



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

**Case No. EA/2013/0121**

**ON APPEAL FROM:**

**Information Commissioner's  
Decision Notice No: FS50467604  
Dated: 15 May 2013**

**Appellant: Emrys Jones**

**First Respondent: The Information Commissioner**

**Second Respondent: Swindon College**

**On the papers**

**Date of decision: 17th January 2014**

**Before  
CHRIS RYAN  
(Judge)  
and  
JACQUELINE BLAKE  
DAVID WILKINSON**

**Subject matter**      **Whether information held s.1:  
Personal data s.40**

## DECISION OF THE FIRST-TIER TRIBUNAL

The Appeal is dismissed because the Decision Notice correctly concluded that the Public Authority was not required to take any further action in respect of the Appellant's original request for information. However, a substituted Decision Notice should be issued in order to record the fact that, as conceded by the Information Commissioner, he reached his decision on two parts of the appeal for the wrong reason.

### Substituted Decision Notice

**Date:** 17th January 2014

**Public Authority:** Swindon College

**Complainant:** Mr E Jones

**Decision:** For the reasons set out in the Reasons for Decision below the Public Authority did not hold information in respect of (a) the amount paid in compensation for pension loss suffered by [name redacted] as a result of the Public Authority's actions or (b) the total of all legal fees incurred by the College in the claim for compensation by [name redacted]. Accordingly, in light of those conclusions and the conclusion in the original Decision Notice that the information held by the Public Authority in respect of the total of the compensation claim by [name redacted] was exempt information under section 40(2) of the Freedom of Information Act 2000, no direction is made requiring the Public Authority to take any further action.

## REASONS FOR DECISION

### Background

1. In February 2011 the Second Respondent, Swindon College ("the College") was found liable in the High Court to one of its former employees ("the Claimant") for making a negligent misstatement about the Claimant in an email sent to the organisation which then employed him. The College was criticised by the trial judge for the way it had conducted itself. The amount of damages to be paid to the Claimant by the College was left to be determined at a later date.

2. Ultimately the College reached a compromise agreement with the Claimant which led to the stay of the proceedings on terms that the College would pay a certain figure to the Claimant by way of compensation, together with costs. The amount of costs was also subsequently agreed.
3. The College's liability to the Claimant fell within the terms of an insurance policy. Under the policy the College was required to contribute £30,000 to any award or settlement, by way of excess, but was entitled to an indemnity from the insurers for the balance of damages and costs payable to the Claimant.
4. Insurers appointed solicitors to represent the College in the litigation. The solicitors subsequently negotiated the settlement and the insurers discharged their liability to indemnify the College by paying the agreed sums for both damages and costs to the Claimant or his representatives.

#### The request for information and the Decision Notice

5. On 15 May 2012 the Appellant asked a number of questions of the College. Of those questions only three remain a matter of dispute in this Appeal. They are:
  1. What was the amount of compensation paid to the Claimant for his pension loss?
  2. What was the total amount of compensation and/or damages paid to the Claimant?
  3. What was the total of all legal fees, expenses and other costs incurred by the College in the litigation?We will refer to this set of questions as "the Request".
6. The Request was made under section 1 of the Freedom of Information Act 2000 ("FOIA"), which imposes on the public authorities to which it applies an obligation to disclose requested information unless certain conditions apply or the information falls within one of a number of exemptions set out in FOIA.
7. The College refused to disclose the information sought relying upon the exemptions provided under FOIA section 36(2) (prejudice to the effective conduct of public affairs) and section 40(2) (third party personal data). It maintained its refusal following an internal review and the Appellant complained to the Information Commissioner about the manner in which the Request had been handled.
8. Following an investigation, the Information Commissioner published a Decision Notice on 15 May 2013 ("the Decision Notice") in which he concluded that the College had been entitled to rely upon the section 40(2) exemption and that, in those circumstances, it was not

necessary to consider whether or not the information requested would have been exempt also under section 36(2).

#### The appeal to this tribunal

9. On 12 June 2013 the Appellant appealed the Decision Notice to this Tribunal.
10. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based. Frequently we find ourselves making our decision on the basis of information that is more extensive than that submitted to the Information Commissioner. That was the case in this appeal although, as we make clear, we had some concerns about the manner in which the additional information was presented to us.
11. The Registrar of this Tribunal issued a Case Management Note on 30 July 2013, which provided for the College to be joined as Second Respondent and for the filing of two bundles of relevant documents, an open bundle, which was available to all parties, and a closed bundle (comprising materials containing or referring to the information in dispute), which was not made available to the Appellant.
12. By consent of all parties the appeal was determined on the papers, without a hearing. In our view the appeal was an appropriate one to be determined by that means and we have based our decision on the content of the bundles and the written submissions filed by all parties.
13. We deal with each element of the Request separately.

#### *Compensation for pension loss*

14. In the Decision Notice the Information Commissioner concluded that the College did hold the information sought but that it was exempt under FOIA section 40(2). However, in his Response to the Notice of Appeal the Information Commissioner modified his position because, he said, he had made further enquires of the College and :

*“...now understands from the College that it was not told whether the final settlement figure was broken down and,*

*consequently was not told whether the final figures included a particular sum for pension loss.”*

The Information Commissioner invited us to issue a substituted decision to the effect that the College did not hold the evidence falling within this part of the Request.

15. We received no evidence from the Information Commissioner as to the nature of the further enquiries referred to and, although the agreed bundle included copies of correspondence between the Information Commissioner and the College before the Decision Notice was finalised, we were shown no correspondence after that date.
16. Part of the Registrar’s rationale for joining the College as a party to the appeal was that the Information Commissioner had changed his position on certain matters, including this issue. However, when the College subsequently came to file its own Response to the appeal it offered no more, by way of evidence or explanation, than this:

*“...upon enquiry from [the Information Commissioner] and further consideration on this point, it is clear the request for information by the Appellant relates specifically to the amount of compensation eventually paid to [the Claimant] for pension loss. The final settlement was a global sum and did not specify pension loss. [The College] confirms that it does not hold the specific information requested by the Appellant.”*

17. We were concerned at the surprisingly casual way in which the College approached this part of the Request, when considering whether or not to comply with the Request, and the failure of the Information Commissioner to ascertain the true position during his investigation. Neither of them apparently focused on the fact that the Appellant was asking for information on an element of the agreed compensation package that the College did not have. And when the Information Commissioner awoke to the inconsistency in his own Decision Notice he chose to explain the error in quite general terms in its Response. The College was no more informative in its own Response. In those circumstances we decided that, before finalising our determination, we should at least see the correspondence recording the questions raised by the Information Commissioner and the responses provided by the College. We therefore directed the Information Commissioner and the College to provide us with copies of the written exchanges that had passed between them. A small bundle was subsequently provided to us, part open and part closed. It was apparent from this that the member of the Information Commissioner’s legal staff responsible for the preparation of this appeal identified an inconsistency in earlier correspondence, which led him to question the College. This brought to light a misunderstanding on the part of

the College about the scope of the Request and clarification of exactly what information it held.

18. In view of the exchange of communications provided to us we are satisfied that, although the College had been in possession of some information about the sum claimed in respect of pension loss, it was never in possession of information about any figure attributed to that element of the Claimant's claim in the final settlement. It follows that the Decision Notice was wrong in its conclusion that the information requested was held by the College, but was exempt from disclosure, and a substituted decision notice should be issued recording that the information requested in this part of the Request was not held by the College.

*Total compensation*

19. The Information Commissioner decided, as in the case of the first part of the Request, that the information sought was held by the College but that it was exempt under FOIA section 40(2). In this case the Information Commissioner did not change his mind about the information held.
20. FOIA section 40(2) provides that information is exempt information if it constitutes personal data of a third party the disclosure of which would contravene any of the data protection principles.
21. Personal data is itself defined in section 1 of the Data Protection Act 1998 ("DPA") which provides:

*"'personal data' means 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"*

The Appellant does not challenge the Information Commissioner's conclusion that the requested information in this case did constitute the personal data of the Claimant.

22. The data protection principles are set out in Part 1 of Schedule 1 to the DPA. The only one having application to the facts of this Appeal is the first data protection principle. It reads:

*"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 ..."*

Schedule 2 then sets out a number of conditions, but only one is relevant to the facts of this case. It is found in paragraph 6(1) and reads:

*“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.”*

The term “processing” has a wide meaning (DPA section 1(1)) and includes disclosure.

23. A broad concept of protecting, from unfair or unjustified disclosure, the individuals whose personal data has been requested is a thread that runs through the data protection principles, including the determination of what is “necessary” for the purpose of identifying a legitimate interest. In order to qualify as being “necessary” there must be a pressing social need for it - *Corporate Officer of the House of Commons v Information Commissioner and others* [2008] EWHC 1084 (Admin).

24. In determining whether or not disclosure of the names would be contrary to the data protection principles we have to consider:

- i. whether disclosure at the time of the information request would have been necessary for a relevant legitimate purpose; without resulting in
- ii. an unwarranted interference with the rights and freedoms or legitimate interests of the Claimant.

And if our conclusion on those points would lead to a direction that the information should be disclosed we have also to consider:

- iii. whether disclosure would nevertheless have been unfair or unlawful for any other reason.

25. In respect to the issue of fair and lawful processing under (iii) above we have to bear in mind guidance provided in paragraph 1(1) of Part II of Schedule 1 to the DPA, which provides:

*“In determining for the purposes of the [first data protection principle] whether personal data are processed fairly, regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed.”*

26. The Information Commissioner decided that the section 40(2) exemption applied to the requested information but reached that conclusion by a slightly different route than that set out in paragraph 25 above. He concluded, first, that the settlement with the Claimant

was intended by both parties to be confidential and that there was a public interest in parties to litigation being able to resolve their differences in private. The Claimant, he said, therefore had a reasonable expectation of confidentiality and would suffer a degree of distress if that were to be breached, particularly in view of the stressful nature of the circumstances that gave rise to the claim. The Information Commissioner considered that there was a public interest in the amount paid by a public authority in compensation for wrongdoing, but that this had been satisfied by the public judgment on liability combined with the disclosure that the College had paid out £30,000, the amount of its excess. He did not believe that there was a further public interest in the privately negotiated terms of the settlement being disclosed and concluded that the Claimant's right to privacy should prevail.

27. We consider that the Information Commissioner's balancing exercise took into account the factors appropriate when considering the legitimate interest in disclosure and the Claimant's risk of suffering an unwarranted interference in his privacy rights if disclosure was made. Accordingly, although he adopted a slightly different route to his decision, we are satisfied that he reached the right conclusion and that disclosure would breach the data protection principles. The information requested in this part of the Request was therefore exempt under FOIA section 40(2).

#### *Costs incurred by the College*

28. The Information Commissioner decided that, as the sum ultimately paid to the Claimant had been negotiated by the insurers' solicitors without further reference to the College, there was no information on the matter held by the College itself beyond the amount of the excess it was required to pay. That information had already been disclosed to the Appellant in response to the Request.
29. Once again, the Information Commissioner changed his position when he came to submit his Response to this Appeal. Having reconsidered the scope of this part of the Request he found himself prepared to accept that the use of the word "incurred" referred to the amount of costs and disbursements which were agreed to be paid to the Claimant, even though the effect of the College's insurance policy was that it was the insurers, and not the College, which actually paid the money. The fact that the insurers, having agreed to indemnify the College for any costs it was ordered or agreed to pay, in fact negotiated directly with the Claimant's representatives and paid the sum ultimately agreed, did not mean that the liability had not been "incurred" by the College. Accordingly, he conceded, it was an error to have concluded that it was only information about the College's policy excess that fell within the scope of this part of the Request. The Request should



be interpreted as referring to any information the College held about the costs figure ultimately paid to the Claimant.

30. The Information Commissioner did not invite us, in light of his altered position, to issue a substituted Decision Notice on the point. However, his original decision was that the College did hold some relevant information but that it had been disclosed. His revised position is that there was no relevant information held at all. It seems to us that, if we are able to accept that this is factually correct (as to which see below) we should record the corrected position in the substituted decision notice.

31. The Information Commissioner went on in his Response to acknowledge that the error in the Decision Notice made it necessary to consider if the College held any information at the relevant time about the total costs figure. The Response dealt with the point in the following terms:

*“38 However, the Commissioner, having carried out further investigations with the College, understands that the College’s solicitors did not advise the College of the total costs incurred. The College advised the Commissioner that no final or other invoice was received by the College from its solicitors other than in connection with the sums paid by the College under the insurance excess.*

*39 Although the situation may be unusual, the Commissioner has no reason to doubt what the College has told the Commissioner. In the circumstance, the Commissioner accepts that the College did not hold any further recorded information falling within the scope of [this part of the Request].”*

32. The Response also noted that the College had stated to the Information Commissioner that it had no information as to whether the costs figure had been agreed before the date of the Request (in which event it would have been held by the College at the relevant date) or at a later date (in which event it would not).

33. The College dealt with the costs part of the Request in the following terms:

*“The Second Respondent confirms the Solicitors instructed on its behalf in the [Claimant’s claim] dealt with the question of costs directly with the insurer. The Second Respondent has no knowledge of the costs, when they were agreed or paid, other than in respect of the insurance policy excess.”*

34. We were, again, sufficiently troubled at the limited information provided to us in support of the altered position adopted by the Information Commissioner and the College that we directed that the written communications between the two parties recording the

Information Commissioner's "further investigations" should be made available to us before we concluded our determination. Having now considered that information we are satisfied that the College did not receive any information about the figure for costs ultimately negotiated and paid, so that the Information Commissioner was right to conclude in his Decision Notice that no information falling within this part of the Request was held by the College at the relevant time.

### Conclusion

35. In light of the above we consider that it is not necessary or appropriate to direct the College to take any further steps in respect of the Request because, to the extent that it held any of the requested information that information is exempt from disclosure. However, because the Decision Notice contained two errors in respect of the Information Commissioner's decision as to what information was held by the College, we will issue a substituted Decision Notice in order to rectify the position.

36. Our decision is unanimous.

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**Chris Ryan**  
Judge  
17th January 2013

Promulgated: 20th January 2014