the internal review conducted by the Council and resulting in its response of 21 February 2012 was ambiguous.

18. As to this last mentioned complaint, at paragraph 12 of the present Decision Notice the Commissioner agreed that there was an ambiguity. However during the Commissioner's investigation carried out in the wake of the present Decision Notice, the Council confirmed that it did hold correspondence relating to the interviews in question which at stated above were conducted on the phone but that it considered that such information was exempt under section 40.

19. During the investigations carried out by the Commissioner, the Council had in fact confirmed that further searches were undertaken. In the process the Council sought to categorise the information which it considered fell within the scope of the request and which is the subject of the appeal in question into five categories. The Council has contended that in relation to this appeal, only two of such categories called respectively Evidence 4 and Evidence 5, i.e. the final two categories of the five categories involved, are relevant for the purposes of appeal.

20. However for the sake of completeness and convenience, it is felt by the Tribunal that all five categories should be set out at this point. The Tribunal does discern any argument addressed by the Appellant taking issue with this five-fold categorisation. Equally, it is satisfied, as contended for by the Council and indeed by the Commissioner, that only two of the said categories are in issue in the present appeal.

21. Evidence 1 is described as correspondence identified as not previously disclosed to the Appellant, i.e. the previous information covered under the Notice bearing the reference

RFA0408078. This information has now been disclosed to the Appellant and no further mention need be made of it.

22. Evidence 2 is described as correspondence sent by the former Chief Executive to the Eversheds representative said to comprise "extensive email chains" between the said Chief Executive and the Appellant. It necessarily follows that the Appellant holds such information and again, nothing further need be said about this category.

23. For much the same reasons as apply to the previous two categories, Evidence 3 comprises correspondence between a particular Councillor and the Appellant not previously released but now clearly held by the Appellant. Again, nothing further need be said about Evidence 3.

24. The remaining two categories therefore remain in issue. Evidence 4 is correspondence relating to telephone interviews between the Eversheds representative and the former Chief Executive as well as between certain officers and employee of the Council (as well as the Chief Executive) on the one hand, and the same Eversheds representative on the other. This category is subject to claims based on section 40 advanced by the Council.

25. Finally, Evidence 5 is correspondence not previously released (under section 40) but subject to the qualified exemption in section 42 of FOIA. As stated above, the Grounds of Appeal advanced by the Appellant appear not to take issue with the applicability of section 42. However, as indicated above, the Tribunal will address this issue later in this judgment.

26. At paragraph 17 of his Decision Notice the Commissioner noted that Evidence 4 contained an Audit Committee report entitled "Internal Audit Services – Position Statement" dated 28 June 2010. This particular document is published and therefore a disclosed document.

27. As for any and all information which might otherwise be said to be covered by the present request, the same comprises or constitutes the Appellant's own personal data. Again, as indicated above, this information was treated as a subject access report request under the DPA. It necessarily follows such information falls outside the terms and scope of FOIA and of this appeal.

The Decision Notice

28. In the Decision Notice which is subject to appeal and after setting out the relevant principles with regard to section 40 which will be readdressed in more detail below, the Commissioner turns to consider the nature of the information requested, i.e. Evidence 4 and the relevant reasonable expectations which the request gave rise to. These expectations will again be addressed below. He accepts that information relating to

complaints against individuals carried a strong general expectation of privacy. He refers to his own published guidance entitled "Access to information about public authority employees". As against the general expectation of distress that would be likely to occur in the wake of disclosure, the guidance stated that it could also in some cases be a factor militating in favour of disclosure if disclosure related to a serious allegation of impropriety or criminality. Here, such allegations were considered to be absent by the Council. The Commissioner's general view therefore was that this type of information should remain private. The Commissioner added that although, as acknowledged by the Council itself (and as perhaps is already clear from this judgment), the investigation in this case did not result in disciplinary action. The Commissioner regarded issues concerning the request as reflecting in effect a personnel related matter which in general terms meant that the information should remain private even though the withheld information addressed the carrying out by officials of their public functions. The Commissioner said he considered that disclosure of information relating to a complaint even though not upheld would be an intrusion of privacy, would cause distress and could cause permanent damage to the relevant data subject's or subjects' future prospects and general reputation.

29. With regard to any possible legitimate interests in favour of disclosure, the Commissioner accepted the Council's contention that the appointment of an extensive independent investigation went "some way towards satisfying the general public interest, in as much as concerns regarding bias may be assuaged": (see paragraph 38). In particular the Commissioner noted that the Report was shared with the Appellant on 3 November 2010 and:

> "… therefore the legitimate interests of the [Appellant] in knowing how the complaints had been investigated and what the outcomes were had been met before the information request was submitted to the Council".

30. The Commissioner duly found there would be unfairness to the relevant data subject were the information sought to be released. There was therefore a breach of the first data protection principle within the DPA. The Commissioner added that there was no need to consider whether a Schedule 2 condition had been met.

31. With regard to section 42 and Evidence 5, despite what is said above, the particular information which the Council had confirmed it held in that regard comprised, first, communications between Eversheds as the Council's lawyers and a named officer and a Council Leader, information created for the purposes of creating or seeking providing legal advice and other information which had not been disclosed or made public. The Commissioner had reviewed the information and was satisfied that the withheld information was subject to legal professional privilege. This was because Eversheds gave the relevant legal advice insofar as the named officer was not in a position to give

legal advice, such that the former activity by Eversheds was nonetheless communicating legal advice to the Council Leader and/or the Council itself.

32. In the event, the Commissioner determined not only that the qualified exemption in section 42 applied, but also that the balance of public interest militated in favour of maintaining the exemption. For the reasons stated above, the Tribunal is content to endorse that determination of the Commissioner irrespective of its findings made with regard to section 40.

33. The law

34. The Tribunal is content to adopt in effect the description of the relevant provisions in FOIA as set out in the Commissioner's Decision Notice with regard to the operation, particularly of section 40(2).

35. Section 40(2) states that information is exempt from disclosure if constitutes the personal data of a third party and its disclosure would breach any of the so-called data protection principles as set out in Schedule 1 to the DPA.

36. There can be no doubt that the information which is here in question and referred to in Evidence 4 constitutes personal data. The Appellant does not contend otherwise. The first data protection principle is that personal data shall be processed fairly and lawfully and in particular shall not be processed unless at least one of the conditions set out in Schedule 2 to the DPA is met.

37. In considering whether disclosure of the information in Evidence 4 would be unfair the Commissioner took into account the nature of the information, the reasonable expectations of the data subjects or subject in question, the consequences of disclosure on those subjects, coupled with a consideration of the balance as between the rights and freedoms of data subjects and the legitimate interest in disclosure.

38. As noted above, the Commissioner found disclosure to be unfair and in breach of the first principle of the DPA. There was therefore no need to consider whether a Schedule 2 data protection condition had been breached.

The Appellant's Notice of Appeal

39. With due respect to the Appellant, and whilst the Tribunal fully understands her concerns that led to the FOIA request and to the present appeal, it has not been easy to disentangle the basis of her appeal against the Decision Notice from her concerns as to how the matter had actually been handled by the Council. That she has continuing concerns about the latter is fully appreciated by the Tribunal. The Tribunal in general would agree with the approach taken by the Commissioner in his former Response that

there appear to be 10 distinct grounds. The Tribunal notes that in her further submissions, the Appellant appears to accept this analysis.

40. First, it is claimed that Evidence 4 contains her personal data. This, it is contended, causes the scope of the Decision Notice in question to be "flawed": see paragraph 2 of her Grounds. It is claimed that the Commissioner should have considered the Appellant's right as part of the process of his decision. This in turn would have allowed the Appellant to obtain access not only to her own personal information, but also it is claims, to other "false personal information" that may be held: see in particular paragraphs 7 and 8 of her Grounds. The Appellant also contends that "by their very nature, the witness statements in Evidence 4" must refer to her actions and therefore the statement she seeks must be considered to be her personal data.

41. The Tribunal agrees with the Commissioner. It has itself seen the withheld information. The Tribunal endorses the decision made by the Commissioner that save for the document entitled "Internal Audit Service – Position Statement" which in any event was outside the scope of the Decision Notice, only the personal data of the third party interviewees was involved.

42. Moreover, even if as the Appellant contends the withheld information did contain any of her personal data, such data would constitute exempt information under section 40(1). As such, such information would be outside the scope of the Decision Notice.

43. The second Ground relates to the general allegation that the Report was itself "flawed": see in particular paragraphs 4 and 11 of the Grounds. This allegation relates to what has already been referred to in connection with the scope of this Tribunal's jurisdiction. The true stance in the Tribunal's view is the one already alluded to. Neither the Commissioner nor the Tribunal has any jurisdiction entitling him or it to revisit the Report in terms of its findings.

44. The Tribunal again accepts the contention submitted by the Commissioner. Not only was the Commissioner, as well as the Tribunal, entitled to take at face value the findings of an outside investigator's report, i.e. the Report, any suggested reliance whether "heavy" to use an expression adopted by the Appellant or otherwise, by the Commissioner on those findings and with regard to a substantive determination as to section 40(2) is misplaced, if not totally erroneous. The general nature and character of the Report was one of a number of elements which the Commissioner took into account in coming to his formal conclusion as to section 40(2). This is made clear by the earlier terms of this judgment.

45. The Tribunal notes the further contention advanced by the Council. The Report in its finished form has not been disclosed to the public although this appears to be disputed

by the Appellant in her final submissions: see paragraph 65, etc at the end of this judgment. As will be referred to again below, in connection with some final submissions put in by the Appellant, this represents an assertion made in unequivocal terms by the Council which the Tribunal fully accepts. It is therefore difficult, if not impossible, to see what harm or prejudice could or would result, including but not limited to, the self-evident fact that it has not been made public. Indeed, the Tribunal notes that the Report is marked "Private & Confidential". In those circumstances disclosure can hardly be seen as comprising any given rise to any kind of harm: see paragraph 8 of the Appellant's Grounds.

46. The third Ground of Appeal is connected with the second Ground. It is claimed that non-disclosure of Evidence 4, or part of it, would encourage public officials to mislead investigators in the future and will result in the "closing down" of investigations into misconduct: see e.g. paragraph 12 of the Grounds put in by the Appellant.

47. With great respect to the Appellant, the Tribunal is not persuaded by this argument. This is partly for the reasons given above with regard to the second Ground. However, much more important is the fact that each case has to be viewed on its merits both by the Commissioner and by this Tribunal. The Tribunal sees no basis for taking issue with the relevant findings in the Decision Notice on this score and with the related argument put forward both by the Commissioner and by the Council that it is difficult if not impossible to see how, as a practical matter, a decision upholding the withholding of information could be said to have any influence whatsoever of the type described by the Appellant. In the present case nothing would be disclosed.

48. The fourth Ground contends that when in considering the balance of interests in play with regard to section 40, "greater weight should have been attached to the damage or distress caused to an individual when he made a complaint in good faith and as a result been misrepresented": see paragraph 10 of the Grounds.

49. The short answer in the Tribunal's judgment is that given by the Commissioner in his Response. The facts relating to the Appellant's own personal data have to be considered under the DPA. That is an entirely separate exercise to the exercise conducted under FOIA, including the applicability of section 40(2).

50. Moreover, the Appellant's contention appears to be that her own personal position, and in particular, her alleged distress, represents a legitimate interest with regard to disclosure under FOIA. In the Tribunal's judgment this amounts to saying in turn that such distress is a proper ingredient in assessing the desirability for transparency. In the Tribunal's judgment this is an impossible contention. The legitimate interests do not go as far as the Appellant contends. As the Decision Notice points out at paragraph 37,

such matters as accountable interest and transparency exclude, save perhaps in exceptional circumstances of which this case is not one, private interests.

51. Insofar as the Appellant claims that distress has been caused to her on account of the outcome of the Report on the basis that such an outcome could be said to reflect badly on her, the Tribunal repeats an observation made earlier in this judgment. The Report is not a public document. In the Tribunal's judgment, it is simply impossible to see how the distress said to have been suffered could have been caused at least in the sense of such distress being a reflection of any public image that the Appellant had or might have which is how the Tribunal interprets the Appellant's contention. Having carefully considered the Report itself, the Tribunal fails to see how its contents could in any way be held to have caused or to cause the alleged distress. It finds nothing that can be said to reflect adversely on the Appellant in the way contended for.

52. The fifth Ground of Appeal relies on that part of the Commissioner's Guidance which has already been referred to and which states in general more senior staff should expect more information to be disclosed about them than those at lower rank in a relevant staff structure. Again, the Tribunal agrees in this regard with the Commissioner and with the Council. Even in the case of a senior public official, there is no general, let alone any form of automatic right, to have information relating to that officer's personal data disclosed.

53. As indicated above the Tribunal has carefully considered the disputed information but it has done so with particular regard to this Ground of Appeal. It agrees with the Commissioner that were there to be disclosure of records of staff interviews undertaken carried out as part of the independent propriety investigation into the conduct of the Chief Executive, those involved in the interviewing process would expect their views to remain private. Publication of adverse comments even if not endorsed by an outcome such as that reached in the Report clearly would risk causing that data subject, or the relevant data subjects, distress, including as the Commissioner points out in paragraph 28 of the Decision Notice, the risk of there being caused "permanent damage to their future prospects and general reputation".

54. The Tribunal also gratefully adopts an additional argument put forward by the Council. The Appellant's contention fails to recognise that it is not only what can perhaps be called genuine or true personal information such as medical records which should and will be exempted from disclosure. There is no reason why such items of information as staff interviews which are part of a disciplinary process as the one conducted in the present case should also not benefit from the same protection if in all the circumstances it is reasonable so to treat them.

55. The sixth Ground of Appeal could be said to revisit at least in part the fifth Ground as well as the second Ground. The specific argument is made that justification for disclosure is "stronger" where a disciplinary measure is being taken against a senior member of staff over what is said to be a serious allegation of impropriety (Ground 16). The Commissioner disagrees and that disagreement is set out in paragraph 30 of the Decision Notice. The Tribunal again agrees with the Commissioner on that score. Enough has been said even in this judgment to justify the Commissioner's contention that he did not consider that the complaint in this case related to serious allegations of impropriety or criminality. Moreover it is, as has already been pointed out on more than one occasion in this judgment, the case that the Report found there to have been no breach of the relevant code of conduct and the Chief Executive had not acted unreasonably. While the Tribunal recognises that the Appellant disagrees with the conclusions of the Report, the resolution of such matters does not fall within the Tribunal's remit. Such matters in any event constitute matters of private, as distinct from matters of public interest.

56. The Tribunal pauses here to note what can perhaps be viewed as a further argument necessarily implicit in this sixth Ground of Appeal. It appears to the Tribunal that the Appellant is also necessarily contending that there is a legitimate interest in knowing how complaints, including the present complaint, are investigated.

57. The Tribunal considers that although this last contention is perhaps unobjectionable on its face, it fails to address the determination reached by the Commissioner in the present case. Any such legitimate interest in the present case had already been met and satisfied by the time the Appellant made her request. The Report has been disclosed to the Appellant. She therefore knew how the investigation had been carried out, what the result of the review was and she necessarily knew of its outcome.

58. In this case, not only did the Appellant know of the outcome of the Report, but she also knew how the investigation had in fact been conducted. This is made abundantly clear by the fact that the Appellant makes a number of complaints about the procedures that were followed, e.g. the fact that she was interviewed on only one occasion and that there was in her words "no cross-examination" of the witness evidence. She also alludes to what she regards as misleading statements given by other witnesses to the investigator.

59. The seventh Ground reflects paragraph 19 of the Appellant's Grounds. The Tribunal feels it is perhaps appropriate to set the terms of that paragraph out in full which reads as follows, namely:

> "The Commissioner notes that Evidence 4 contains an Audit Committee report entitled "Internal Audit Service – Position Statement" dated 28 June 2010. It is

not clear what relevance this would have had to the investigation, but it could have misled the investigator. In contrast, one might have expected the investigator to be provided with the minutes of the Audit Committee meeting of 17th March 2010, another published document which is particularly relevant to the investigation, but the Commissioner makes no mention of it. It is in the public interest to know what information the Council did and did not provide to the investigator."

60. The Tribunal accepts the contentions made in response by the Commissioner. It is plainly the case that the Commissioner referred to the Position Statement simply in order to exclude it from the scope of the Decision Notice. As pointed out above it was therefore a published document already in the public domain: see paragraph 17 of the Decision Notice. In addition, as also pointed out above it is not, and was not, part of the remit of the Commissioner to do anything other than consider the applicability of the relevant exemption or exemptions to the undisclosed information. not only could the Commissioner as a matter of law and jurisdiction not revisit the investigative process but it is impossible to see how as a practical matter he could in fact have done so.

61. The eighth Ground of Appeal is referred to in paragraph 21 of the formal Grounds of Appeal which in turn refers to paragraph 31 of the Decision Notice. As indicated above, in paragraph 31 of the present Decision Notice the Commissioner referred to the fact that he, the Commissioner, had had his attention drawn to two previous Decision Notices in order to demonstrate the type of information in question related to what the Commissioner called at paragraph 31 a personnel matter.

62. In the Tribunal's judgment nothing in the Decision Notice suggests that the Commissioner did anything other than consider the request and the Council's response on entirely their own merits. The Commissioner is not bound by his own previous Decision Notices. All the Commissioner observed in relation to the two other Notices was that there was "similarity" and a "similar reasoning should be applied". On the other hand, the Tribunal is entirely satisfied that the reasoning set out by the Commissioner on the face of the Decision Notice speaks for itself and clearly demonstrates the approach he took with regard to the particular facts arising with regard to this particular request. There is no question, if the same be alleged, that the Commissioner has in some way blindly followed other Decision Notices and/or the outcomes which those Notices contain.

63. The ninth Ground of Appeal takes issue with the fact that in the present Decision Notice the Commissioner stated that he had not considered whether there was what he called a schedule 2 condition, i.e. a reference to the relevant Schedule in the DPA for processing the information: see paragraph 21 of the grounds of appeal. This Ground reflects or refers to the workings of the DPA. They have been briefly set out above. The first data

protection principle entails a consideration of whether it would be fair to disclose the personal data in all the circumstances. The Commissioner determined that it would not be fair to disclose the requested information and thus the first data protection principle would be breached. There was no need in the present case therefore to consider whether any other Schedule 2 condition or conditions could be met because even if such conditions could be established, it would still not be possible to disclose the personal data without breaching the DPA.

64. The tenth and last Ground involves the contention that the Council has shown itself to be unreliable and that it has done all in its power to prevent access to the information which is requested. The Tribunal agrees with the Commissioner and with the Council that this cannot be regarded as a valid Ground of Appeal.

Further submissions

65. The parties have submitted a number of documents which seeks to expand on the ten Grounds addressed above and have done so in a set of submissions in the period leading up to the preparation of this judgment. The Tribunal has carefully read and considered all these documents. It did not however find any argument or contentions which differed in any material way from the ten Grounds which have been set out and addressed above.

66. The Appellant claims that the Report itself is already in the public domain. The Council in its last submissions to the Tribunal refutes this although in her final set of submissions, the Appellant does not accept that refutation. Admittedly, this question is not entirely clear. However, on the balance of probabilities the Tribunal accepts the version put forward by the Council.

67. In the view of the Tribunal, a copy of the Report was not disclosed to the Appellant under either of the access regimes, i.e. under FOIA, or under the DPA. Rather, it appears to have been given to her quite separately and understandably perhaps as a complainant entitled to know the outcome of the investigation.

68. It may be that the Council wishes to revisit the relevant wording on this website to avoid confusion and to avoid inadvertent disclosure.

Additional factors

69. Insofar as not already dealt with above in relation to the ten individual Grounds of Appeal there are two additional issues which have attracted further and separate submissions by the Council and which the Tribunal is of the view are worthy of separate treatment. The Tribunal sees these two issues as representing in effect two of the principal themes running throughout the Appellant's appeal.

70. First, she on more than one occasion submits that if the information given by the witnesses and which finds expression in the Report is true, then disclosure of the information requested would not cause any or any "unwarranted" damage or distress.

71. The Tribunal wholly accepts the Council's overall submission in response. First, on any view, it is demonstrably false that accurate or truthful information can never cause damage or distress. A simple illustration will show this. An individual who may now want information disclosed to the effect that he or she has revealed certain information about a third party or about that party's activity, even if the information were true might still elicit distress on the part of the third party. This is the basis on which invariably the informants provide relevant information to the police.

72. Second, disclosure into the public domain of the substantive contents of a witness statement in a case such as the present would if nothing else reveal the fact that such evidence had been provided, in this case, in an inquiry which found the original complaint unsubstantiated. Such disclosure would also in the Tribunal's clear judgment cause unjustified damage or distress.

73. Thirdly, the Appellant on more than one occasion in her submissions suggests at least indirectly that the Council is seeking to conceal or avoid or even block proper examination and scrutiny of its processes. It is clear she feels strongly on the matter but these are not matters on which the Commissioner has expressed any concerns.

74. In the Tribunal's judgment any such argument by the Appellant flies in the face of the clear terms and effect of FOIA. It is enough to emphasise the fact that FOIA contains a clear set of exemptions which have to be applied in accordance with the Act as a whole either by way of a qualified exemption or by way of absolute exemption. There is now an established body of case law both in the Upper Tribunal and in the civil courts showing how this exercise is to take place in accordance with the statute. In a case of personal data the exemption is there predominantly with a purpose to protect third parties. Not only is the argument put forward by the Appellant in clear conflict with the spirit and more importantly the letter of FOIA, but it is also not supported in any way whatsoever by any cogent evidence as distinct from mere assertion on the part the Appellant.

Conclusion

75. For all the above reasons the Tribunal dismisses the Appellant's appeal and upholds the Commissioner's Decision Notice.

Signed ……..

(David Marks QC)
Judge

Dated: 29.01.2013