



**IN THE FIRST-TIER TRIBUNAL**  
**GENERAL REGULATORY CHAMBER**  
**(INFORMATION RIGHTS)**

**Appeal No: EA/2017/0102**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50652431**

**Dated: 2 May 2017**

**Appellant: Peter Simmonett**

**Respondent: The Information Commissioner**

**Heard on the papers**

**Date of Hearing: 5 September and 5 October 2017**

**Before**

**Chris Hughes**

**Judge**

**And**

**Jean Nelson & Paul Taylor**

**Tribunal Members**

**Date of Decision: 6 October 2017**

**Subject matter:**

**Section 40 Freedom of Information Act 2000**

**IN THE FIRST-TIER TRIBUNAL**  
**GENERAL REGULATORY CHAMBER**  
**(INFORMATION RIGHTS)**

**Appeal No: EA/2017/0102**

**SUBSTITUTED DECISION NOTICE**

**Dated: 5 October 2017**

**Public authority:**                **Melbourn Parish Council**

Address of Public authority: Melbourn Community Hub, 30 High Street, Melbourn,  
Cambridgeshire SG8 6DZ

**Name of Complainant:**        **Peter Simmonett**

**The Substituted Decision**

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 2 May 2017.

**Action Required**

Melbourn Parish Council must disclose the undated report of the grievance hearing against Councillor Tulloch within 35 days of today's date with the redactions identified in the conclusion of this decision.

Dated this 6th day of October 2017

Judge Hughes

[Signed on original]

## **REASONS FOR DECISION**

### **Introduction**

1. Melbourn Parish council (“the Council”) is a parish council in Cambridgeshire. It is a member of the Cambridgeshire and Peterborough Association of Local Councils (CAPALC) which is a membership organisation for town councils covering legal, financial, HR issues supporting 240 councils in Cambridgeshire (minutes of Council meeting of 27 June 2016 bundle page 75). A number of complaints were made against the Chairman of the Council and the Council approached CAPALC for assistance in resolving the issues. An independent panel of 3 experienced councillors from other councils in the area was convened to consider the nine grievances. They were supported by a HR advisor appointed by CAPALC whose role was to guide the panel on procedural issues, to act as secretary and to draft the report. The panel heard evidence from 10am to 5pm on Friday 22 April 2016.

2. The report was presented to the Council. It held an Extraordinary Meeting on 16 May. At the subsequent Council meeting on 27 June 2016 the Clerk reported (minutes at bundle page 71 minute PC45/16):-

*“The Clerk reported following the advice of CAPALC the Agenda item on 16<sup>th</sup> May 2016 was to receive the report. The Parish Council chose to reject the report therefore this was procedurally incorrect. The Parish Council accepted a motion that was not on a published agenda; therefore it is on the agenda this evening to debate the report.”*

3. The minutes go on to indicate that three councillors had resigned since the 16 May meeting. Ian Dewar, the CEO of CAPALC, was present and expressed concern at how the Council had handled the report, he confirmed that the report was confidential. The Council subsequently went into a private session;- *“Councillor Tulloch stated that Members will now go into camera and debate the report at which point Members will decide if the document should become public or not”*. The meeting finished some 24 minutes later with the final recorded comment being *“A question was raised about the Code of Conduct and that trying to bury any complaint against the Council or any of its members goes against it.”*

4. On 18 July Ian Dewar wrote to the Parish Clerk expressing his concern about:- *“how the council has been dealing or failing to deal with the report on the complaint that was raised which was essentially about the treatment of council staff”*. He went on to note that in debating the report there had been a number of failures to comply with the councillors duties under s34 of the Localism Act 2011. He listed a number of instances of the failure including:- *“failed to leave the chair when the council debated a report about them in closed session”* and concluded:- *“It seems that some councillors may have chosen to disregard the guidance and rules in respect of disclosable interests in an attempt to protect their own position and the behaviour in question seems to have gone well beyond what is expected of someone in public office as a parish or town councillor. In summary on the face of what has been witnessed in meetings and what has been recorded in minutes of meetings there seems to be sufficient evidence to conclude there has been a number of failures in respect of the 2011 Act.*
5. On 20 July Mr Simmonett wrote to the Council asking for the report:-  
*“I would be grateful if you could please send me a copy of the grievance document as discussed at the full council meeting on the 27<sup>th</sup> June.”*
6. Approximately 150 members of the public attended the Council Meeting of 25 July (minutes bundle pages 79-92) the Chairman proposed that the communication from Mr Dewar should be considered in a separate meeting, however Mr Dewar was invited to speak. A resolution was passed that *“...the Minutes from 27<sup>th</sup> June 2016 which had been edited by the Chairman be rejected and the clerks minutes from 27<sup>th</sup> June be presented for approval...”*. Mr Dewar presented his letter to the Clerk and in dealing with the grievance report was recorded as saying that under FOIA as the Council have now dealt with the report and no further action will be taken the Grievance Report can now be submitted to the Clerk for Publication although names of the public would need to be redacted. Later in the meeting, the chair of the grievance panel made a similar comment.
7. On 27 July a firm of solicitors wrote to the Council in these terms:-  
*“We have been consulted by a party who is named in this report. This person intends to take legal action concerning the allegations and sensitive information in the report. We understand that a Freedom of Information request may be made, or has recently*

*been made, for production of this report. Clearly, with legal action pending it would be inappropriate and potentially unlawful to disclose the report in its entirety or at all pending the outcome of any legal proceedings...”*

8. On 4 August the Council responded to Mr Simmonett stating that it could not provide the information on the basis that it had received a letter from solicitors, warning the council not to disclose the information. On the same day the Council wrote to the solicitors, noting that they had not identified their client and indicating an intention to comply with the FOIA request by providing a redacted report removing the names of members of the public and Council employees. On 23 August the Council again wrote to the solicitors and received a reply confirming:-

*“We are instructed by one or more former Parish Councillors concerning issues arising out of the report. Our clients do not agree that the report should be produced in the redacted form you refer or at all. It would assist you to be aware that our clients still intend to take separate proceedings for libellous comments given during the events leading up to and after the production of the report.”*

9. Mr Simmonett again wrote to the Council on 7 September and on 16 October the Council confirmed that it was not disclosing due to fear of litigation. Mr Simmonett complained to the ICO who conducted an investigation. During the course of the investigation the solicitors wrote to the ICO confirming that they were representing clients who had resigned from the Council subsequent to the 27 July meeting. The letter included a schedule of points of disagreement between their clients and the report and criticisms of the report. It raised the argument that the report should be exempted under s30 FOIA (which relates to certain forms of investigations conducted by public authorities). It argued that, in the event that the report be published, references to one of their clients who was not the focus of the report should be removed. It is of concern to the tribunal that this letter, while referred to in the decision notice, was not included in any bundle whether open or closed and required a direction from the tribunal in order for it to be available to the tribunal.
10. In her decision notice the ICO concluded that the exemption in s40(2) fell to be considered. The report contained personal data *“the information is the personal data of a number of third parties. Primarily however it relates to two individuals, the initiator of the grievance and the individual which the grievance relates to.”*

11. She set out her view that where information relates to an internal investigation there is a strong expectation of privacy: - *“Even among senior members of staff there would still be a high expectation of privacy between an employee and his employer in respect of disciplinary matters”*, in her view neither of the two parties she had identified would have expected the information to be more widely disclosed and may be distressed at wider disclosure. *“Disclosure of the information would be likely to be prejudicial to the reputations of at least some individuals, either the instigator of the grievance or those who the grievance was against.*
12. She recognised that there was a legitimate interest *“in allowing the public to know how an investigation into the actions of a member or members of the council has been investigated and the outcome of that investigation”*. She recognised that there was a public interest in the Council and its running and that disclosure of the withheld information would shed light on this, but weighing this against her view of the legitimate interests of the data subjects she concluded that it would be unfair to disclose.
13. In his appeal Mr Simmonett gave some details of the allegations of bullying and abusive behaviour at the heart of the report, gave details of the alleged misconduct and the concerns expressed by CAPALC concerning the governance of the Council. He drew attention to a Government statement during the preparation of the legislation that became FOIA which emphasised the importance of the provision of information to the public to promote accountability and good decision-making.
14. In responding to the appeal the ICO maintained the position set out in her decision notice. She argued that although the fact of the report’s existence was known at the time of the request the contents were not. She noted that in October 2016 (some four months after the request) the contents of the recommendations had been put in the public domain by the Council.
15. She maintained the position that disclosure would be unfair since it would not have been within the expectation of the parties at the time the information was provided and *“loss of privacy that would result from disclosure would cause unwarranted distress to some of the parties”*. In the event that she did not succeed on fairness she also set out the test for consideration of the application of paragraph 6(1) of Schedule 2 to DPA which provides that processing is permissible where:-

*“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”.* She argued that *“whilst it might well be the case that those councillors who are closest to the issues raised in the report would be aware of the identity of the councillors and those who had made complaints, it is not clear (and no evidence – i.e. published minutes or other information in the public domain – has been put forward to support this) that this would be more widely known to the public as a whole which would suggest that disclosure to the wider public as a whole would be fair in response to his FOIA request.”*

### Consideration

16. The tribunal has had difficulty accepting the approach of the ICO which is of an over-generalised nature and shows a failure to grapple with the underlying issues in this case.

17. The ICO has misrepresented the position of the Council which is to follow the normally pragmatic approach of the ICO and redact the names from the document of individuals who were not at the time of the grievance hearing councillors. The reason the Council has not released the document in such form is that it received two short letters from solicitors threatening defamation proceedings on behalf of unnamed clients. The formal position was explained to the ICO in a letter of 23 March 2017 and repeated on 4 May 2017 (after the publication of the decision notice) rebutting the ICO’s description of its stance in the decision notice:-

*“To the contrary, we make it clear that the Council considers that the report could be published with the names of the public and council employees redacted”.*

18. A consideration of the disputed information shows that the following categories of names are within the report –

- the three CAPALC councillors who form the panel together with that of their HR adviser.
- The names of two councillors who gave evidence, one of whom is the subject of the complaints,

- three other witnesses; of these the original complainant indicated in an email of 21 September that she was content for her name to appear, the second is the Town Clerk and the Principal Officer of the Council and a third witness.
- the names of individuals who had submitted written material or who were referred to, some of whom were and some of whom were not councillors.

19. The approach of the Council is that with redaction of most of the names the material could be released.

20. The decision notice relies on an argument with respect to employees who are subject to disciplinary proceedings and who have an expectation that such matters will remain confidential. This is a misleading and inappropriate analogy. The report concerns the actions of a holder of a public office acting in his capacity as a public office holder. The reasonable expectations of that individual are therefore entirely different. Those reasonable expectations must be shaped by the Principles of Public Life (the Nolan Principles) –

- Selflessness – acting solely in the public interest
- Integrity – not take decisions to further their own interests
- Objectivity - take decisions impartially, fairly and on merit
- Accountability - Holders of public office are accountable to the public for their decisions and actions and must submit themselves to the scrutiny necessary to ensure this
- Openness - Holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing
- Honesty - Holders of public office should be truthful
- Leadership - Holders of public office should exhibit these principles in their own behaviour. They should actively promote and robustly support the principles and be willing to challenge poor behaviour wherever it occurs

21. Expectations as to privacy of holders of public office are radically tempered by the clear obligations of office, for this reason alone the decision of the ICO is fundamentally flawed.



22. The other person most closely involved made clear her position in an email to Mr Simmonett on 21 September 2017 (in response to the Tribunal's directions) in which she stated that she was "*always aware that this document could become public*" and she saw its publication as "*setting the record straight*". Since the report is into complaints she made about the Chair of the Council which had employed her, it is hardly surprising that she would be prepared to accept that her name should potentially enter the public domain.
23. The ICO's position in respect of fairness is untenable and, in relation to condition 1 of Schedule 2, with regard to the original complainant, simply incorrect.
24. The ICO in her analysis set out the test for condition 6(1) of Schedule 2. The tribunal will address each in turn:-
- Is the third party or parties to whom the data is to be disclosed (in this case the world at large under FOIA) pursuing a legitimate interest or interests?
  - Is the disclosure necessary for the purposes of those interests?
  - Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?
25. It is hard to see a more clear cut case of a FOIA request pursuing a legitimate interest. The Chair of a Council has, using his role as chair, controlled the receipt of a report critical of him and caused it to be rejected in a private session of the Council. This was misconduct of a councillor of considerable gravity. Mr Simmonett was properly seeking to ensure the proper conduct of the business of the Council.
26. Is the disclosure necessary for the purposes of those interests? At the time the request was made the report had been taken to two Council meetings and, according to the evidence in the bundle, on neither occasion had it been properly considered. On both occasions the Chairman of the Council had most improperly remained in the chair of the meeting to influence the proceedings in his own interests. Mr Simmonett could have no assurance that other routes would be taken to address the improprieties given the level of control which the Chairman had over the Council. There is no indication from the ICO of what other means could reasonably have been pursued by Mr Simmonett or assurance that he could have that the position would be resolved. On the contrary it is clear that the receipt of the FOIA request had some impact on driving

the matter forward to the conclusion of the resignation of the Chairman. It was reasonably necessary to release the information. It was proportionate so to do.

27. With regard to the third question, the facts speak for themselves. The Chairman of the Council received the scrupulously fair and impartial report of a well-conducted panel of experienced councillors which made adverse findings with respect to his conduct and sought to suppress it in breach of his fundamental obligations as a holder of public office. It is hard to see any right to confidentiality with respect to such misconduct, there is no legitimate interest of the Chairman of the Council to protect.
28. We would also add that it is clear from a description of the Council meeting held on 25<sup>th</sup> July 2016, (based on an audio recording of the meeting, the transcript of which has been posted on-line at [www.askyourcouncil.uk/council-meeting-monday-25th-july](http://www.askyourcouncil.uk/council-meeting-monday-25th-july) and has been included in the bundle), that the grievance report has been discussed in public, including that this relates to the Chairman. Whilst the date of this meeting and the date the article was posted online (28<sup>th</sup> July 2016) are after the date of the request (20<sup>th</sup> July 2016), both were before the date of the Council's response to the request on the 4<sup>th</sup> August 2016. Consequently it is appropriate to take this evidence into account.
29. The ICO in mechanically applying the provisions of the DPA without proper scrutiny of the underlying factual issues came to an erroneous conclusion.

#### Conclusion and remedy

30. For the reasons stated this appeal is allowed and this decision notice substituted for the ICO's decision.
31. The Council is to disclose the report with the redaction of all the names within the report or such other information which would be reasonably likely to identify those data subjects which are not the names of Councillors (whether of this Council or the names of the Councillors on the panel), the name of the complainant and the name of the Town Clerk .
32. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 6 October 2017

Date Promulgated: 9 October 2017