



ON APPEAL FROM

THE INFORMATION COMMISSIONER'S DECISION NOTICE NO:
FS50596065

Dated: 28th. April, 2016

Promulgation Date 9th January 2017

Appeal No. EA/2016/0142

Appellant: Janet Dedman

Respondent: The Information Commissioner
("the ICO")

Before

David Farrer Q.C.

Judge

and

Henry Fitzhugh

and

Marion Saunders

Tribunal Members

Date of Decision: 7th. January, 2017

The Appellant appeared in person assisted by Mrs. Maggie Prettyman.

The ICO did not appear at the hearing but submitted a written response to the grounds of appeal.

Subject matter :

Whether disclosure of the requested information, a draft report to a district council on an investigation resulting from a complaint as to the conduct of the Chair of a parish council, would amount to unfair processing of her personal data; hence whether the district council was entitled to rely on the exemption provided by FOIA s.40(2) when refusing the Appellant's request.

The Tribunal's decision

- (i) Disclosure was not unfair so the district council was not entitled to rely on s.40(2).
- (ii) The appeal is therefore allowed. The report must be disclosed within twenty-eight days of the publication of this decision.

David Farrer Q.C.

Tribunal Judge

7th. January, 2017

The Reasons for our Decision

The Background

1. Hickling Parish Council (“HPC”) is a local authority which functions within the area administered by North Norfolk District Council (“NNDC”). The data subject (“C”), with whose personal data this appeal is concerned, was, until 7th. May, 2015, the Chair of HPC. She lost her seat at the election of that date.
2. HPC adopted NNDC’s Code of Conduct for councillors in July, 2014. The provisions of that Code which give rise to this appeal are framed in very broad terms. They require a councillor to behave “fairly, appropriately and impartially” in the discharge of his/ her duties. To mislead the media deliberately would clearly violate such a requirement. NNDC had jurisdiction under the Code to investigate complaints that parish councillors had breached the Code and to impose specified sanctions.
3. Hickling Barn is a valued asset owned and administered by a charitable trust, Hickling Playing Field or Recreational Ground Charity (“HPFRG”). For

some time before the events briefly described below HPC and HPFRG had been at odds over the protection from development which Hickling Barn enjoyed and what, if any, further protection was required. The merits of that dispute and the correct view as to the state of protection afforded by the trust deed, planning controls and other relevant materials at the relevant time have no bearing on the outcome of this appeal.

4. An Extraordinary General Meeting of HPFRG took place on 26th. September, 2014. It was attended by about two hundred Hickling parishioners. Its purpose was, apparently, to discuss whether HPFRG required a new “constitution” for the proper protection of the Barn. C addressed the meeting and advocated the adoption of a new constitution.
5. Following the meeting, the trustees wrote to HPC stating that they were redrafting the constitution to incorporate changes designed to satisfy HPC and the local community generally.
6. A meeting of HPC, chaired by C, took place on 6th. October, 2014, at which this letter was discussed, according to the minutes. The trustees’ position appears to have been that the Barn was already adequately protected but that they were prepared to strengthen that protection.
7. On 27th. October, 2014 the Eastern Daily Press (“the EDP”) published a report on the matter which purported to quote C as asserting that HPFRG had shown no desire to negotiate as to a new “constitution” and that “*They don’t want to make changes to the constitution to protect the village asset and it’s very sad*”.

8. Mr. Robin Slattery, a local resident, complained to the NNDC monitoring officer that –

“C made statements to the Eastern Daily Press which were factually inaccurate and accordingly has deliberately misled the readers of the Eastern Daily Press and the parishioners of Hickling.”

and asserted that this amounted to a breach or breaches of the Code of Conduct.

9. The monitoring officer appointed an external solicitor to investigate this complaint and report her findings to the NNDC Standards Committee (“the Committee”). She submitted a “(draft) final report” after C had ceased to be a councillor as a result of the election of 7th. May, 2015.

10. The monitoring officer decided that there was “no public benefit” in taking the matter further (presumably by reference to the Committee) because C was no longer a serving councillor.

The request

11. On 29th. July, 2015 Mrs. Dedman, a Hickling parishioner, requested a copy of that report from NNDC. She evidently believed that the complaint related to statements made by C at the EGM. Mr. Terry Barker gave evidence of a complaint that he made in October, 2014, relating to C’s address at the EGM but the draft report makes clear that the complaint investigated was that of Mr. Slattery arising from the report in the EDP. Nothing hinges on any such confusion because there was only one investigation and one draft report.

12.NNDC responded on 1st. September, 2015 by refusing the request in reliance on s.40(2) of FOIA, that is to say on the ground that it related to C's personal data and that disclosure would be unfair, hence a breach of the First Data Protection Principle ("FDPP1"). It had not sought C's consent to disclosure. It maintained that refusal in a response dated 9th. October, 2015 to a request for an internal review, which succinctly set out Mrs. Dedman's case for disclosure?

13.She complained to the ICO.

The Decision Notice ("The DN")

14.In accordance with his usual practice, the ICO, in the course of his ensuing investigation, posed a number of questions to NNDC which it answered by letter of 14th. January, 2016. In summary, it submitted that the data were C's personal data and related to her service as a public official, which had now ended. The report was a draft report which had led to no decision since she had ceased to be a councillor. C would have had a legitimate expectation that the details of the investigation would remain confidential. The draft report was marked "confidential". NNDC's policy is that draft standards investigation reports are not shared with persons who are not parties to the complaint. The prejudice to C's interests outweighed any legitimate public interest in disclosure.

15.In the DN the ICO accepted these submissions which were broadly repeated in a Confidential Annex which was disclosed to Mrs. Dedman, save as to one paragraph, by order of the Chambers President dated 11th. August, 2016.

The DN therefore upheld NNDC's refusal to disclose the draft report and its reliance on s.40(2).

16. Mrs. Dedman appealed.

The Appeal

17. FOIA s.40(2) and (3), so far as material, provide –

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

(a) it constitutes (third party) personal data

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 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,

. ”

18. FDPP 1, the only relevant principle, is set out in Schedule 1. Part 1 §1 to the Data Protection Act, 1998 (“the DPA”) . So far as material, it reads -

“Personal data shall be processed fairly and lawfully, and in particular shall not be processed unless-

(i) at least one of the conditions in Schedule 2 is met,

19. Condition 6(1) of Schedule 2 (the only condition which requires consideration here) provides -

“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”.

So the test for disclosure is fairness which involves balancing the legitimate interests of the data subject in maintaining confidentiality against the public interests in disclosure and includes the specific requirement of compliance with (here) condition 6(1) of Schedule 2.

20. The evidence before the Tribunal consisted of a witness statement from Mrs. Dedman and oral evidence from Mr. Terry Barker who had been elected as a parish councillor in May, 2015 and had read the draft report subject to a requirement of confidentiality, together with the documents establishing the undisputed background facts and examples of disclosure of reports on the investigation by other local authorities of alleged violations of similar codes of conduct.

21. The case for the ICO was set out in the Confidential Annex to the DN (now disclosed) and his Response, which, whilst acknowledging Mrs. Dedman’s argument as to the legitimate public interest in the public conduct of elected representatives, repeated the reasons given in the Confidential Annex. They are simple and clear:

- NNDC ‘s policy was to withhold draft reports from public scrutiny;
- C therefore had a reasonable expectation that this draft report would not be disclosed;
- She had not been asked to consent to disclosure;
- There was no public “benefit” in further consideration of the draft report since C was no longer a councillor;

- A draft report does not have the status of a final report and the Committee had not formally accepted or approved this one.
- These considerations outweighed the arguments for transparency.
- Condition 6(1) was therefore not satisfied because disclosure would be unwarranted.
- That being so and having regard to the general requirement of fairness, NNDC was entitled to invoke the absolute exemption provided by s.40(2).

The Tribunal's Findings

22. The Tribunal has read the draft report. There is no doubt and it is not disputed that the report contains the personal data of C and that there is no practical possibility of editing it so as to avoid the disclosure of such data.

23. There is plainly a strong public interest in the disclosure of findings as to the conduct of the chair of a parish council when performing her public duties. That is especially the case where a complaint has been made that she misled a newspaper and its readers, including her local parishioners, as to important matters relating to a controversial local issue. There is a danger that the withholding of a report may encourage the suspicion that its findings are adverse to the subject, whether or not that is, in fact, the case.

24. As indicated in §14 above, the Tribunal interprets the NNDC letter of 14th January, 2016 as implying that NNDC would generally disclose a final report received and acted upon by the Committee. Whether or not that assumption is correct, it has no doubt that publication of such a final report would, in almost all circumstances, be fair.

25. In this case, six central questions arise, in our judgement:

- (i) When C undertook to be bound by the Code of Conduct by declaring her acceptance of the office of councillor, did she expect that a report of an investigation into a subsequent complaint that she had infringed the Code would remain a draft report, hence withheld indefinitely from publication?
- (ii) If so, was that expectation reasonable?
- (iii) If she formed or may have formed an expectation that the draft report would not be disclosed only after the monitoring officer withdrew it from the Committee, was such an expectation reasonable?
- (iv) Is there a real possibility that the final report would have been different in substance from the draft?
- (v) Is the public interest in disclosure of the findings of the draft report reduced or extinguished by C's loss of office due to electoral defeat?
- (vi) In the light of the answers to (i) to (v), would it have been unfair in July 2015 to disclose the draft report?

26. The obvious justification for withholding a draft report is that it awaits consideration by the body (here the Committee) to which it is addressed and

that public discussion of its content in advance of such consideration is undesirable, especially where the Committee's deliberations may involve decisions as to whether or not a sanction should be imposed and, if so, what sanction. Any councillor could reasonably expect her personal data to be protected at that stage.

27. The reasonable expectation of the data subject is generally a significant factor when assessing the fairness of the disclosure of personal data. In our opinion C could reasonably expect protection so long as the draft report awaited the deliberations of the Committee. When the monitoring officer withdrew it from the Committee, the position changed and the rationale for the general embargo on disclosure disappeared. There might still be reasons intrinsic to the report in a particular case, why disclosure would still be unfair to the subject; for example, because the report was tainted by obvious bias or undermined by a lack of evidence to support adverse conclusions. Here the monitoring officer withdrew it simply because he judged that further consideration would confer no benefit on the public, an assessment which we discuss below.

28. A significant consideration is C's expectation when making her declaration when the Code was adopted. If a person undertakes public service on the understanding that her personal data will, in specified circumstances, remain confidential, then justice generally demands that such an understanding will be respected; if she had known that it would be ignored, the public servant might never have undertaken public duties in the first place. At that time, C must have expected that any complaint would be investigated, that a report would be received by the Committee, that it would make its decision on the

basis of that report and that the report would then be published. A decision to confound that expectation by premature disclosure might well have been unfair. However, any expectation arising after the monitoring officer's decision, that the draft report, whatever it said, was now dead and buried would not, in our view, be reasonable. In fact, there is no direct evidence that she did form such an expectation at that stage nor, we find, any basis for inferring that she would have done so. With respect, we judge that the assessments of NNDC and the ICO of C's reasonable expectation required further analysis.

29. Draft documents may vary widely in the finality of their findings and conclusions. A "first draft" prepared by a junior officer may be no more than a trigger for discussion. On the other hand, other draft judgments or reports may leave open for debate little more than the trenchant terms in which certain points are made and the niceties of punctuation. Much depends on the status of the author of the draft, his/ her relationship to the body receiving the report, the terms in which its findings are expressed and how far the body to which a draft report is addressed can properly override those findings.

30. The requested information was headed "(Draft) Final Report". It was prepared by an independent external solicitor. It is based on documents which would have been available to the Committee and interviews with relevant witnesses, including C, which were conducted in the absence of any committee member. It concludes with the solicitor's findings. There is no suggestion in the report that any of these findings were provisional or qualified or that any further investigation was contemplated. Indeed, the heading would have been seriously misleading, were that the case.

31. In those circumstances, it is hard to see how or in what substantial respects, its findings of fact or its final conclusion could properly have been altered by the Committee, had it been submitted to them. Of course, the Committee could have rejected it as a whole, if it had been manifestly inadequate, demonstrably unfair or its conclusions utterly unsupported by the evidence which had been gathered. However, neither NNDC nor the ICO has made any such claim and, whatever moderate criticisms might be made of it, no reasonable reader could argue that it exhibited in any degree any of the fatal failings referred to above.

32. The Committee might have modified the wording to a minor extent and would have decided what followed from the findings. To have ignored or contradicted those findings, however, might well have exposed its decision to judicial review.

33. We have examined this issue because the DN treats a draft report, ipso facto, as a quite different creature from a final report without apparent consideration of the practical differences that might have existed in this case. Of course, if the draft awaited further assessment by a fact finder or a senior solicitor, the difference might be substantial. Here, we assess that it would have been minimal. Given that there never will be a final report that is a significant finding.

34. It is not within the Tribunal's remit to pass judgment on the monitoring officer's decision to discontinue the investigative process. It is, however,

highly material to consider whether the legitimate public interest referred to in §23 is diminished or even extinguished where the public officer ceases to hold her office before the Committee considers the draft report.

35. The Tribunal finds that the public interest in disclosure was affected minimally, if at all, by the fact that C lost her office in May, 2015, before the Committee adjudicated on the draft report. The public is entitled to know whether a serious complaint as to the conduct of an elected representative was found to be justified, regardless of her status when the report is disclosed. Such transparency is essential to the maintenance of proper standards in public life, whether or not the subject of the complaint remains in office.

36. Moreover, looked at from a practical standpoint, if that were not so, a delinquent public officer, faced with a draft report containing serious criticism of his/her conduct, could simply prevent disclosure by timely resignation.

37. In this case, as Mrs. Dedman argues, there is a realistic possibility that C will again seek election to the Parish Council or another public authority in the future. That being so, the electorate should be apprised of the findings of the draft report, whether favourable or adverse to C. In seeking election in the future, she should neither be prejudiced by unjustified suspicions as to her past conduct nor, as the case may be, protected from disclosure of a past breach or breaches of the Code of Conduct.

38. Whatever the findings of the draft report, there was and is a strong public interest in disclosure regardless of C's loss of office. Whether or not there is also a "public benefit", if that is something different, is not the test which we must apply.

39. In summary, the Tribunal finds that the public, especially the local community, had a powerful legitimate interest in disclosure of the requested information and that C could have no reasonable expectation that it would not be disclosed in the circumstances that arose. That it was a draft report and marked "confidential" when received was no obstacle to disclosure nor was the fact that C was no longer in office. For the purposes of Condition 6(1) of DPA Schedule 2, Mrs. Dedman had a legitimate interest in knowing the findings of the draft report which could only be satisfied by its disclosure. For the reasons already discussed, disclosure was not unwarranted by reason of prejudice to C's rights, freedoms or legitimate interests. If there was such prejudice, it was clearly justified in this case, given the public role undertaken by C and what she might reasonably expect as to publicity for the findings of such a report.

40. Accordingly disclosure was not unfair and NNDC was not entitled to rely on the s.40(2) exemption.

41. There is one further matter which provides some very limited additional support for this conclusion, which it is appropriate to refer to very briefly in the Closed Annex to this decision. We emphasise that we should have come to the same conclusion regardless of this further matter.

42. For these reasons we allow this appeal.

43. Our decision is unanimous.

David Farrer Q.C.

Tribunal Judge

7th. January, 2017