



Case Reference: EA/2022/0018

First-tier Tribunal  
General Regulatory Chamber  
Information Rights

Heard: on the papers  
Heard on: 5 July 2022  
Decision given on: 26 July 2022

Before

TRIBUNAL JUDGE BUCKLEY

TRIBUNAL MEMBER PAUL TAYLOR

TRIBUNAL MEMBER DANIEL PALMER-DUNK

Between

LEO McAULEY

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

**Decision:** The appeal is dismissed.

## REASONS

Introduction

1. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.
2. This is an appeal against the Commissioner's decision notice IC-103772-D1B4 of 23 December 2021 which held that Queen's University Belfast ('QUB') should have cited s 40(5A) and refused to confirm or deny some of the information because it was the complainant's personal data and that QUB was entitled to rely on s 40(2) of the Freedom of Information Act 2000 (FOIA) to withhold the remainder of the requested information.

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

3. The appeal arises out of a whistleblowing complaint submitted by Mr McAuley to QUB in December 2019 about its handling of a case of student misconduct. The complaint was investigated by external consultants, PWC. The request relates to the outcome of the investigation and the investigation report produced by PWC.

### **Requests, decision notice and appeal**

#### *The request*

4. This appeal concerns the following request made on 6 February 2021 by Mr McAuley:

This is a freedom of information request for (i) a copy of an investigation report prepared by PwC in its role of investigator of my whistle blowing complaint dated 16 December 2019, and (ii) a copy of written findings and the judgement of Ian Howse, head of internal audit, arising from his consideration of the PwC report.

#### *The response*

5. On 11 February 2021 QUB provided Mr McAuley with a redacted version of the executive summary of the report. QUB responded to the request on 23 February 2021 withholding the requested information under s 40(2) (personal data of a third party). They provided Mr McAuley with a redacted extract of the report's 'recommendations' section. This is part of the executive summary that had already been provided to Mr McAuley.
6. QUB did not carry out an internal review.

#### *The Decision Notice*

7. In a decision notice dated 23 December 2021 the Commissioner decided that some of the requested information was Mr McAuley's personal data and determined that QUB should have neither confirmed nor denied that it held that information under s 40(5A). In relation to the remainder of the requested information the Commissioner concluded that it was entitled to withhold it under s 40(2).

8. The Commissioner was satisfied that some of the requested information related to Mr McAuley in his capacity as the whistle blower. Although he is not named, the Commissioner considered that he was identifiable because anyone with knowledge of the whistleblowing complaint would be able to identify him as the whistle blower. The information relates to Mr McAuley in that it comprises information, opinion and allegations put forward by him. This information is Mr McAuley's personal data and the exemption at s 40(1) is engaged. The Commissioner considered that QUB should have cited s 40(5A). QUB has undertaken to provide Mr McAuley with the personal data he would be entitled to receive in response to a subject access request made under the UK GDPR.
9. The Commissioner was satisfied that the information which was not Mr McAuley's personal data related to a number of other data subjects including a student, University staff and other professionals involved in the misconduct matters. The Commissioner was satisfied that they were all identifiable individuals. The Commissioner concluded that the information fell within the definition of 'personal data' in s 3(2) DPA.
10. The Commissioner accepted that Mr McAuley had a legitimate interest in being advised of the outcome of the investigation and action taken as a result. The Commissioner was not persuaded that there was a wider legitimate interest in the public being informed about this particular case.
11. The Commissioner was satisfied that the disclosure of information setting out the findings and recommendations was sufficient to meet the limited legitimate interest in disclosure. The Commissioner was not satisfied that disclosure of the requested information was necessary.

### *Notice of Appeal*

12. The grounds of appeal to the extent that they are within the jurisdiction of the tribunal are, in essence, that:
  - 12.1. The Commissioner was wrong to conclude that there was no wider legitimate interest in disclosure.
  - 12.2. The Commissioner was wrong to conclude that disclosure was not necessary for the purposes of the legitimate interests.
13. The grounds of appeal raise a number of other issues which are outside the tribunal's jurisdiction in this appeal. Our reasons for this conclusion are set out in 'Discussion and conclusions' below. These issues are, in summary:
  - 13.1. The Commissioner erred in failing to investigate QUB failing to rely on the s 21 exemption.
  - 13.2. The Commissioner erred in not investigating the correspondence of 11 and 17 February and 2 March, which undermine the response to the request.

## **The Commissioner's response**

14. The Commissioner was not persuaded that the arguments put forward by Mr McAuley were sufficient to support the view that there is a wider legitimate interest in the public having disclosure of the remainder of the report. The Commissioner notes from the executive summary that the investigators were unable to substantiate any of the complaints made. Whilst recommendations were made, these were disclosed under FOIA.
15. The Commissioner understands that Mr McAuley's complaint to the Northern Ireland Public Sector Ombudsman (NIPSO), concerning maladministration of QUP concerning the same issues addressed in the report, has not been accepted. The Commissioner submitted that this further limits any wider legitimate interest in disclosure.
16. The report relates to one specific matter rather than QUP's conduct in general.
17. The Commissioner maintained that neither the circumstances of this case, nor the content of the requested information indicate that there is a wider benefit to disclosure. The Commissioner remains satisfied that the disclosures made to the Appellant are sufficient to meet the limited legitimate interest in disclosure. The Commissioner remains of the view that there is insufficient evidence to persuade him that disclosure of the withheld information under FOIA is reasonably necessary in this case.
18. The other matters raised by Mr McAuley are outside the jurisdiction of the tribunal in this appeal.

## **Mr McAuley's reply**

19. Mr McAuley argues that QUB should have applied s 21 rather than s 40(2). He submits that the Commissioner erred in not investigating QUB declining to cite s 21.
20. Mr McAuley further submits that the 11 and 17 February and the 2 March correspondence undermine the FOI response from 23 February 2021. He submits that the Commissioner erred by not investigating this correspondence. This correspondence is relevant to the tribunal hearing, because it is key evidence in determining whether the Commissioner's investigation was thorough and therefore whether the decision notice is correct in law.
21. The 11 February email is evidence that QUB made a disclosure to Mr McAuley under the whistleblowing policy. The 17 February and 2 March correspondence is strong evidence that the university lied to him about the basis for the 11 February disclosure to avoid making further disclosure under the whistleblowing policy. The 23 February FOI response is a 'stalking horse' that has successfully distracted the

Commissioner from investigating the 11 February disclosure and its relationship to section 21 FOIA. The comments about the conduct of the ICO senior case officer are included as evidence that the Commissioner did not investigate the 11 and 17 February and 2 March correspondence in the course of preparing the decision notice.

22. In relation to the wider legitimate interest, Mr McAuley submits that his allegations were supported by evidence, and refers to the evidence in support.
23. Mr McAuley submits that the Commissioner's understanding in relation to the complaint to the NIPSO is wrong. The referral to NIPSO only related to three of the six disciplinary hearings covered by the PwC investigation. NIPSO's assessment of the case is critically undermined by a number of factors.

### **Mr McAuley's final submissions**

24. It is not correct that Mr McAuley withdrew his whistleblowing complaint.
25. The Commissioner's position that the communications dated 11 and 17 February 2021 and 2 March 2021 are outside the jurisdiction of its FOI department is a mask adopted by the Commissioner to cover case officer's failures to investigate those communications.
26. The decision letter dated 10 March 2022 from the Commissioner to Mr McAuley in relation to the alleged data protection breaches is unprofessional and fails to provide a legal basis for the disclosure or cite any statutory provision. The Commissioner is asking the tribunal to find that the FOI department is not responsible when the department it purports to be responsible has failed to take that responsibility.

### **Legal framework**

#### ***Personal data***

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

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if -
  - (a) It constitutes personal data which does not fall within subsection (1), and
  - (b) either the first, second or the third condition below is satisfied.
- (3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act -
  - (a) would contravene any of the data protection principles, or.....

- (5A) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

28. Personal data is defined in s 3 of the Data Protection Act 2018 (DPA):

(2) 'Personal data' means any information relating to an identified or identifiable living individual (subject to subsection (14)(c)).

(3) 'Identifiable living individual' means a living individual who can be identified, directly or indirectly, in particular by reference to—

(a) an identifier such as a name, an identification number, location data or an online identifier, or

(b) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

29. This is in line with the definitions in the UK General Data Protection Regulation (UK GDPR). The tribunal takes the view that the recitals to the GDPR 2016/679 are a useful guide to the interpretation of the UK GDPR. Recital 26 to the GDPR is relevant, because it refers to identifiability and to the means to be taken into account:

(26) The principles of data protection should apply to any information concerning an identified or identifiable natural person. Personal data which have undergone pseudonymisation, which could be attributed to a natural person by the use of additional information should be considered to be information on an identifiable natural person. To determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly. To ascertain whether means are reasonably likely to be used to identify the natural person, account should be taken of all objective factors, such as the costs of and the amount of time required for identification, taking into consideration the available technology at the time of the processing and technological developments. The principles of data protection should therefore not apply to anonymous information, namely information which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is not or no longer identifiable. This Regulation does not therefore concern the processing of such anonymous information, including for statistical or research purposes.

30. 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 identified or identifiable, directly or indirectly, from those data.

31. 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. Although these

relate to the previous iteration of the DPA, we conclude the following principles are still of assistance.

32. 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.

33. 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.

34. The High Court in **R (Kelway) v The Upper Tribunal (Administrative Appeals Chamber) & Northumbria Police** [2013] EWHC 2575 held, whilst acknowledging the Durant test, that a Court should also consider:

(2) Does the data "relate" to an individual in the sense that it is "about" that individual because of its:

- (i) "Content" in referring to the identity, characteristics or behaviour of the individual?
  - (ii) "Purpose" in being used to determine or influence the way in which the individual is treated or evaluated?
  - (iii) "Result" in being likely to have an impact on the individual's rights and interests, taking into account all the circumstances surrounding the precise case (the WPO test)?
- (3) Are any of the 8 questions provided by the TGN are applicable?

These questions are as follows:

- (i) Can a living individual be identified from the data or from the data and other information in the possession of, or likely to come into the possession of, the data controller?
- (ii) Does the data 'relate to' the identifiable living individual, whether in personal or family life, or business or profession?

- (iii) Is the data 'obviously about' a particular individual?
- (iv) Is the data 'linked to' an individual so that it provides particular information about that individual?
- (v) Is the data used, or is it to be used, to inform or influence actions or decisions affecting an identifiable individual?
- (vi) Does the data have any biographical significance in relation to the individual?
- (vii) Does the data focus or concentrate on the individual as its central theme rather than on some other person, or some object, transaction or event?
- (viii) Does the data impact or have potential impact on an individual, whether in a personal or family or business or professional capacity (the TGN test)?
- (4) Does the data "relate" to the individual including whether it includes an expression of opinion about the individual and/or an indication of the intention of the data controller or any other person in respect of that individual. (the DPA section 1(1) test)?

35. Personal data of which the applicant is the data subject is always exempt by virtue of s 40(1) FOIA.

36. In relation to other personal data, the data protection principles are set out Article 5(1) of the UK GDPR. Article 5(1)(a) UK GDPR provides: that personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject. Article 6(1) UK GDPR provides that processing shall be lawful only if and to the extent that at least one of the lawful bases for processing listed in the Article applies.

37. The only potentially relevant basis here is article 6(1)(f):

Processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which requires protection of personal data, in particular where the data subject is a child.

38. The case law on article 6(1)(f)'s predecessor established that it required three questions to be answered, which we consider are still appropriate if reworded as follows

1. Is the data controller or a third party pursuing a legitimate interest or interests?
2. Is the processing involved necessary for the purposes of those interests?
3. Are the above interests overridden by the interests or fundamental rights and freedoms of the data subject?

39. Lady Hale said the following in *South Lanarkshire Council v Scottish Information Commissioner* [2013] 1 WLR 2421 about article 6(f)'s slightly differently worded predecessor:

27. ... It is well established in community law that, at least in the context of justification rather than derogation, 'necessary' means 'reasonably' rather than absolutely or strictly necessary .... The proposition advanced by Advocate General Póitres Maduro in *Huber* is uncontroversial: necessity is well established in



community law as part of the proportionality test. A measure which interferes with a right protected by community law must be the least restrictive for the achievement of a legitimate aim. Indeed, in ordinary language we would understand that a measure would not be necessary if the legitimate aim could be achieved by something less. ...

40. S 40(2) is an absolute exemption and therefore the separate public interest balancing test under FOIA does not apply.

### *The role of the tribunal*

41. 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 he 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*

42. The issues for the tribunal to determine are:

- 42.1. Do the matters raised by Mr McAuley come within the tribunal's jurisdiction?
- 42.2. Does the information relate to an identified or identifiable living individual?
- 42.3. In relation to personal data of which the appellant is not the data subject:
  - 42.3.1. Is the data controller or a third party pursuing a legitimate interest or interests?
  - 42.3.2. Is the processing involved necessary for the purposes of those interests?
  - 42.3.3. Are the above interests overridden by the interests or fundamental rights and freedoms of the data subject?

### **Discussion and conclusions**

#### *Jurisdiction*

43. As the tribunal carries out a full merits review, we do not need to make findings on whether the Commissioner carried out a thorough investigation, or whether he failed to take account of relevant information.

44. We do not have any jurisdiction to consider Mr McAuley's arguments on s 21 FOIA. A public authority has a duty, under part I FOIA, where the public authority is to any extent relying on a claim that information is exempt information, to communicate that to the requestor.

45. A public authority is not under any duty under part I FOIA to rely on a claim that information is exempt under any particular section or at all. This is not a requirement of part I FOIA. Accordingly a failure to rely on s 21 FOIA, or a decision

not to rely on s 21, even if s 21 were applicable on the facts, is not something which can form the basis of an application to the Commissioner under s 50 for a decision on whether a request has been dealt with in accordance with the requirements of Part I FOIA. S 78 of the Act provides that:

Nothing in this Act is to be taken to limit the powers of a public authority to disclose information held by it.

46. The Commissioner could not, and did not, make a ruling on this in the decision notice. Accordingly we have no jurisdiction to deal with the s 21 issue.
47. In our view, the particular correspondence highlighted by Mr McAuley (dated 11 and 17 February and 2 March 2021) is not relevant to the issues we have to determine and would not have been relevant to the issues that the Commissioner had to determine.

*Personal data*

48. The question for us to determine is whether the withheld information is the personal data of an identifiable living individual or individuals.
49. In our view, the entire report is the personal data of the student who is the subject of the misconduct case ('the student'). The report is an independent review to determine whether the University has complied with its disciplinary procedures in regard to how it handled the case of the student's misconduct. The report is biographical in a significant sense, in that it goes beyond the recording of the student's involvement in a matter that has no personal connotations for the student. The matter in question had extremely significant personal connotations for the student. Given the nature of the alleged misconduct and the explanation or mitigation put forward, it is clearly a life event in respect of which the student's privacy would be compromised by disclosure.
50. The focus of the report is the handling of that student's misconduct case. The report is obviously about the university's treatment of that student's misconduct case. It is obviously about him and his activities and clearly linked to him and provides particular information about him and the way in which his case was handled by the University. The report's central theme is the way in which his misconduct case was handled.
51. The student is not named in the report, but given the level of detail about the case including, for example, the course, the dates of study and specific dates of examinations we find, on the balance of probabilities, that a motivated individual would have been able to identify the student from the report and other information likely to be known by at least a section of the public.
52. We find that some of the report also relates to Mr McAuley, in that it contains information, opinions and allegations put forward by him. We agree with the

Commission that, on the balance of probabilities, a motivated individual would have been able to identify Mr McAuley from the report and other information likely to be known by at least a section of the public. Further, Mr McAuley in his request refers to 'my whistle blowing complaint' so he would be identifiable from the request and the response taken together.

*Legitimate interest*

53. We except that Mr McCauley has a legitimate interest in the disclosure of the report in that he has a legitimate interest in being advised of the outcome of the investigation into his whistleblowing allegations.
54. We also accept that there is a wider legitimate interest in transparency and scrutiny in relation to whether the university follows its own procedures when dealing with allegations of student misconduct. Other than this, we do not accept that there is any wider legitimate interest in relation to any of the specific findings in the report, or the specific allegations made in this case.

*Reasonable necessity*

55. We have considered whether the disclosure of the requested information is reasonably necessary for the purposes of the identified legitimate interests. Disclosure must be more than desirable, but less than indispensable or an absolute necessity. Disclosure must be the least intrusive means of achieving the legitimate aim in question, because it would not be reasonably necessary if it could be achieved by anything less. We must consider whether the legitimate aim could be achieved by means that interfere less with the privacy of the data subjects.
56. In relation to Mr McAuley's legitimate interest in being advised of the outcome of the investigation into his whistle blowing allegations, we do not accept that disclosure of the entire report to the world is reasonably necessary. In our view the legitimate aim can be achieved by means that interfere less with the privacy of the data subjects, namely by disclosing the executive summary to Mr McAuley himself rather than by disclosing the entire report to the whole world. Having read the executive summary and the entire report, we find that the executive summary is a fair reflection of the contents of the full report and is not to any extent a selective or sanitised summary of the full findings.
57. In terms of the wider public interest in transparency, we do not except that it is reasonably necessary to disclose the full report of a particular independent review carried out to determine whether the University had complied with its disciplinary procedures in regard to how it handled a particular case of student misconduct. Having read the report there are no criticisms of the university which, in our view, are of such an extent or of such broad application that it is reasonably necessary to disclose this particular report to the public as a whole.

58. On this basis we agree with the Commissioner's decision in relation to s 40(2) and s 40(5A).

*Are the above interests overridden by the interests or fundamental rights and freedoms of the data subject?*

59. Given our conclusions set out above it is not necessary for us to decide whether or not the above interests are overwritten by the interests of fundamental rights and freedoms of the data subjects. For completeness we have gone on to consider what we would have decided if we had determined that disclosure was reasonably necessary for the purposes of the legitimate interests.

60. In assessing the consequences of disclosure we would have taken account of the particular nature of the personal information about the student. The information is detailed, personal and sensitive. There is no evidence before us to suggest that the student would consent to the publication of the report, or that the student would expect the report to be published. We would have concluded that disclosure would not have been within the reasonable expectations of the student and that there is clear potential for harm and distress given the nature of the factual allegations against the student and the nature of the information put forward in mitigation.

61. Taking all the above into account, we would have concluded in any event that the legitimate interests were overridden by the interests or fundamental rights and freedoms of the student.

Signed Sophie Buckley

Date: 22 July 2022

Judge of the First-tier Tribunal