



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

**EA/2013/0220**

**ON APPEAL FROM:**

**Information Commissioner's Decision Notice: FS50491509  
Dated: 23 September 2013**

**Appellant: COLIN PARKER  
Respondent: THE INFORMATION COMMISSIONER  
Second Respondent: NORTH LINCOLNSHIRE COUNCIL  
Date of hearing: 12 February 2014**

**Date of Decision: 26 February 2014**

**Before**

**Annabel Pilling (Judge)  
Gareth Jones  
Jean Nelson**

**Subject matter:**

FOIA – Absolute exemptions – Personal data s.40 (2)

**Representation:**

For the Appellant:	Colin Parker
For the Respondent:	Laura John
For the Second Respondent:	Edward Capewell

## **Decision**

For the reasons given below, the Tribunal refuses the appeal and substitutes the Decision Notice to find that section 40(5) of the Freedom of Information Act 2000 is engaged and that North Lincolnshire Council was not obliged to confirm or deny whether or not it held any information in response to the Appellant's request of 4 December 2012.

## **Reasons for Decision**

### **Introduction**

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 23 September 2013.
2. The Decision Notice relates to a request made by the Appellant under the Freedom of Information Act 2000 (the 'FOIA') to the North Lincolnshire Council ('the Council') for copies of all correspondence and paperwork regarding a complaint he had made against Councillor X.
3. By way of background, the Appellant had made a complaint against the Clerk to a Town Council in respect of her recording and explanation of certain words contained in minutes relating to a planning decision. Councillor X conducted the investigation and the Appellant's complaint was not upheld. The Appellant complained to the Standards Committee of the Council that the way in which Councillor X had handled his complaint was in breach of the Council's Code of Conduct. As part of the investigations by the Standards Committee Assessment Panel, Councillor X submitted a document setting out his response to the Appellant's complaint. It is this document and the associated administrative correspondence which forms the disputed information in this case. After receiving a letter of advice from the independent person the Assessment Panel advised the Appellant that no further action would be taken in respect of his complaint against Councillor X. The Appellant is concerned that the Councillor misled the Assessment

Panel based on a comment included within the letter of advice from the independent person:

*“...it appears to me that...the complaint concerns or is really about dissatisfaction with a Council decision or policy rather than a breach of the Code of Conduct because...the complaint stems from [the Appellant’s] grievance that his land was the subject of an adverse comment by the Council in relation to future development...”*

4. The Appellant considers that this is completely untrue and a *“...perverse opinion...”* because his complaint was limited to concerns about the way Councillor X investigated his complaint about the Clerk. The Appellant is concerned that Councillor X misled the Council.
5. The Council refused to disclose the information on the basis of section 30(2) FOIA (investigations and proceedings conducted by public authorities).
6. The Appellant complained to the Commissioner who investigated the way the request had been dealt with by the Council. He concluded that the Council had failed to demonstrate that the withheld information engages the exemption at section 30(2) FOIA, but concluded that the information requested is exempt under section 40(2), as it is the personal information of a third party.

### **The appeal to the Tribunal**

7. The Appellant appeals against the Commissioner’s decision. The Council was joined as Second Respondent. It agrees with the position taken by the Commissioner but submits that if the Tribunal disagrees, it would argue that the information is exempt from disclosure under the provisions of section 30(2) and also section 31(law enforcement) FOIA.

8. The Tribunal was provided in advance of the hearing with an agreed bundle of material, and written submissions from the parties. We were also provided with a small bundle of Closed Material which included the disputed information. On the day of the hearing, the Commissioner provided us with copies of the relevant parts of the legislation and three First-Tier Tribunal decisions, there being no binding decisions from the Upper Tribunal or a higher court to assist us.
9. Although we cannot refer to every document in this Decision, we have had regard to all the material before us.

### **The Issues for the Tribunal**

10. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it holds the information requested, and (b) if so, to have that information communicated to him.
11. The section 1(1)(b) duty of the public authority to provide the information requested will not apply where the information is exempt by virtue of any provision of Part II of FOIA. The exemptions provided for under Part II fall into two classes: absolute exemptions and qualified exemptions.
12. Where the information is subject to a qualified exemption, it will only be 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 (section 2(2)(b)).
13. The exemption provided for in section 40 FOIA is an absolute exemption. The exemption in section 40(2) is engaged if it is shown that disclosure of the personal data of third parties would contravene one of the data protection principles set out in Schedule 1 of the Data

Protection Act 1998 (the “DPA”).

14. Since making his decision, the Commissioner is now of the view that the Council had no duty to confirm or deny under section 1(1)(a) FOIA that it held any information falling within the scope of the request as to do so would contravene one of the data protection principles, that is, would be unfair. Section 40(5) FOIA provides as follows:

*“40(5) The duty to confirm or deny-*

*...*

*(b) does not arise in relation to other information if or to the extent that..-*

*(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles.”*

15. The data protection principles regulate the way in which a “data controller” (in this instance, the Council) must “process” personal data. The word “process” is defined in section 1(1) of the DPA and includes:

*“disclosure of the information or data by transmission, dissemination or otherwise making available.”*

16. The first data protection principle provides:

*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.*

17. There is no dispute that the disputed information in this case is

personal data. We agree with the Commissioner that to confirm or deny whether information was held relating to a complaint made against Councillor X would reveal his personal data, in other words, would reveal that a complaint had been made against him as it is unlikely that the Council would hold any recorded information which confirms that no complaints have been made against any individual. We therefore have to consider first whether to do so would fair.

18. There is an inherent tension between the objective of freedom of information and the objective of protecting personal data. There is no presumption that openness and transparency of the activities of public authorities should take priority over personal privacy. In the words of Lord Hope of Craighead in *Common Services Agency v Scottish Information Commissioner*<sup>1</sup> (referring to the equivalent provisions in the Freedom of Information (Scotland) Act 2002 (the 'FOISA'):

*"In my opinion there is no presumption in favour of the release of personal data under the general obligation that FOISA lays down. The references which that Act makes to provisions of DPA 1998 must be understood in the light of the legislative purposes 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...."*

19. The Commissioner submits that the following factors should be taken into account:

- (1) the nature of the personal data and whether confirmation or denial would be within the data subject's reasonable expectations;
- (2) what, if any, consequences would flow from the confirmation or denial; and

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<sup>1</sup> [2008] UKHL 47

(3) whether there are any legitimate public interests in the public authority confirming or denying whether it does hold the requested information.

20. The Appellant has made a request for personal data of Councillor X in the context of one individual complaining about another individual. As part of the Council's complaints process, Councillor X provided the disputed information on the basis that it would only be provided to the Assessment Panel. The Assessment Panel meets in private session, documents sent to members are marked "private and confidential" and its decision is not placed in the public domain. While not determinative, we are also aware that Councillor X has confirmed that he does not wish the information to be disclosed.

21. We are satisfied that Councillor X would have the reasonable expectation that information of this nature would not be made publicly available, in particular when a complaint is not upheld.

22. In considering the consequences of disclosure, the Appellant submits that there is no basis to conclude that Councillor X would be caused "substantial distress", section 10 DPA 1998.

23. We agree with the Commissioner that the Appellant has misconstrued section 40 FOIA. Section 40(5)(b)(i) and section 40(3)(a) FOIA provide that disclosure shall not be given where it would "contravene any of the data protection principles or section 10 of the Data Protection Act 1998". These are not cumulative requirements and there is no need to show that section 10 DPA is engaged. Deciding whether disclosure, in this case, the confirmation or denial that information is held, would breach any of the data protection principles requires a consideration of whether disclosure would be "fair".

24. In considering this, the consequences of disclosure must be examined and one of the consequences is the impact upon Councillor X. To reveal that a complaint had been made (about his handling of a complaint against the Clerk) when he had been assured of

confidentiality and when the complaint had not been upheld would, we are satisfied, cause distress to Councillor X.

25. Notwithstanding the reasonable expectations of Councillor X or any distress caused to him by disclosure, it may still be fair to disclose the requested information if there is a more compelling public interest in releasing the information.

26. The reasons identified by the Appellant as compelling the Tribunal to override the individual's rights of privacy in the personal data and to justify disclosure, relate to his strongly held belief that Councillor X misled the Assessment Panel investigating the complaint against him.

27. The Appellant submits that disclosure would be fair as there is a legitimate interest in the requested personal data for the following reasons:

- (i) This is not the first example of a Councillor from this Town Council acting in a dishonest manner and misconduct by public officials should be exposed;
- (ii) The Assessment Panel was misled and should have taken further action in respect of the complaint against Councillor X;
- (iii) There was an "inequality of arms" during the investigation of the Appellant's complaint as he was not able to comment upon the response made by the Councillor.

28. The Appellant does not suggest that all those working for the Town Council are dishonest but has provided evidence to the Tribunal of examples of wrong doing by other individuals in the past. He submits that as there have been so many problems with this particular Town Council, the public has a *"right to know what they are up to. It can't be*



*hidden.”*

29. We do not consider that these examples of wrongdoing by other individuals add any weight to the public interest in disclosing that a complaint has been made about Councillor X.
30. The Appellant submits that because the independent person advised the Assessment Panel that the complaint was *“really about dissatisfaction with a Council decision or policy rather than a breach of the Code of Conduct because...the complaint stems from [the Appellant’s] grievance that his land was the subject of an adverse comment by the Council in relation to future development...”*, this opinion could only have come from the information provided by Councillor X.
31. If the disputed information revealed that Councillor X had been dishonest or misled those investigating the Appellant’s complaint about him, this would be something we could take into account when assessing whether there was any public interest in disclosure in this case. We have seen the disputed information and agree with the Commissioner and the Council that there is nothing in the disputed information that can be said to have misled the independent person whose advice was presented to the Assessment Panel.
32. The Appellant submits that if the Council was acting in accordance with the Nolan Principles, it would not be allowing Councillor X to give evidence in secret. As the procedure for investigating the complaint is unfair, this is another factor in favour of disclosure being fair.
33. The Council has set out in some detail its arrangements for the standards regime which exists under the Localism Act 2011 for the regulation of the conduct of elected members of local authorities. In particular, it submits that the investigation of complaints is not akin to litigation by two individuals and that there is no expectation that all material considered by the Assessment Panel would be made available to the person who made the complaint. The Commissioner and the

Council further submit that the Tribunal is, in effect, being asked to act outside its remit in concluding that the procedure for investigating the complaint is unfair and not fit for purpose.

34. We cannot reach such a conclusion. Even if this were within our remit, it does not follow that there is a public interest in disclosing to the public at large the personal data of an individual who had been promised confidentiality as part of that process, or that such disclosure would be fair.
35. The Commissioner concedes that there is always some legitimate public interest in the disclosure of information concerning public officials because they receive public money and, in principle, work on behalf of the public. However, in this particular case there is no evidence that the way in which Councillor X responded to the Appellant's complaint is symptomatic of a wider public concern with either this individual or with the Council. The Appellant is dissatisfied with the outcome of his complaint about the way Councillor X handled his complaint about the Clerk.
36. We agree with the Commissioner that the limited and general public interest in the disclosure of information concerning public officials is greatly outweighed by the expectations of Councillor X and the distress likely to be caused to him in respect of the Council's handing of a request for his personal data.
37. We do not consider that there is any legitimate public interest in confirming or denying whether or not the requested information is held
38. There is an element of artificiality as far as the Appellant is concerned because he had made the complaint against Councillor X. However, the Tribunal is considering a request for information made under the FOIA regime which cannot be limited to disclosure to one individual, but has to be considered in the context of disclosure to the public at large.

39. The legislation drives us to the conclusion that if the Council were to confirm or deny whether it holds information relating to a complaint made against Councillor X this would reveal his personal data in that it would reveal that a complaint had been made against him. For the reasons given above we have concluded that this would not be fair, and thus would be in breach of the first data protection principle. We find that section 40(5) FOIA is engaged.

40. We therefore amend the Decision Notice of the Commissioner to reflect our findings in respect of section 40(5) FOIA.

Judge Pilling

26 February 2014