



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2019/0011**

**Decided without a hearing  
On 6 June 2019**

**Before**

**JUDGE BUCKLEY**

**ANNE CHAFER AND JEAN NELSON**

**Between**

**KEVIN LARKIN**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

**DECISION**

1. For the reasons set out below and in the closed annex the tribunal allows the appeal against decision notice FS507177135 and issues the following substitute decision notice.
2. The tribunal accepts that the disputed information must remain secret during the proceedings. There is a closed annex to this decision. A redacted version of the closed annex will be released after the expiry of the time for applying for permission to appeal or the conclusion of any appeal.

## SUBSTITUTE DECISION NOTICE

Public Authority: Leeds City Council

Complainant: Kevin Larkin

### **The Substitute Decision**

1. For the reasons set out below the Public Authority was not entitled to refuse the Complainant's requests for information made on 18 October 2017 and 30 October 2017 on the ground that the requested information was exempt from disclosure under s 40(2) FOIA.
2. For the reasons set out in the closed annex a small part of the information is outside the scope of the request and do not need to be disclosed.

### **Action Required**

3. The Public Authority is required to respond to the complainant's requests within 49 days of the promulgation of this judgment by supplying the information identified in the closed annex.

## REASONS

### **Introduction**

1. This is an appeal against the Commissioner's decision notice FS50717735 of 17 December 2018 which held that the request was for personal data and Leeds City Council ('the Council') was correct to withhold the disputed information (three email chains) in accordance with section 40(2) of the Freedom of Information Act 2000 (FOIA).

### **Factual background to the appeal**

2. In September 2015 five devolution bids were submitted to the government from Yorkshire. One of those bids was from the Sheffield City Region ('SCR'). In October 2015 George Osborne, the Chancellor, signed an agreement with the leaders of the SCR to devolve powers and provide for a directly elected mayor. This agreement initially included nine local authorities across South Yorkshire, North Derbyshire and North Nottinghamshire but was amended later to include only Barnsley, Doncaster, Rotherham and Sheffield local authorities.
3. In August 2017 17 out of 20 Yorkshire Councils, including Barnsley and Doncaster, stated their commitment to a 'One Yorkshire' option of a broader devolution deal.
4. Sajid Javid, Communities Secretary wrote to the leaders of all Yorkshire Councils on 15 September 2017 indicating that parliament had already legislated to

implement key elements of the SCR deal and that the Government were not prepared to consider any other deal which would cut across or unravel the SCR deal.

5. At a meeting of the SCR Combined Authority held on 18 September 2017 the leaders of Barnsley and Doncaster councils voted against a recommendation to progress the SCR deal because of their views that a wider Yorkshire deal was preferable.
6. In December 2017 local polls were held in Barnsley and Doncaster asking residents whether they were in favour of the SCR option or the 'One Yorkshire' option. The One Yorkshire option received 85% of the votes compared to 15% for the SCR option.
7. In May 2018 the SCR mayoral election took place and Dan Jarvis was appointed Mayor of the Barnsley, Doncaster, Rotherham and Sheffield combined authority.

*Dramatis Personae*

Tom Riordan	Chief Executive of Leeds City Council
Judith Blake	Leader of Leeds City Council
Jo Miller	Chief Executive of Doncaster Council
Ros Jones	Mayor of Doncaster
Diana Terris	Chief Executive of Barnsley Council
Sir Steve Houghton	Leader of Barnsley Council
John Mothersole	Chief Executive of Sheffield Council
Julie Dore	Leader of Sheffield Council
Roger Marsh	Chair of Leeds City Region Enterprise Partnership

**Request, Decision Notice and appeal**

8. The appellant made a request for the following information on 18 October 2017:
  - 1a) For the period between 01/08/2017 and 19/09/2017 copies of all emails sent and received between Tom Riordan and Jo Miller (Chief Executive of Doncaster Council).
  - 1b) For the period between 01/08/2017 and 19/09/2017 copies of all emails sent and received between Judith Blake and Ros Jones (Mayor of Doncaster).
  - 2a) For the period between 01/08/2017 and 19/09/2017 copies of all emails sent and received between Tom Riordan and Diana Terris (Chief Executive of Barnsley Council).

- 2b) For the period between 01/08/2017 and 19/09/2017 copies of all emails sent and received between Judith Blake and Sir Steve Houghton (Leader of Barnsley Council).
- 3a) For the period between 01/08/2017 and 19/09/2017 copies of all emails sent and received between Tom Riordan and John Mothersole (Chief Executive of Sheffield Council).
- 3b) For the period between 01/08/2017 and 19/09/2017 copies of all emails sent and received between Judith Blake and Julie Dore (Leader of Sheffield Council).
9. The appellant requested the following information on 30 October 2017:
- 1) Copies of all emails sent and received to 'tom.riordan@leeds.gov.uk' between 19/09/17 and 30/10/17 on the subject of devolution in Yorkshire (including but not limited to the One Yorkshire Devolution proposals and the Sheffield City Region devolution proposals).
10. The Council replied to both requests on 1 December 2017. The Council refused the requests on the basis of s 36(2)(b)(ii) and s 40(2) FOIA.
11. The appellant requested a review on 1 December 2017 and the decision was upheld on review on 22 December 2019.
12. During the course of the Commissioner's investigation the Council disclosed the majority of the requested information to the appellant on 5 October 2018. It continued to withhold three email chains. In relation to the remaining withheld information the Council indicated that it no longer relied on s 36(2)(b)(ii). The Council initially relied on s 40(2) and s 43(2) (commercial information) but by the time the decision notice was issued, it no longer relied on s 43(2).
13. In a decision notice dated 17 December 2018 the Commissioner concluded that the withheld information was personal data on the basis that it contained the personal opinions of the chief executives and senior leaders or figures in other organisations involved in discussions about the devolution process. The Commissioner decided that disclosure would contravene the first data protection principle because disclosure would be unfair to the individuals expressing opinions and candid views in the emails. In assessing fairness the Commissioner took account of the reasonable expectations of the individuals that information of the type requested would not be disclosed, concluding that there was a reasonable expectation that the personal opinions expressed in the emails would not be disclosed given the content and nature of the emails.
14. She concluded that disclosure would have some infringement on the individual's privacy even though the views were expressed in an official context, because the comments in the emails were different both in content and tone to public comments of the Chief Executives. The Commissioner considered that there was a clear public interest in transparency about discussions about devolution and that this extended to the roles that the individual Chief Executives took given that

there was suggestion in interviews of tensions between individuals. The Commissioner concluded that the legitimate interests in disclosure did not outweigh the legitimate interest in protecting the privacy of the individuals on the basis that the council has been relatively open and transparent and the degree to which disclosure of the remaining information would genuinely inform the public debate is limited.

15. The Grounds of Appeal, in summary, are that it would not be unfair to disclose the information and that the public interest favours disclosure.
16. The Commissioner's response simply relies on the Decision Notice.

## **Legal framework**

### S 40 – Personal Information

17. The relevant parts of s 40 of FOIA provide:

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

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.

(3) The first condition is-

- (a) in a case where the information falls within any of paragraphs (a)-(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...

...

(5) The duty to confirm or deny –

...

- (b) does not arise in relation to other information if or to the extent that either
  - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 191(a) would (apart from this Act) contravene any of the data protection principles...

18. Personal data is defined in s1(1) Data Protection Act 1998 ('DPA') as:

data which relate to a living individual who can be identified – (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indications of the intentions of the data controller or any person in respect of the individual.

19. The definition of "personal data" consists of two limbs:
  - i) Whether the data in question "relate to" a living individual and
  - ii) Whether the individual is identifiable from those data.

20. The tribunal is assisted in identifying 'personal data' by the cases of *Ittadieh v Cheyne Gardens Ltd* [2017] EWCA Civ 121; *Durant v FSA* [2003] EWCA Civ 1746 and *Edem v Information Commissioner* [2014] EWCA Civ 92, from which the following principles are drawn.

21. In terms of 'identifiability', personal data covers, for example, the name of a person in conjunction with his telephone details or information about his working conditions or hobbies, as well as information that a person has been injured and is on half time, or his name and address.

22. In *Durant*, Auld LJ, giving the leading judgment said at [28]:

Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject's involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person's or body's conduct that he may have instigated. In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity.

23. In *Edem Moses LJ* held that it was not necessary to apply the notions of biographical significance where the information was plainly concerned with or obviously about the individual, approving the following statement in the Information Commissioner's Guidance:

It is important to remember that it is not always necessary to consider 'biographical significance' to determine whether data is personal data. In many cases data may be personal data simply because its content is such that it is 'obviously about' an individual. Alternatively, data may be personal data because it is clearly 'linked to' an individual because it is about his activities and is processed for the purpose of determining or influencing the way in which that person is treated. You need to consider 'biographical significance' only where information is not 'obviously about' an individual or clearly 'linked to' him.

24. Although s 1(1) provides that expressions of opinions about an individual are that individual's personal data, this does not answer the question of whether or not somebody's opinions are their personal data. The Commissioner's Guidance on Access to Information held in Complaint Files (version 3.0) contains three pages under the heading 'Are somebody's opinions their personal data?'. Whilst this

appeal does not concern a request for complaint files, the discussion is of more general relevance to the present appeal. The guidance is not binding on us, but we have found it to be of assistance.

25. The guidance explains that for an opinion to be personal data it must both identify an individual and relate to him or her. It is the second issue which can be difficult to determine. The guidance states:

This can call for careful judgment based on the nature of the information, the context in which it is held and the purpose for which it is used. The following questions may help you decide whether information recording an individual's opinion is their personal data:

- Does the opinion tell you anything significant about the individual holding the opinion – for example biographical details, characteristics or their personal beliefs?
- Just how 'personal' is the opinion? Is it a subjective, personal view rather than a professional, objective appraisal of an individual or issue?
- Is the opinion being used, or could it be used, to find out something about the individual holding the opinion, to treat him or her in a certain way or to inform a decision in respect of him or her?

If the answer to any of these questions is 'yes' then the opinion is likely to be the personal data of the individual holding it.

If the answer is 'no', then the opinion is unlikely to be the personal data of the individual holding it – of course it could be the personal data of the individual the opinion is about.

26. The first data protection principle is the one of relevance in this appeal. This provides that:

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless -  
(a) at least one of the conditions in Schedule 2 is met..." (See para.1 Sch 1 DPA).

27. The only potentially relevant condition in Schedule 2 DPA is section 6(1) which provides that the disclosure 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.' (See para.s 6 Sch. 2 DPA)

28. The case law on section 6(1) has established that it requires the following three questions to be answered:

1. Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
2. Is the processing involved necessary for the purposes of those interests?

3. Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

### The Task of the Tribunal

29. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

### **Issues**

30. The issues we have to determine are:
  - 30.1. Was the withheld information personal data?
  - 30.2. Would disclosing the information be fair?
  - 30.3. If so, are the conditions in 6(1) met i.e.
    - 30.3.1. Is the data controller or the third party or parties to whom the data is disclosed pursuing a legitimate interest or interests?
    - 30.3.2. Is the processing involved necessary for the purposes of those interests?
    - 30.3.3. Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

### **Evidence**

31. We have read and were referred to an open and a closed bundle of documents, which we have taken account of where relevant.

### **Submissions**

32. The appellant's submissions focussed on whether or not disclosing the information would be fair and on the public interest in disclosing the information.

### *Would disclosure be fair?*

33. The appellant addressed each of the factors that the Commissioner identifies at para 22 of the Decision Notice as relevant to the question of fairness.

### *What the public authority may have told them about what would happen to their personal data*

34. As Chief Executives, the individuals would have known that their emails are subject to the FOIA. The Councils are publicly committed to openness and transparency.



*Their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights (ECHR)*

35. Personal opinions on the subject of public policy would not fall within a private social life and it is likely that the employees would have been notified that their emails would be monitored.

*The nature and content of the information itself*

36. The disclosure by York Council of emails containing personal views sets a precedent for disclosure and shows that embarrassment is not a reason to prevent release of information. The views were expressed in an official context, using official council communication services, with a lower expectation of privacy. Devolution as an issue and its sensitivities are irrelevant – the Council withdrew its reliance on s 36.

*The circumstances in which the personal data was obtained*

37. The individuals personally typed the information into an email system they knew was subject to the FOIA.

*Any particular circumstances of the case, eg established custom or practice within the public authority*

38. The Commissioner has stated that the amount of information being withheld is minimal and that ‘there is a case to be made for saying that the Council has been relatively open and transparent’. The appellant disagrees with this statement and submits that, in any event, this is not relevant to the question of fairness.

*Whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused*

39. It is not known if they have explicitly refused, but they should have a ‘much more significant’ expectation that their emails would be disclosed.

*The consequences of disclosure*

40. There may be some embarrassment, but this should not necessarily prevent disclosure and is outweighed by the public interest in disclosure.

*Whether information of the nature requested is already in the public domain, the source of that disclosure and whether the passage of time means that disclosure now could still cause damage or distress*

41. The Chief Executives have given interviews on devolution putting their views in the public domain. If their privately expressed views were different, this increases the public interest in disclosure. If ‘now’ means today rather than the date of the

request then the passage of time has decreased the potential to cause damage or distress.

### *The public interest*

42. There is a public interest in the issue of Yorkshire devolution which has significant and wide ranging consequences now and for many years to come. There is a clear public interest in the bodies involved in devolution and their Chief Executives being open and transparent. There were tensions between the individuals involved, and the personalities involved played a role in the lack of progress on this major public policy issue.
43. Disclosure would increase transparency, accountability and public knowledge on this important debate. The fact that disclosure would reveal the individual's candid views on some issue associated with the devolution process which are different in content and tone to public interviews is a factor clearly favouring disclosure. The public has a right to know if there is a difference in view and why. This could have impacted on the likely success of any devolution plan. People were taking part in a public vote and views publicly shared at the time could have influenced the votes. People have a right to know if those views were not genuinely held.

### **Discussion and conclusions**

#### *Was the withheld information personal data?*

44. The Commissioner does not explain why she concluded at para 19 that the opinions of the individuals constituted their personal data. It is unclear to us whether, in error, she thought that this was expressly included in s 1(1)(b) ('includes any expression of opinion about the individual'). Alternatively the decision may have been made on the basis that the opinions were 'personal' opinions.
45. The question of whether or not an individual's opinions are their personal data is a question to be determined on the facts in accordance with the usual principles.
46. The individual in question in each email is the author of the email. That individual is identified by name and therefore that limb is satisfied. The question for us is whether or not the data in question 'relate to' the individual. The content of the emails is not 'obviously about' the author nor it is clearly 'linked to' an individual, because it is about his or her activities and processed for the purpose of determining or influencing the way in which that person is treated.
47. We have therefore considered where the data falls in relevance and proximity to the data subject taking into account whether or not the information is biographical in a significant sense and the focus of the data. We think in

answering these questions, the Commissioner's guidance cited above highlights relevant factors.

48. We have looked at each email and considered whether or not it reveals anything significant about the individual holding the opinion, such as their characteristics or personal beliefs. We have considered whether, in the context of emails sent at work between Chief Executives and other senior leaders concerning the devolution process the opinions expressed are subjective personal views or professional, objective appraisals of the issue. We have considered whether the opinion could be used to find out something about the individual, to treat the individual in a certain way or to inform a decision in respect of him or her.
49. We have concluded that some of the emails contain personal data, and some do not. The specific conclusions that we have reached in relation to each email and the reasons for those conclusions are set out in the closed annex, which will be released after the conclusion of any appeal.

*Would disclosing the information be fair?*

50. In relation to those emails that we have concluded are personal data, we conclude that disclosure would be fair and would not be in breach of the first data protection principle. We would have reached the same conclusion in relation to those emails that we have found do not constitute personal data.
51. We accept that disclosure of the emails may cause some limited embarrassment and to the authors of the emails because the views in the emails are fairly frankly expressed, but for the reasons set out below, we do not think that the authors had a reasonable expectation of privacy.
52. We have not been provided with any information about the Council's general policy on emails, nor have we been told what the individuals were told about their emails. In general, we find that the Chief Executive of a Council or other similar senior leaders would not have a strong expectation of privacy in relation to their work emails. However we note that the Council is not asserting that the individuals had a expectation of privacy in relation to their emails as a whole, but that they had an expectation of privacy in relation to the expression of personal opinions. This is unlikely to be explicitly covered in any policy on emails.
53. We do not accept that the Chief Executives and other senior leaders would have a strong expectation of privacy in relation to these particular emails, compared to other emails that they send at work. We accept that, even for a chief executive, there is likely to be a reasonable expectation of privacy in relation to the content of emails sent at work which relate to that individual's private social life, including his or her private social life with other senior leaders. These emails do not fall into that category.

54. The opinions are soundly located in a work sphere: they concern devolution, a matter that was being dealt with by these individuals in their professional capacity. None of the emails are internal communications within a particular Council. They are all emails sent to external organisations. Further, none of the emails contain any indication that they are to be considered private or confidential or not for wider circulation. The fact that personal opinions about work issues are expressed by senior leaders to external senior leaders in strong terms does not, in our view, give rise to a reasonable expectation of privacy. We do not accept that any sensitivities surrounding the devolution issue give rise to any increased expectation of privacy.
55. Looking at all these factors in the round, we conclude that it would be fair to disclose the data.

*Are the conditions in 6(1) met?*

56. Having found that disclosure would be fair it is necessary also to consider 6(1). Although the appellant's submissions focussed on the public interest, that is not the right test. Disclosure must be reasonably necessary for the purposes of the legitimate interests of the appellant and it must not be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
57. We accept that there is a legitimate interest in the public knowing the views of these particular individuals related to Yorkshire devolution. Yorkshire devolution is an issue of significance to the public both from an economic and a political perspective. There is a legitimate interest in the roles that individual Chief Executives and other senior leaders took in the process and therefore a legitimate interest in the public knowing their individual views. This is strengthened by the fact that there is, as the Commissioner observed, some differences in content and tone between views given in interviews and the views expressed in these emails.
58. Disclosure of the information would give the public insight into the working relationships of the individuals with a significant impact on the direction of the devolution process. We accept that the limited amount of information contained in the remaining emails would not inform the public to a large extent, but the Council has retained all information which contains the 'personal opinions' of the individuals and therefore it is this retained information which is reasonably necessary for the purposes of the legitimate interest identified above.
59. We do not think that disclosure is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject. We have found that the individuals did not have a reasonable expectation of privacy and that only limited embarrassment might be caused.
60. For those reasons we find that the conditions in 6(1) are satisfied.

61. There are a small number of emails which we find are outside the scope of the request and therefore do not need to be disclosed. These are identified in the closed annex.
62. This appeal is allowed. Our decision is unanimous.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 25 June 2019

Promulgated: 27 June 2019