

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. GIA/4597/2014

Before: Upper Tribunal Judge K Markus QC

Representation:

For the Appellant: Ms Anya Proops (counsel, instructed by Wiggin LLP)

For the First Respondent: Mr Robin Hopkins (counsel, instructed by Mr Richard Bailey, solicitor for the Information Commissioner)

For the Second Respondent: Mr Christopher Knight (counsel, instructed by Ms Victoria Bracegirdle, solicitor for Bolton Council)

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

The decision of the Upper Tribunal **is to allow the appeal.**

The decision of the First-tier Tribunal made on 3 July 2014 under number EA/2014/0029 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remake the decision.

The decision which I make is that the name of the councillor who is referred to as “Case 5” in the Annex to the Second Respondent’s response to the request for information is not exempt from disclosure under section 40(2) Freedom of Information Act 2000. The Second Respondent must provide that information to the Appellant within 35 days after the date on which this decision is sent to the parties.

OPEN REASONS FOR DECISION

Background to the appeal

1. The Appellant is a journalist who works for the Bolton News. He submitted a request under the Freedom of Information Act 2000 (“FOIA”) to Bolton Council (“the Council”) for disclosure of information about councillors who had received reminders for non-payment of council tax since May 2011. The Council told him that there were six such councillors and informed him which political party they were members of, how much had been owed, how much was outstanding, and that two had been summoned to court. On 16 November 2012 the Appellant asked for the names of the individual councillors. The Council refused on the

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ground that the names were exempt from disclosure under section 40(2) FOIA. On complaint by the Appellant, that decision was upheld by the Information Commissioner (“the Commissioner”).

2. The Appellant appealed to the First-tier Tribunal, in relation to the two councillors who had been summoned to court. The First-tier Tribunal dismissed the appeal. Subsequently one councillor voluntarily identified himself, so that there is now only an issue regarding one councillor.
3. The First-tier Tribunal gave the Appellant permission to appeal to the Upper Tribunal. I directed that there be an oral hearing of the appeal. This took place over two separate half days. At the first hearing I considered and refused the Appellant’s application to be informed of the gist of the closed material which had been before the First-tier Tribunal and was before me. At the second hearing, I heard submissions as to the substantive issues in the appeal.
4. There has been some delay in my determination of the appeal arising from the fact that, when I was considering my decision, a factual query arose. I anticipated that a reply to my query from the Respondents would involve provision of further closed material and so the process for my raising the query and determining what could then be disclosed to the Appellant was unfortunately but necessarily protracted.

Legal Framework

5. Section 1(1) of FOIA confers the basis right to information:
 - (1) Any person making a request for information to a public authority is entitled—
 - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.
6. Section 2 qualifies the general right in relation to certain classes of information:
 - (2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—
 - (a) the information is exempt information by virtue of a provision conferring absolute exemption, ...
 - (3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—
 - ...
 - (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,”
7. The relevant provisions of section 40 are:
 - “(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—

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(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

(i) any of the data protection principles

...

(7) In this section—

“*the data protection principles*” means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

“*data subject*” has the same meaning as in section 1(1) of that Act;

“*personal data*” has the same meaning as in section 1(1) of that Act.”

8. Personal data is defined as follows in section 1(1) of the Data Protection Act 1998 (“DPA”):

“‘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,...

9. It is common ground that the name of an individual is his or her personal data.

10. Schedule 1 to DPA sets out the data protection principles. This appeal concerns the first data protection principle (“DPP1”) which is:

“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, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”

11. The conditions in Schedule 2 include:

“1. The data subject has given his consent to the processing.

...

6(1) 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.”

12. The effect of these provisions is that information which is the personal data of someone other than the requestor may not be disclosed unless disclosure is fair, lawful and one of the conditions in Schedule 2 of the DPA is met.

13. In the case of sensitive personal data, a condition in Schedule 3 must also be met.

The Information Commissioner’s decision

14. The Council had provided the Commissioner with details of personal mitigating circumstances which were said to explain how late payment had occurred in

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relation to each councillor. The Commissioner decided that, in general, it was reasonable for councillors to expect that recent failure to pay council tax in a private capacity was likely to impact on their public role and so they should reasonably expect that they may be identified. However, in the light of the mitigating circumstances, the Commissioner decided that the councillors should not be identified. His reasons were as follows:

“37. However, the Commissioner appreciates that each case needs to be considered on its own merits. In particular, he acknowledges that there may well be mitigating circumstances which explain why certain councillors have not paid their council tax on time and thus have received reminders and/or court summons in relation to non-payment. Moreover, the Commissioner accepts that such mitigating circumstances could significantly impact on whether disclosure of a councillor’s name would be fair. This is because the nature of the circumstances in a particular case may legitimately increase a councillor’s expectation that they would not be publically [sic] named. For example, the late or non-payment of council tax was due to factors outside of their control.

38. As noted above, the Council has provided the Commissioner with submissions which explain why, for each of the five councillors, the late payment occurred. The Commissioner has considered these submissions carefully and has concluded that for all five councillors the nature of their personal circumstances which resulted in late payment would significantly, and moreover legitimately, raise their expectation that they would not be publically named. This is to the extent that in the Commissioner’s view disclosure of the names of the five councillors would be so contrary to their legitimate expectations that disclosure would clearly be unfair.”

The First-tier Tribunal’s decision

15. With the consent of the parties the First-tier Tribunal determined the appeal on consideration of the papers, without a hearing. The tribunal had been provided with copies of the mitigating circumstances in relation to the two councillors whose identity was in issue. The tribunal’s reasons were relatively brief. Having summarised the facts and the positions of the parties, the tribunal explained its decision as follows:

“19. The Tribunal has seen and considered – as closed and confidential information – the personal mitigating circumstances in the instant cases. When this process is used, it is used with rigour in respect of the public interest in disclosing matters where possible.

20. The Tribunal has no doubt that those personal circumstances placed the individuals in a position where they could “significantly and legitimately” have expected not to be named.

21. To give any further detail in respect of these requests will in fact identify the individuals in question and would be counter-productive.

22. Bolton Council, in its response in this appeal, dealt with the issue of the information being – for a time – in the public domain. It did not publish information about council tax arrears or information about members of the public to whom a reminder had been sent nor details about whom it had issued court process against for non-payment of council tax.

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23. The Tribunal accepts that the councillors had not consented to this information being disclosed.

24. It has concluded, considering carefully the issues of balance and proportionality that properly arise out of the private life issues in this appeal – which are clearly engaged – and the Article 10 issues of freedom of speech in terms of local newspapers' duties to inform the public (which are equally clearly engaged), that releasing the information could potentially cause unnecessary and unjustified damage and distress to the individuals.

25. There was a specific "fair processing" notice attached to the Council's information with a commitment to abide by the Data Protection Act 1998 principles. Releasing this information would breach the first data protection principle.

26. It accepted that the information became temporarily in the public domain when cases were brought to the Magistrates' Court for consideration. Information would only normally be published about non-payment of council tax if a journalist attended the Magistrates' Court and listened to and then reported on the cases being heard.

27. The Council used to publish information about people who had failed to pay their Poll Tax but stopped doing that because of the impact on the individuals. The Council had not been assisted in the council tax collection process by publication of names. In any event it believed – correctly, in the Tribunal's view - that such publication would be contrary to the Article 8 ECHR private life rights of the individuals.

28. The Tribunal notes that the Bolton News had clearly tried to obtain the information from the court but could not because that is the effect of the absolute exemption of s.32 FOIA in terms of court records.

29. It is not as if the newspaper cannot ever obtain such information. But, to do so, it must be physically present in court during the council tax "lists" at the Magistrates' Court. That attendance, on behalf of the public, provides a platform for legitimate and legally privileged publication of the information."

16. There were no closed reasons.

17. The First-tier Tribunal gave the Appellant permission to appeal.

18. In these reasons, I use masculine pronouns to refer to the councillor in question. This is merely by way of convenient shorthand, it is the mode that was used during the hearing, and is not an indication of the actual gender of the councillor.

Closed material

19. In their written responses to the appeal the Council and the Information Commissioner said that they would liaise to attempt to provide a gist of the closed material (the mitigating circumstances) if possible. However, the Respondents decided that they were unable to disclose even a gist without revealing information which would allow the data subject to be identified.

20. This was the issue which I addressed at the first oral hearing. I decided that a gist should not be disclosed. This is more fully explained in the closed reasons. I am limited as to what I am able to say in the open reasons.

21. The approach to use of closed material was explained by the Court of Appeal in Browning v Information Commissioner [2014] 1 WLR 3848 at [29] and [33] - [35].

In particular information should not be withheld from a party unless it is strictly necessary to do so in order to achieve justice and as much as possible should be disclosed.

22. Save for stating what is already known (that the material relates to the personal circumstances of the individual and is advanced in explanation for the default in paying council tax), it is not possible to provide a gist of the mitigating circumstances without materially increasing the risk of the councillor being identified. Even if an ordinary member of the public could not identify the councillor from the gist, there is a real risk that any person who knows something about his personal circumstances would be able to work out his identity. That would defeat the purpose of the appeal. I also take into account that, if the Appellant succeeds in this appeal, he will be provided with the councillor's name but not the mitigating circumstances. It will be a matter for the councillor whether to disclose any of the mitigating circumstances.
23. While I recognised that the Appellant would be disadvantaged in the conduct of the appeal in not knowing the gist of the mitigating circumstances, I concluded that it would not present a significant obstacle to his ability to advance his case. Much of his grounds of appeal rest on issues of principle or on the approach of the First-tier Tribunal which could be articulated without knowing the substance of the mitigating circumstances. In the event, this has turned out to be the case.
24. In separate closed reasons I give further explanation for this decision by reference to the content of the mitigating circumstances.
25. Neither of the Respondents thought it necessary for there to be a closed hearing in which they could address me on the mitigating circumstances in relation to the substantive merits of the appeal. In the closed reasons I explain my decision on the appeal in relation to the mitigating circumstances.

The parties' submissions on the appeal

26. In summary Ms Proops, for Mr Haslam, submits that the First-tier Tribunal wrongly elevated the councillor's rights to data privacy over the important interests for which Mr Haslam contended in seeking to inform the public about the councillor's default. She submits that this is not merely an attack on the assessment of the relative weight of competing factors but that the tribunal failed to address the substantive issues relevant to the interests in disclosure and failed to give adequate reasons. She also says that the tribunal acknowledged that article 10 ECHR was engaged on the facts of this case but it failed correctly to identify the nature of the article 10 rights and so failed to place them in the balance when considering fairness. In support of her submissions as to the approach to the interests favouring disclosure, Ms Proops relied by analogy on the provisions relating to sensitive personal data but I have not found that submission to be relevant and, in the light of my conclusions on the appeal, need say no more about it.
27. Mr Hopkins for the Information Commissioner says that the tribunal correctly identified the relevant factors, that the assessment of those factors was a matter for the tribunal and that it gave adequate reasons. He accepts that there are legitimate interests in the information being disclosed and in the journalistic reporting of matters to further public debate, although he does not agree that

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Article 10 is engaged. Whether those interests outweigh the interests of the councillor in the light of the mitigating circumstances was a matter for the tribunal.

28. On behalf of the Council, Mr Knight agrees with the Commissioner. In addition he points out that non-disclosure of the name of the councillor does not prevent the Appellant from publishing a story about defaulting councillors. He says that the relevance of Article 10 not being engaged is that the issue is to be assessed by reference to the Appellant's legitimate interests as a journalist but without reference to the normative weight that attaches to Convention rights. There is a significant private element to the councillor's position and the Appellant has overstated the public element.

Discussion

Legal principles

29. There is no presumption of disclosure in the public interest. In Common Services Agency v Scottish Information Commissioner (HL (Sc)) [2008] 1 WLR 1550, Lord Hope said at [7]:

“In my opinion there is no presumption in favour of the release of personal data under the general obligation that FOISA lays down. The references which that Act makes to provisions of DPA 1998 must be understood in the light of the legislative purpose of that Act, which was to implement Council Directive 95/46/EC. The guiding principle is the protection of the fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data...”

30. At [63] to [68] Lord Rodger said that, in enacting the freedom of information legislation of 2002, the Scottish Parliament did not intend to dilute the high degree of protection afforded by the DPA to individuals, while giving third parties an effective right to obtain information from public authorities. He concluded at [68]

“There is ... nor reason why courts should favour the right to freedom of information over the rights of data subjects.”

31. However, the interests of the data user must also be considered and, where relevant, the interests of the wider public. The approach has been helpfully explained by the Information Tribunal in Corporate Officer for the House of Commons v Information Commissioner and Norman Baker [2011] 1 Info LR 935 as follows:

“If A makes a request under FOIA for personal data about B, and the disclosure of that personal data would breach any of the data protection principles, then the information is exempt from disclosure under the Act ... This is an absolute exemption ... Hence the Tribunal is not required to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure under section 2(2). However.... the application of the data protection principles does involve striking a balance between competing interest, similar to (though not identical with) the balancing exercise that must be carried out in applying the public interest test where a qualified exemption is being considered.”

32. It follows that the task of the First-tier Tribunal was to undertake a balancing exercise, involving the interests of the data subject (the councillors), the data controller (the Council) and third parties. There was some dispute in this case as to whether it is permissible to take into account the specific interests of the Appellant or the interests of the public more generally. In the present case this is

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a difference without any real significance. The Appellant relies on his interest as a journalist seeking to report on matters of public interest. He submits that his ability to report the name of the councillor pursues the public interest in transparency and accountability of the democratic process.

33. As to the factors which are relevant in determining fairness, the Information Commissioner has given guidance which, although not legally binding, helpfully summarises the proper approach. Paragraph 44 of the guidance states that relevant considerations include:

- “ - the possible consequences of disclosure on the individual;
- the reasonable expectations of the individual, taking into account: their expectations both at the time the information was collected and at the time of the request; the nature of the information itself; the circumstances in which the information was obtained; whether the information has been or remains in the public domain; and the FOIA principles of transparency and accountability; and
- any legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the individuals who are the data subjects.”

34. Counsel for both Respondents have reminded me of the importance of the Upper Tribunal exercising restraint when faced with a challenge to a decision of the First-tier Tribunal and in particular when the reasons which it gives are being examined. As Lord Hope said in Jones v First-tier Tribunal & CICA [2013] UKSC 19 at [25], “The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it.”. Applying Jones in UCAS v Information Commissioner and Lord Lucas [2014] UKUT 557 (AAC) Upper Tribunal Judge Wikeley said at [59]: “The question is rather whether the Tribunal has done enough to show that it has applied the correct legal test and in broad terms explained its decision...”.

My analysis and conclusions

35. There is no dispute that the information (the name of the councillor) is personal data. Nor is there any issue as to lawfulness of disclosure.
36. The key issues relevant to fairness which arose in this case were the reasonable expectations of the councillors, the consequences for them of disclosure of their names and the balance of those expectations and consequences against the interests in disclosure. I have concluded that the way in which the tribunal addressed these important issues was fundamentally flawed. In summary there is no indication that the tribunal had regard to a number of specific relevant factors, and it has failed adequately to explain how it reached its conclusions in the light of those factors.
37. The tribunal’s reasons as to the reasonable expectations of the councillors are at paragraph 20 which I have set out above. These reasons are wholly inadequate. They are barely more than a statement of a conclusion. I accept that the Tribunal was severely constrained as to what it could say about its approach to the personal mitigating circumstances, given the confidential nature of that information. However this does not explain or excuse the silence as to any other factors relevant to reasonable expectation, such as those in paragraph 44 of the Commissioner’s guidance.

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38. In the present case Mr Haslam had made written submissions to the effect that councillors cannot expect to remain anonymous in relation to non-payment of council tax because of the public role of councillors, the strong link between non-payment and performance of their obligations as councillors, and in the interests of public accountability and transparency. Although the Commissioner stood by his decision, he also recognised the countervailing considerations arising from the significant public element to the role of councillors. The tribunal summarised some of Mr Haslam's and the Commissioner's submissions as to those factors, but they are nowhere to be found in the tribunal's assessment.
39. There was much debate before me as to the extent to which non-payment of council tax by a councillor was a public or a private matter. The position of the Council was in essence that a councillor's failure to pay the council tax was largely a private matter and so the tribunal's silence as to the asserted public nature of the issue was not as significant as contended by Mr Haslam. I accept that there is a private element to non-payment of council tax, even in the case of a councillor. It is a matter of a private debt in respect of which the individual incurs a private liability. It arises out of a person's occupation of a private property. The liability may arise jointly with other persons with whom the individual forms a household. Persistent non-payment will lead to the individual being summonsed, in a personal capacity, and possibly being subject to a liability order.
40. But, in the case of a councillor, it is not only a private matter. A councillor is a public official with public responsibilities to which non-payment of council tax is directly and significantly relevant. A number of specific features of this were advanced in submissions to the First-tier Tribunal. In particular, section 106 of the Local Government Finance Act 1992 bars a councillor from voting on the Council's budget if he or she has an outstanding council tax debt of over two months. If a councillor is present at any meeting at which relevant matters are discussed, he or she must disclose that section 106 applies and may not vote. Failure to comply is a criminal offence. Thus council tax default strikes at the heart of the performance of a councillor's functions. It is evident that setting the council's budget is one of the most important roles undertaken by councillors. The loss of one vote could make a fundamental difference to the outcome. This adds a significant public dimension to the non-payment of council tax. The very fact that Parliament has legislated in this way reflects the connection between non-payment and the councillor's public functions. Moreover, as the Commissioner observed in his decision notice, recent failure to pay council tax is likely to impact on public perceptions and confidence in a councillor as a public figure.
41. These factors are of critical relevance to expectation. As the Commissioner had observed, those who have taken public office should expect to be subject to a higher degree of scrutiny and that information which impinges on their public office might be disclosed. More specifically, unless the local electorate know the identity of a councillor to whom section 106 applies, they cannot discover that that councillor is failing to fulfil his functions. Nor can they know that the process of declarations under section 106 is being adhered to. In addition the electorate may wish to know whether they can trust a councillor properly to discharge his functions if he stands for office again.
42. Finally, in his submissions to the First-tier Tribunal the Appellant submitted that, even if there were powerful personal mitigating circumstances explaining non-

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payment by an individual, it did not necessarily follow that the individual could expect not to be named rather than to be provided with a fair opportunity to explain his circumstances.

43. The tribunal did not address any of these issues. It could not properly address the issue of reasonable expectation without doing so. In consequence it failed to take into account highly material considerations.
44. It is true that at paragraph 24 of its reasons, in addressing fairness, the tribunal referred to the interests of the public in being informed. But paragraph 24 is formulated in general terms. It does not indicate what weight the tribunal gave to the public interest in knowing the identity of a defaulting councillor, nor what factors it took into account in that respect. There is no indication that the tribunal gave any consideration to the above important factors. The conclusion that releasing the information would cause “unnecessary and unjustified” damage and distress presupposes an assessment of what is necessary or justified, and that must take into account the nature of and weight to be afforded to the competing interests in the information being disclosed, but there is no assessment of this.
45. I appreciate of course that, in explaining its conclusion as to reasonable expectation and as to the balance between the councillors’ and other relevant interests, there were severe constraints as to what the tribunal could say because the personal mitigating circumstances were a significant aspect of the assessment and they were confidential. However, this would not have prevented the tribunal addressing the above non-confidential factors. In addition the tribunal could have given closed reasons for how it addressed the personal mitigating circumstances. It did not do so and so I do not know whether or how the tribunal carried out its assessment of the competing relevant factors.
46. Mr Hopkins submits that, in the absence of closed reasons for the tribunal’s approach to the mitigating circumstances, the question that I have to ask is whether no reasonable tribunal could have concluded that the normal expectation of disclosure should be displaced by the mitigating circumstances. I disagree. There is no indication that the tribunal accepted the Commissioner’s position that the normal expectation by a councillor should be that he should be identified where he defaults, yet this was an important element of the analysis. Moreover, inadequate reasons or failure to have regard to relevant factors are errors of law and will usually lead to the decision being set aside unless I conclude that the errors could have made no difference. I certainly cannot reach that conclusion.
47. It is no answer to this that the tribunal took into account other factors (see paragraphs 23, 25 and 27). These matters are not wholly irrelevant but they do not address the matters of the nature of the public role of councillors nor the wider interest in disclosure, and they add little weight to the balance against disclosure. Absence of consent is of little relevance save that it means that Condition 1 in Schedule 2 could not be relied upon. The fair processing notice adds little if anything as it begs the question whether disclosure would breach the first Data Protection Principle which was the question that the tribunal had to decide. The approach to publication of the names of members of the public who defaulted on the Poll Tax is of limited relevance as it does not touch on the particular considerations arising from the position of councillors.
48. In the light of these errors, I conclude that the Tribunal’s decision must be set aside.

Whether to remit or remake the decision

49. At the outset of the second hearing, I asked the parties as to their positions in the event that I allowed the appeal. The Appellant and the Commissioner submitted I should remake the decision, but the Council said I should remit it. All parties made submissions as to how I should remake the decision, if that was the course which I decided to take.
50. I have decided that I should remake the decision. Remitting the appeal to another tribunal would involve further delay. I have had detailed submissions from the parties as to the substantive merits of the issues. I have all the evidence that I require to make the decision. There was no live evidence and the First-tier Tribunal considered the appeal on the papers last time. I am therefore in as good a position as a First-tier Tribunal to decide the appeal.

My decision

Fairness

51. I start by reminding myself that the guiding principle under the DPA is “the protection of the fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data” (CSA at [7]). An ordinary member of the public could reasonably expect not to be named in the event of non-payment of council tax and even if he is summoned (subject to any publicity that might arise as a result of being identified at a court hearing). For the reasons that I have set out above, in the case of an ordinary member of the public, the payment or non-payment of council tax is essentially a private matter.
52. Identifying a defaulting councillor would engage all the private issues that would apply to any other person and may, as a result of the councillor’s position, lead to a greater intrusion into his private life. It would identify him as a person who has defaulted in his council tax (in this case, in two consecutive years), in substantial sums of money. The fact that he has been summoned means he has failed to pay despite reminders from the Council. More so than an ordinary member of the public, a councillor may be subject to considerable pressure to explain his default and he may feel that revealing the information is the only way in which he is able to do so. In any event, it is possible that probing by the media or other members of the public will bring to light such matters or may lead to harmful speculation which the councillor can only end by explaining the true position. The circumstances touch on some personal matters disclosure of which may cause distress.
53. Despite the above, I conclude that it is not reasonable for a councillor to expect not to be identified where he is summoned for non-payment of council tax. I have already set out the powerful factors as to why a councillor’s default in paying council tax is a serious matter of public concern, both as to the ability of the councillor to perform his key functions and in terms of public confidence and accountability. As well as the impact of section 106, non-payment of council tax puts the councillor in conflict with the obligations of his office including to protect the council’s resources, to act in accordance with the law, and to act in accordance with the trust which the public has placed in him. In my judgment a

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councillor should expect to be scrutinised as to, and accountable for, his actions in so far as they are relevant to his public office.

54. I have explained the factors which show that there is a compelling legitimate interest in the public knowing whether a particular councillor has failed to pay the council tax, at least in circumstances where they have remained in default for over two months with the result that section 106 applies. In most cases this compelling interest will outweigh the councillor's personal privacy. The public interest in knowing the information is central to the proper functioning and transparency of the democratic process. The identification of a defaulting councillor involves an intrusion into his private life, as summarised above, but it is an intrusion that a councillor must be taken to have accepted when taking office.
55. So the question is whether the general position pertaining to councillors is displaced in this case by the councillor's personal mitigating circumstances. Those circumstances might be relevant to expectation, as the First-tier Tribunal thought. The question is whether, as Mr Hopkins put it, in the light of the mitigating circumstances, the councillor deserves the damage or distress that identifying him would cause. It may also be relevant to the balance to be struck between the councillor's interests in privacy and the competing interest in disclosure.
56. There may be exceptional cases in which the personal circumstances of a councillor are so compelling that a councillor should be protected from such exposure. But I do not consider that the personal circumstances of the councillor in this case are sufficiently strong to displace the significant interests in disclosure of his name. I take into account that the councillor may feel compelled to explain his default or that identification of him may lead to exposure of some of his personal circumstances. I accept that there may be some distress to him, and damage to his reputation or standing. I do not consider that the consequences are sufficiently adverse to mean that it would be unfair to disclose his name. Unlike the First-tier Tribunal, taking into account the reasons for disclosure, I do not consider that these consequences are "unnecessary" or "unjustified". I explain how I have addressed the personal mitigating circumstances in the closed reasons.
57. I should deal with two other submissions advanced by Mr Knight in support of the Council's case that the private rights of the individual should be protected. He relies on the decision of the Supreme Court in R (T) v Chief Constable of Manchester Police [2015] AC 49 and submits that the fact that the individual has committed a wrong does not prevent him relying on his article 8 rights. If a conviction can recede into the past and become private, as in that case, a civil wrong (particularly where there was no accompanying publicity at the time) can do so much more quickly. While this shows that the mere fact of wrongdoing does not negate a person's right to privacy, that is not the key issue here. The legitimate interest in the councillor being identified is because of the relevance to and the impact on his public office. In addition, the information in this case cannot be said to be historic in the sense in which the disputed information was in T. Mr Knight also points out that, although a summons is a court document, it will not necessarily lead to a hearing and that, in any event, just because something has at one time been in the public domain does not necessarily outweigh the individual's privacy rights (see the Information Commissioner's Guidance on Personal Information at pages 16 and 17). I also accept this, but the fact that the

name may have been in the public domain through the court process is not a factor that has influenced my decision.

Condition 6(1)

58. This is the only relevant condition under Schedule 2.
59. The proper approach to condition 6(1) was explained by Upper Tribunal Judge Wikeley in Goldsmith International Business School v The Information Commissioner and the Home Office [2014] UKUT 563 (AAC) at [35]-[42]
60. First I must consider whether the third party to whom the data is disclosed is pursuing a legitimate interest or interests. There was a discussion at the hearing as to whether the relevant interest is that of Mr Haslam in obtaining the information for journalistic purposes, or whether the relevant interests are broader than that. Mr Hopkins repeats the submissions which he advanced in GR-N v Information Commission and Nursing and Midwifery Council [2015] UKUT 449 (AAC) that, as disclosure under FOIA is to the whole world, requests are to be determined on a “motive blind” basis and so the interests of Mr Haslam are not relevant. In GR-N Judge Jacobs rejected that argument. I do not repeat Judge Jacobs’ reasoning here. I agree with the reasoning and his conclusion.
61. In any event, the issue is not as important in this case as it was in GR-N. Mr Haslam’s interest as a journalist is to publish the information to the wider public. His interest in informing the public elides with that of the public in knowing the identity of the journalist, and both are rooted in the interests of transparency, accountability and efficacy of the democratic process. There is no doubt that the interest is legitimate.
62. The next question is whether disclosure of the identity of the councillor is necessary to the legitimate interest in question. “Necessity” means “more than desirable but less than indispensable or absolute necessity”, and disclosure must be the “least restrictive” means of achieving the legitimate aim.
63. Mr Haslam could publish a story that an unidentified councillor has defaulted in payment of council tax and been summoned. But that would not achieve the transparency of the Council’s processes nor the accountability of the councillor to the public which Mr Haslam seeks and which I have decided is an important legitimate interest.
64. Mr Knight points out that there are other means by which accountability and transparency can be achieved. If the councillor made a declaration pursuant to section 106, that would have been minuted. If the defaulting councillor decided not to attend a meeting in order to avoid having to make a declaration, an interested member of the public such as a journalist could have asked why he was absent. Mr Knight also says that the Council monitors compliance with section 106. However, these submissions assume that the process for making and minuting declarations is properly complied with and that a councillor will be open as to the reason for non-attendance at a meeting. Without naming the councillor, the public cannot scrutinise whether any of this works in practice. In resisting identification of the councillor Mr Knight effectively asks the local electorate to trust in the efficacy of monitoring because they have no means of testing it. Moreover, even if these safeguards all work effectively, unless the

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councillor is identified the electorate is deprived of information which, for reasons I have explained, there is a legitimate interest in their knowing.

65. There is no other effective means of a journalist obtaining this information. It is not realistic for a journalist to be available in the magistrates court during all council tax lists in case a councillor might appear in the list. And, as the Council pointed out, a summons does not necessarily mean that a hearing is held in open court. Reliance on a public list including the name of the councillor and on a journalist happening to be in court when and if the list is read out would mean that whether or not the information could be published would be arbitrary.
66. Mr Knight raised, at the hearing, the possibility of the Appellant obtaining court records. This cannot be achieved under FOIA because of the operation of section 32(1). Mr Knight suggested that the records might be obtained under rules of court. He did not say how this could be done. I do not know whether it is possible under the rules of court. But in any event I do not consider that this is a realistic suggestion. It is difficult to see how a journalist would know what lists to obtain. It seems that it may involve a journalist obtaining all lists and scouring them for the names of councillors. On the evidence before me this is not a realistic suggestion.
67. I conclude that disclosure of the identity the councillor is necessary to achieve the objectives of transparency and accountability.
68. Finally, I must consider whether disclosing the councillor's identity is unwarranted by reason of the prejudice to the article 8 rights of the councillor. I have already set out above the ways in which disclosure in this case is likely to interfere with the councillor's rights. The issue substantially overlaps with that of fairness. As explained in the reasons above and in the closed reasons, the prejudice is not unwarranted.
69. I have reached my decision without reference to Article 10 and I do not need to resolve the dispute as to its application in a case such as this.

Conclusion

70. The First-tier Tribunal's decision was made in error of law and I set it aside. The name of the councillor in Case 5 is not exempt from disclosure under section 40(2) FOIA and the Council is obliged to provide that information to Mr Haslam.

**Signed on the original
on 10 March 2016**

**Kate Markus QC
Judge of the Upper Tribunal**