

IN THE FIRST-TIER TRIBUNAL

Case No. **Appeal No. EA/2014/0227**

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Information Notice

Dated 18<sup>th</sup> August 2014

BETWEEN

Medway Council

Appellant

And

The Information Commissioner

Respondent

Determined on the papers on 13<sup>th</sup> January 2015

Date of Decision 4th February 2015

BEFORE

Fiona Henderson (Judge)

Anne Chafer

And

Dave Sivers

Subject matter:

s43 of the Data Protection Act – Information Notice

**Decision: The Appeal is Refused**

### **REASONS FOR DECISION**

#### Introduction

1. This appeal is against the Information Commissioner's Information Notice dated 18<sup>th</sup> August 2014 issued to Medway Council (the Council) pursuant to s43 of the Data Protection Act (DPA) which required the Council to explain in full the causes of a breach of the DPA.
2. On 30<sup>th</sup> January 2013 the Council notified the Commissioner about 2 data security breaches which took place on 10<sup>th</sup> December 2012:

- i) the Special Educational Needs (SEN) statement for Child C was sent to the address of the parents of a different Child, Child B. This document went in an envelope containing material relevant to child B whose parent opened the envelope and contacted the parents of Child C using the telephone number on the front of the SEN statement.
- ii) The SEN statement for Child B was sent in an envelope containing material relevant to child C to the former address of Child C, this was retrieved unopened by the Council once the error had been noticed<sup>1</sup>.

Both documents contained sensitive personal data.

3. The Council explained that the 2 statements were accidentally placed in the wrong envelopes by human error although they conceded that in making the mistake the employee had breached the Council's DPA policies. The fact that the envelope for Child C (which contained Child B's SEN statement) was sent to an old address (the database breach) the Council originally asserted, was caused by a flaw in the computer software used, the "Impulse system". Impulse is the database that *"holds data relating to the educational provision for all pupils in Medway... Letters are generated automatically according to the action inputted into the system"*<sup>2</sup>

#### **Notice of Intention**

4. Relying upon this explanation (which was maintained in detail both in writing and orally to the Commissioner's office), the Commissioner formed the preliminary view that the database breach was a serious breach of the seventh data protection principle<sup>3</sup> and that the conditions for issuing a Monetary Penalty Notice (MPN) were met. Consequently the Commissioner issued a Notice of Intent dated 19<sup>th</sup> June 2014 in which he concluded (amongst other things) that:

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<sup>1</sup> Because this statement was sent to an old address this will henceforth be referred to as the "database breach"

<sup>2</sup> P10 Bundle

<sup>3</sup> Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.

- a) the data controller had failed to take appropriate technical and organisational measures against the unauthorised processing and accidental loss of confidential and sensitive personal data,<sup>4</sup>
- b) Some of the SEN Officers working in this Team were also aware that Impulse did not always prompt them to update a parent's address on the "SEN" work stream. However, there were no mechanisms in place for reporting technical faults to the data controller.<sup>5</sup>
- c) Impulse had been used by the data controller since 2005 and the Team Manager was aware of this problem with Impulse when she worked for another Council".<sup>6</sup>
5. The Council responded to this on 18<sup>th</sup> July 2014 in which they changed their explanation for the second data protection breach now arguing that "*there is no evidence of a 'system glitch'*" and that it now appeared that a Council employee had sent Child B's SEN statement to Child C's parents at the old address in error and had subsequently updated the address in the Impulse system so that it would look as if the Impulse system was to blame. This employee was now subject to disciplinary proceedings. They suggested that the appropriate course was for the Commissioner to re-open his investigation based on this new information.

### **The Information Notice**

6. The Commissioner re-opened his investigation and exercised his power under s 43 DPA which provides:

*(1) If the Commissioner – ...*

*(b) reasonably requires any information for the purpose of determining whether the data controller has complied or is complying with the data protection principles,*

*he may serve the data controller with a notice (in this Act referred to as "an information notice") requiring the data controller to furnish the*

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<sup>4</sup> P73 Bundle

<sup>5</sup> P74 Bundle

<sup>6</sup> P75 Bundle

*Commissioner with specified information relating to the request or to compliance with the principles.*

*(1A) In subsection (1) “specified information” means information –*

*(a) specified, or described, in the information notice, or*

*(b) falling within a category which is specified, or described, in the information notice.*

7. The terms of the s43 Notice were to “*provide a full explanation of how the security breach on 10 December 2012 occurred*”.

### **The Appeal**

8. The Council appeals on the grounds that “*it has provided [the Commissioner] with a full explanation of how the security breach on 10 December 2012 occurred*”. It relies upon the Communications with the Commissioner over the course of his investigation.
9. The Commissioner argues that the s 43 notice is necessary:
- a) to furnish him with all the necessary information he required in order to arrive at a final determination of the breach of 10.12.12.
  - b) He does not have sufficient information to establish which of the two explanations is correct,
    - i) The Council’s second explanation as currently framed is inconclusive “*it is more probable than not that the breach occurred due to human error*”.<sup>7</sup>
    - ii) It does not include the employee’s explanation or the findings of any disciplinary hearing.
    - iii) The Council have not explained properly why they had changed their position thus enabling him to evaluate the accuracy of the current explanation.

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<sup>7</sup> P82 OB

- c) The Commissioner needs to be able to rely upon any explanation received from the Council and this is legislated for in s 47 DPA which provides:

*(2) A person who, in purported compliance with an information notice or a special information notice –*

- a) makes a statement which he knows to be false in a material respect, or*  
*b) recklessly makes a statement which is false in a material respect,*  
*is guilty of an offence.*

### **The First and Second Explanations**

10. The Tribunal has had regard to the agreed bundle comprising 115 pages. Whilst the Council assert that *“it has provided [the Commissioner] with a full explanation of how the security breach on 10 December 2012 occurred”* we disagree. We agree with the Commissioner that they have provided two inconsistent and incompatible accounts with no clear explanation about why the first one was relied upon in such detail and for so long. In their grounds of appeal they rely upon all their correspondence and the ICO visit in which they *“explained the position to the ICO investigators”* even though on their own account *“what has come to light is a significantly different version of how the breach occurred”* which is presented as *“new information”*<sup>8</sup>.

11. In particular we take into consideration that the first explanation was relied upon in a phone call with the SEN Manager on 29.10.13 when on the evidence of the second explanation that account had already been discounted through investigation by the IT department<sup>9</sup>:

*“What we can say for certain by looking at the replicated Test system and the audit trail is that when the first letter was sent on December 10<sup>th</sup> Impulse did not pull off the wrong address”*<sup>10</sup>. The SEN Manager was the recipient of the email in which this

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<sup>8</sup> p82 bundle

<sup>9</sup> The exact status of the person undertaking the investigation is not apparent from the redacted emails but from the letter of 18.7.14 would appear to be the Systems Administrator of the Impulse Educational Database.

<sup>10</sup> P86 Bundle - email to SEN Manager dated 18.12.12

was concluded and had also been copied in to the emails including the computer log and the test log details.

12. Despite this clear information from IT, the undated Risk assessment<sup>11</sup> submitted to the Commissioner by the SEN continued to rely upon an explanation which she knew had been discounted by IT.

13. Additionally the second explanation is inconclusive:

*“The reason that the guardian address was not up to date on Impulse (correlating with the pupil address) **may** be due to the fact that a box was not ticked when updating the pupil address, **it could be an anomaly in the system**, but in all honesty **human error is much more likely**... Impulse pulled off the guardian address that was present at that time, due to it not being updated (due to an as yet undetermined reason)... What **we cannot conclusively say** is why that address may not have been updated.<sup>12</sup>”*

14. No reason is given by IT for asserting that human error is more likely and no consideration has been given to the information provided to IT by the SEN Manager that:

*“when the address is changed for the child, an automatically generated window dialog box should appear asking if the parent/guardian address should also be changed.*

*Even though you can tick the box (and we also had this problem when I worked in Kent) **the parent/guardian details do not always save as an update**<sup>13</sup>(even though they may appear as an update).*

15. This un-followed up statement would suggest that there may still be a glitch in the system and that the SEN Manager ought to have been aware that this might apply at Medway.

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<sup>11</sup> From the dates included within it (December 2013, 29 October 2013) this must have been completed after the email of 18.12.12

<sup>12</sup> Emphasis added. Email to SEN Manager 18.12.12 p 86 Bundle

<sup>13</sup> Emphasis added. Email from SEN Manager 18.12.12 p 87 Bundle

16. This is dismissed by the Council in their second explanation:

*“This misapprehension of the glitch led the SEN assessment manager to assume that it was the similar to the Kent Impulse system glitch she was aware of whilst working at Kent... (However, we still maintain that the Kent and Medway Impulse system run on different systems)”<sup>14</sup>*

We are satisfied that this assertion would require further elaboration to enable it to be accepted at face value in light of the other evidence provided by the Council because at the date of the second submission<sup>15</sup> :

- a) the database was said to have picked up erroneous data with reports relating annual reviews and information sent to schools in April 2012<sup>16</sup>,
- b) a similar but not identical glitch had been identified in September 2013<sup>17</sup> and
- c) another incident relating to the use of wrong information on the data base was reported in October 2013<sup>18</sup>.

17. Additionally the Tribunal is concerned by the conclusions drawn by the Council and presented as fact in their second submission to the Commissioner. Namely that the change of the data was a deliberate attempt by an employee to hide the amendment (without consideration of the employee’s explanation or the SEN Manager’s assertion that changes were not always saved on the system).<sup>19</sup> Additionally they have not explained what the human error was that caused the old address to be used if as they assert the information stored on the database was accurate at the relevant date and the old address was there for historic reasons<sup>20</sup> .

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<sup>14</sup> P82 Bundle

<sup>15</sup> 18<sup>th</sup> July 2014

<sup>16</sup> P40 Bundle Risk assessment

<sup>17</sup> As referred to in the investigation sent in to the Tribunal as additional information 8.12.14

<sup>18</sup> P40 Bundle Risk assessment

<sup>19</sup> From the additional evidence submitted this does not appear to be the conclusion of the disciplinary investigation but this assertion continues to be relied upon by the Council.

<sup>20</sup> P85 Bundle

### **The third Explanation**

18. The Tribunal has also considered the additional 4 pages submitted by the Council on 8<sup>th</sup> December 2014. Whilst the Commissioner discounts these as being from the day after the issue of the Information Notice, the Tribunal is satisfied that they are of assistance because they demonstrate that as at 19<sup>th</sup> August 2014 (at the time that the Information Notice should have been answered)<sup>21</sup> the Council internally were relying upon a 3<sup>rd</sup> explanation which they had not provided to the Commissioner.
19. The additional documents (which were submitted by the Council with no explanation as to their status or relevance) from their contents appear to be the findings of the investigation pursuant to the disciplinary hearing and a minute and an email dated 19.8.14 detailing the outcome of the disciplinary action.
20. These documents indicate a third explanation namely that when the parent of child C phoned the SEN officer she:

*“looked at the records on the screen, which were showing the updated address. She also checked and found that previous mail had gone to the updated address. She explained this to the parent and said she would press SAVE again in case that helped. Nothing on the screen changed, although it seemed that this registered as an update as far as the Impulse administrator was concerned and reported<sup>22</sup>.*

*After investigation, it appears that the problem may relate to the fact that the option to save the family address does not always appear when a pupil address is updated. The family in question moved in 2006.*

*Since a similar but not identical glitch in Impulse was identified in September 2013, the agreed procedure in SEN was that officers must check the address on any letter going out against paper files”.*

The action taken to overcome the glitches on the system now include:

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<sup>21</sup> 30 days from receipt of the notice dated 18<sup>th</sup> August 2014

<sup>22</sup> This may be different to the account given in the chronology which formed part of the supporting evidence for explanation one (p2 bundle) in which the SEN officer is said to have saved “each screen” whereas in this third explanation it is not clear whether one or several screens were looked at.



*“When updating a pupil address Impulse does not always offer a box to update family address (random). This means the family address remains the old address.*

*Action: SEN officers now have to manually change family address for anyone updating.”*

21. In the meeting between the SEN Manager and the SEN officer whose conduct was in issue following the investigation on 19.8.14, the incident was put down to human error with the rider that:

*“double checking required because of the malfunctions on Impulse, did not happen as thoroughly as required”.*

22. The implication of this email is that there were existing glitches which were known about and there were procedures in place to manage them at the date of the December 2012 incident. This is directly contradictory to the second explanation relied upon by the Council as the basis of their appeal where it is asserted that:

- There is no evidence of a “system glitch”
- There is no evidence to suggest that the “concern” about the dialogue box was raised prior to this data security breach.<sup>23</sup>

23. However, the investigation relied upon in the third explanation is inconsistent with the disciplinary conclusion as the notes imply that the procedure was instigated because of a similar glitch identified in September 2013.

24. In an email dated 19.8.14 (which post dates the second explanation furnished to the commissioner on 18.7.14) it was recorded that the notes relating to the data protection breach would go on [the relevant Officer’s] SEN file **as a record of the incident**<sup>24</sup> and no further action would be taken. The implication being that this third explanation is the one relied upon by the Council and not the 2nd explanation furnished to the Commissioner the month before<sup>25</sup>.

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<sup>23</sup> P82 Open Bundle

<sup>24</sup> Emphasis added

<sup>25</sup> Namely that the change of the data was a deliberate attempt by an employee to hide the amendment and the incident was wholly down to human error.

25. The Tribunal is satisfied that not only is this a third explanation of the breach but it is inconsistent with the other 2 explanations and is internally incoherent:

It concludes that extra checking was required at the time because of known “glitches on impulse” and that is the basis for putting it down to human error, but:

- a) It does not explain what the checking procedures were, when they were commenced or why they were felt necessary.
- b) It does not explain why previous mail was going to the correct address as asserted in the investigation.
- c) The investigation does not confirm whether pressing SAVE to confirm existing information would register it as an update, there appears to have been no discussion with IT as to whether this is what would happen and whether there is another record of the data that was overwritten beyond the information held in the test log which reflects the position several months before.

26. Additionally if changing the parental address requires a manual update (as implied by the action points) it is not clear how pressing SAVE as described would have amended the parental address. The options appear to be that either:

- a) the parental screen was not looked at – hence the explanation that the details were correct when viewed by the SEN officer. In which case it is not clear how in light of the “glitch” did pressing SAVE on the “pupil” screen amend the parental address and what is the explanation for previous post going to the correct address. or
- b) the parental screen was looked at and showed as up to date in which case it does not explain why the letter went to an old address on this occasion.

27. The print out of the computer changes details the change of address as 2008 when the family are said to have moved in 2006 (no detail is given as to whether earlier mail went astray).

28. This third account is inconsistent with the Council’s chronology (submitted to the Commissioner in support of the first explanation) which asserts that the telephone conversation with Child C’s parent and the consequential pressing of “SAVE” took

place in the afternoon whereas the IT print out of changes to the account detail the time of the change as being at 10:15 and 10:19 respectively.<sup>26</sup>

29. The Tribunal is satisfied that there is still no reliable, clear or sufficiently detailed explanation of the incident to enable the Commissioner to be satisfied of:
- a) what went wrong and why,
  - b) whether there was any prior knowledge of the potential for this problem,
  - c) what if any procedures were in place to avoid this type of problem at the relevant date,
  - d) why the Commissioner and the Tribunal have been provided with so many inaccurate and inconsistent accounts.
30. The evidence provided to the Commissioner and the Tribunal has been inconsistent and unreliable and the Tribunal agrees with the Commissioner that it is reasonable that he should utilize a mechanism that enables him to call the Council to account if they *recklessly [make] a statement which is false in a material respect*<sup>27</sup> in light of the various contradictory and conflicting assertions made by the Council thus far.

#### Conduct of this appeal

31. The Tribunal makes the observation that the conduct of this Appeal by the Council has been unhelpful and cavalier:
- i) Redactions were made of personal data from the correspondence which made it harder for the Tribunal to follow with no application made under rule 14 GRC rules to withhold this information from the Tribunal and no justification advanced as to why this was necessary. The redactions themselves were inconsistent:
    - the identity of the SEN Manager included in an internal email chain was redacted from those emails but her name was disclosed elsewhere in the papers,

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<sup>26</sup> P 87 bundle

<sup>27</sup> S47(2)(b) DPA

- whereas the current and former home address of Child C was disclosed in those same internal emails despite their SEN statement being included in the papers redacted to obscure any identifying details including the home address.
- ii) At times the purported redaction was so poorly executed that the name that was intended to be obscured can still be read.
- iii) Additional evidence was sent in with no explanation as to its source, date or significance.

Conclusion

28. For the reasons set out above we refuse this appeal. The Council have 30 days from the date of this decision to comply with the Information Notice of 18<sup>th</sup> August 2014. Our decision is unanimous.

Dated this 4<sup>th</sup> day of February 2015

Fiona Henderson  
Tribunal Judge