IN THE FIRST-TIER TRIBUNAL **Case No. EA/2012/0243**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FS50431587
Dated: 6 November 2012

Appellant: **Ashok Mahajan**

First Respondent: **The Information Commissioner**

Second Respondent: **The Office of the Legal Ombudsman**

Heard at: Field House, London.

Date of hearing: 16 May 2013

Date of decision: 12 June 2013

Before
CHRIS RYAN
(Judge)
and
ALISON LOWTON
ROGER CREEDON

Attendances:

The Appellant attended by video link
The First Respondent did not attend and was not represented
The Second Respondent was represented by Ms Freda Sharkey

Subject matter: Personal data s.40

Cases: Corporate Officer of the House of Commons v Information Commissioner and others [2008] EWHC 1084 (Admin).

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

REASONS FOR DECISION

The background to the Appeal

1. The Appellant addressed an information request to the Second Respondent ("the Ombudsman") on 31 October 2011 covering a number of issues, which have subsequently been narrowed to the three identified below.

2. 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.

3. Some of the information requested was disclosed but some more was refused, leading the Appellant to complain to the First Respondent ("the Commissioner"). In the course of his investigation the Commissioner identified the outstanding information requests which the Appellant required him to consider. They were:

    a. Whether the Ombudsman had been justified in refusing to disclose the name of individuals in its employment who had previously been employed by the Legal Complaints Service ("LCS"); and

    b. Whether, at the date of the original information request, the Ombudsman held information about complaints made by users of the LCS against employees of that organisation who had subsequently become employees of the Ombudsman.

4. The Commissioner decided that the Ombudsman had been entitled to refuse both requests. As to the first he concluded that there was no legitimate public interest in disclosing the employment history of the Ombudsman's employees who had previously worked for its predecessor organisation and that disclosure would therefore have breached the data protection principles set out in Schedule 1 to the Data Protection Act 1998. In those circumstances, he concluded, the information was exempt information under FOIA section 40(2).

5. As to the second outstanding element of the information request the Commissioner concluded that, on the balance of probabilities, the

employment records of those of its employees who had previously worked for the LCS were not transferred to the Ombudsman and were therefore not held by it at the relevant time. The Commissioner reached that conclusion having determined that the LCS had been a completely separate organisation that had been abolished in 2007, some three years before the Ombudsman's office was established in 2010. This part of the Commissioner's decision has not been challenged by the Appellant.

6. The Ombudsman had also relied on FOIA section 40(2) to refuse to disclose information, requested by the Appellant when seeking an internal review of the earlier refusal, about the number of complaints made against those of its employees who had previously been employed by the LCS. As the Commissioner conceded in his Response to the Appellant's Grounds of Appeal he failed to consider this in his decision. In the event the Ombudsman produced data on the point anonymised to a level where none of the relevant individuals could be identified. Although this did not entirely meet the precise terms of the original request (and was of March 2013 as the data could not be recreated retrospectively) it was disclosed to the Appellant by annexing it to the Ombudsman's Response to the Grounds of Appeal and the point was not pursued further.

7. Although the Grounds of Appeal suggested that the Commissioner's decision did not address certain additional issues, we are not prepared to extend the scope of the appeal beyond the issues that were spelt out to the Appellant at an early stage of the Commissioner's investigation. In the absence of any complaint by the Appellant at that stage as to the scope of the investigation it is not appropriate to raise new issues at this stage.

8. In the circumstances it is only the first issue set out in paragraph 3 above that we are required to address.

The Appeal to this Tribunal

9. The Appeal was received by this Tribunal on 20 November 2012. The Grounds of Appeal attacked the Commissioner's decision largely on the basis of arguments based on the provisions of the European Convention on Human Rights and the Human Rights Act 1998. Those arguments are untenable, as the Commissioner's decision did not involve a determination of the Appellant's civil rights, but it is possible to discern from the arguments put forward by the Appellant as to fairness and balance that his complaint is that the Commissioner failed to apply correctly the tests for disclosure or exemption arising under FOIA section 40(2).

10. The Appellant does not challenge the Commissioner's conclusion that the information requested did constitute the personal data of those

affected. His appeal is based on the argument that the Information Commissioner made an error in concluding that the data protection principles would have been breached if the Ombudsman had complied with the request, with the result that the exemption under FOIA section 40(2) was engaged.

The relevant law

11. 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.

12. Section 1 of the DPA provides the following relevant definitions:

> *"data" means information which-*
> *(a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,*
> *(b) is recorded with the intention that it should be processed by means of such equipment,*
> *(c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system,*
> *(d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68, or*
> *(e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d)*
>
> *"'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"*

13. 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…*

14. 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.

15. 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 - C*orporate Officer of the House of Commons v Information Commissioner and others* [2008] EWHC 1084 (Admin).

16. In determining whether or not disclosure of the requested information 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 each of the employees involved.

    And if we are satisfied on those points we have also to consider:
    iii. whether disclosure would have been unfair or unlawful for any other reason.

17. 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 date 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."*

18. Before explaining the decision we have reached on the issues summarised in paragraph 16 we should deal with the difficulties that arose during the course of the Appeal, which led to the Appellant refusing to participate in the hearing.

<u>The Appeal process</u>

19. The Appellant asked for the appeal to be determined at a hearing, as is his right, and directions were given for the Ombudsman to be joined as a Respondent and for the appeal to be determined on the basis of Responses filed, or to be filed, by each of the Respondents, together

with a Reply to be filed by the Appellant once he had seen both Responses. No further written submissions or skeleton arguments were to be filed without the Tribunal's permission.

20. In the event the Appellant filed a Reply to the Commissioner's Response before he had received the Response from the Ombudsman.

21. Directions were also given for the preparation of an agreed bundle of documents. This led to disagreement among the parties. The Appellant considered that the bundle should have included the Ombudsman's correspondence files in respect of certain complaints that the Appellant had made against three firms of solicitors and one barrister. The other parties did not agree. On 25 March 2013 the Tribunal receive an application from the Appellant that the additional material should be added to the bundle and that his time for serving a Reply to the Responses filed by the Commissioner and the Ombudsman should not start to run until he received the expanded bundle.

22. On 27 March 2013 the Tribunal issued a ruling rejecting the application on the basis that it would be disproportionate, in light of the narrow scope of the issues to be determined on appeal, to order that the material in question should be added to the bundle. The Appellant was directed to file his Reply by 26 April 2013

23. The hearing was fixed for 16 May 2013, with the Appellant attending by video link.

24. By a letter received by the Tribunal on 22 April the Appellant argued that insufficient reasons had been given for the Tribunal's ruling and set out his reasons for wanting the additional material he sought. He wrote to the Tribunal again on 3 May complaining that he had not received the further reasoning for the Tribunal's direction that he sought and enclosing a letter to the Upper Tribunal (Administrative Appeals Chamber) indicating that he wished to appeal against the 27 March ruling. The letter to the Tribunal included this passage:

> *"While an issue of the documents for the hearing is pending I am unable to comprehend the Tribunal proceeding to list the matter for hearing, clearly to deny me my fundamental and statutory human right of a fair hearing and objectively deny justice, I therefore am left with no option but to proceed with my appeal. I shall appreciate if you would acknowledge receipt of my notice of appeal and vacate the hearing on 16 May 2013."*

25. On 10 May 2013 the Tribunal informed the Appellant that it did not believe that his letter contained any justification for an adjournment and confirming that the hearing would proceed on 16 May 2013 as previously arranged. However at the start of the hearing on that day

the Appellant stated that he did not intend to remain for the hearing because he felt that it should not proceed while his appeal against the Tribunal's ruling was pending before the Upper Tribunal. He stated that the additional material he required to be added to the bundle was essential if he was to have a fair hearing as it was directly relevant to the issues to be determined. Without that material, he said, he could not make his case. It was explained to the Appellant that the hearing would go ahead although, if his appeal to the Upper Tribunal proceeded and was successful, there might need to be a rehearing of this appeal.

26. Although the Appellant was invited to address the Tribunal and set out his arguments in support of his appeal, (which would be without prejudice to his challenge to the fairness of the process), he declined to do so. He maintained that position despite being told that the hearing would proceed in his absence and he ultimately removed himself from the video conferencing suite from which he had addressed the Tribunal. The hearing accordingly proceeded on the basis of the existing bundle and submissions made by Ms Sharkey on behalf of the Ombudsman (the Commissioner having previously informed us that he would not attend and would not be represented at the hearing).

Our decision

27. Ms Sharkey addressed us on both the FOIA section 40(2) issue and an argument, raised for the first time in the Ombudsman's Response, to the effect that the Ombudsman had been entitled to reject the request for the outstanding information on the additional ground that the request had been vexatious under FOIA section 14. However, as the Appellant had not submitted a Reply on the point and was not present we have decided that, in light of the decision we have made under section 40, it is not necessary, and would not be sensible, to reach a decision on the point.

28. There was no challenge (in either the Appellant's Grounds of Appeal or his Reply) to the Commissioner's conclusion that the employment details did constitute personal data and the Ombudsman adopted the Commissioner's arguments on the other issues we have to consider. These had been set out in the Commissioner's Response (to which the Appellant did file a Reply), to the effect that the Human Rights Act arguments were untenable and that, on the application of the tests set out in paragraph 16 above, the information was exempt under FOIA section 40(2).

29. We have already recorded our decision (in paragraph 9 above) on the human rights issue. The Appellant's argument on the first matter to be considered, whether there was a pressing social need that would be served by disclosure, that it arose from the role allotted to the Ombudsman and the manner in which it operated. He drew attention

to the power of the Ombudsman to investigate serious complaints against lawyers and argued that the public should therefore be aware of the character of those carrying out the work. We do not accept the argument, as it applies to the employees in question who, we were informed, operated below the level of those of the Ombudsman's officers who adjudicated complaints that had not been resolved by mediated agreement.

30. The Appellant attempted to strengthen his case by accusing the LCS of having employed "*viciously corrupt and institutionally racist individuals who in Appellant's experience at best had vested interest at worst took bribes to dismiss serious complaints against solicitors*". He also accused the Ombudsman of "*serving the legal fraternity*" rather than protecting the public, referring to the Ombudsman's office as "*morally bankrupt*" and of "*taking bribes*". There was no evidence or detail put before us to support any of the allegations and we do not therefore think that they add weight to the argument in favour of disclosure.

31. We conclude, therefore, that the weight of the factors in favour of disclosure is very slight. We set those factors in the scales against the degree of interference with the privacy of the employees in question. As we have made clear they were not operating at the level of those of the Ombudsman's officers who determine disputes between lawyers and their clients. In our view they did not have the seniority or public-facing role where they might expect their employment record to be made available to the public. We conclude that to order disclosure would lead to an unwarranted interference with their rights and freedoms.

32. We regard the weight of the factors in favour of protecting the employee's privacy comfortably outweighs the very limited factors in support of disclosure. It is not necessary, in those circumstances, to go on to consider whether disclosure would be unfair for any other reason and we conclude that the information requested does fall within the exemption provided by FOIA section 40(2) and that the Commissioner was therefore right to conclude that the Ombudsman had been entitled to refuse this element of the Appellant's request for information.

33. We therefore dismiss the appeal.

34. Our decision is unanimous.

Chris Ryan

Judge

12 June 2013