



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

EA/2013/0207

ON APPEAL FROM:

**Information Commissioner's Decision Notice: FS50493579
Dated: 21 August 2013**

**Appellant: DARREN CULLEN
Respondent: THE INFORMATION COMMISSIONER**

Date of hearing: 4 December 2013

Date of Decision: 31 December 2013

Date of Promulgation: 3 January 2014

Before

**Annabel Pilling (Judge)
Narendra Makanji
Dave Sivers**

Subject matter:

FOIA – Absolute exemptions – Personal data s.40(2)

Representation:

For the Appellant: Darren Cullen
For the Respondent: Helen Davenport

Decision

For the reasons given below, the Tribunal refuses the appeals and substitutes an amendment to the Decision Notice as follows:

“2. In relation to the remainder of the requests:

Requests i), ii) and iii) are exempt by virtue of section 40(5) (no duty to confirm or deny whether the information is held).

Request v) is exempt by virtue of section 40(1) (personal information of the requestor).

Request vi) is exempt by virtue of section 40(2) (personal information of a third party).

The Trust is therefore not required to comply with those requests.”

Reasons for Decision

Introduction

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the ‘Commissioner’) dated 21 August 2013.
2. The Decision Notice relates to requests made by the Appellant under the Freedom of Information Act 2000 (the ‘FOIA’) to the Norfolk and Suffolk Probation Trust (‘the Trust’) for information about an employee of the Trust:

“In relation to [XY]:

- i) *How many complaints have been made against her in how many years in the probation service?*
- ii) *How many times has she been off sick and long term sick and for what reasons?*
- iii) *Have there been any past problems with her behaviour or health?*

- iv) *Why was she removed from her post at HMP [X] and the date she was moved?*
 - v) *[In relation to meetings with me] copies of her reports, notes of our meetings with the dates and duration of those meetings.*
 - vi) *[Details] of her qualifications and any refresher courses she has undertaken since.”*
3. The Trust refused to disclose information on the basis of section 40(2) FOIA as it was the personal information of a third party.
 4. The Appellant complained to the Commissioner who investigated the way the request had been dealt with by the Trust. He concluded that the Trust breached section 1 and section 10 of FOIA as it had failed to respond to one part of the request. In relation to the remainder of the request he concluded that all the information requested was exempt under either section 40(1), personal information of the requestor (request iv), or section 40(2), personal information of a third party.

The appeal to the Tribunal

5. The Appellant appeals against the Commissioner’s decision. All parties agreed that this was a matter that could be dealt with by way of a paper hearing.
6. The Tribunal was provided in advance of the hearing with an agreed bundle of material, and written submissions from the parties. We did not see the disputed information. Although we cannot refer to every document in this Decision, we have had regard to all the material before us.

The Issues for the Tribunal

7. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it

holds the information requested, and (b) if so, to have that information communicated to him.

8. The section 1(1)(b) duty of the public authority to provide the information requested will not apply where the information is exempt by virtue of any provision of Part II of FOIA. The exemptions provided for under Part II fall into two classes: absolute exemptions and qualified exemptions.
9. Where the information is subject to a qualified exemption, it will only be exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (section 2(2)(b)).
10. The exemption provided for in section 40 FOIA is an absolute exemption. The exemption in section 40(1) is engaged if the information constitutes personal data of which the applicant is the data subject. The exemption in section 40(2) is engaged if it is shown that disclosure of the personal data of third parties would contravene one of the data protection principles set out in Schedule 1 of the Data Protection Act 1998 (the "DPA").
11. Since making his decision, the Commissioner is now of the view that the Trust had no duty to confirm or deny under section 1(1)(a) FOIA that it held any information falling within the scope of requests i) (complaints) and ii) and iii) (ill health or stress) as to do so would contravene one of the data protection principles, that is, would be unfair. Section 40(5) FOIA provides as follows:

"40(5) The duty to confirm or deny-

...

(b) does not arise in relation to other information if or to the extent that..-

(i) the giving to a member of the public of the

confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles.”

12. The data protection principles regulate the way in which a “data controller” (in this instance, the Trust) must “process” personal data. The word “process” is defined in section 1(1) of the DPA and includes:

“disclosure of the information or data by transmission, dissemination or otherwise making available.”

13. The first data protection principle provides:

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.*

14. There is no dispute that the disputed information in this case is personal data. In respect of requests ii) and iii) the information will be sensitive personal data as it is information as to her physical or mental health or condition. In respect of request i) it may be sensitive personal data if it is information as to the commission or alleged commission by her of any offence. One of the schedule 3 conditions must also be met in respect of this information.

15. There is an inherent tension between the objective of freedom of information and the objective of protecting personal data. It has been observed that section 40(2) of FOIA is a “complex provision”¹. There is no presumption that openness and transparency of the activities of public authorities should take priority over personal privacy. In the

¹ *Blake v Information Commissioner and Wiltshire County Council* EA/2009/0026

words of Lord Hope of Craighead in *Common Services Agency v Scottish Information Commissioner*² (referring to the equivalent provisions in the Freedom of Information (Scotland) Act 2002 (the 'FOISA')):

"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 purposes 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...."

16. The Appellant submits that as XY has taken long term sick leave "for allegedly stress related problems" disclosure would be fair as there is a legitimate interest in the requested personal data for the following reasons:

- (i) to assess her suitability for employment by the Trust;
- (ii) to assess her ability to prepare reports upon, for example, the Appellant's suitability for category "D" prison status, and assess the reliability of those reports;
- (iii) the Trust is accountable for spending public money;
- (iv) the Trust was or should have been aware of issues affecting her reliability and taken action;
- (v) misconduct should be exposed;

² [2008] UKHL 47

(vi) there should be adequate scrutiny of the decision making process.

17. The Appellant submits that the requests involve the same main argument, that they will highlight a catalogue of failings by the Trust in respect of how they employed XY.

18. The Commissioner submits that we should first consider whether it would breach the first data protection principle, that is be unfair, to confirm or deny that the information is held. The following factors should be taken into account:

(1) whether confirmation or denial would be within the data subject's reasonable expectations;

(2) what, if any, consequences would flow from the confirmation or denial; and

(3) whether there are any legitimate public interests in the public authority confirming or denying whether it does hold the requested information.

19. The Appellant has made a request for personal data of XY in the context of one individual complaining about another individual. We are satisfied that XY would have the reasonable expectation that the Trust, her employer, would not reveal her personal data, and, in particular, her sensitive personal data, in these circumstances. To confirm or deny whether information was held relating to complaints made against XY would reveal her personal data, in other words, would reveal that complaints had been made against her as it is unlikely that the Trust would hold any recorded information which confirms that no complaints have been made against any individual. Similarly, if the Trust confirms that it does hold information in response to the time and reasons for which XY has been off work sick, this reveals sensitive personal data about XY's health. To reveal such information is likely to cause significant distress to XY.

20. Notwithstanding the reasonable expectations of XY or any distress caused to her by disclosure, it may still be fair to disclose the requested information if there is a more compelling public interest in releasing the information.
21. We do not consider that there is any legitimate public interest either in confirming or denying whether or not the requested information is held in respect of requests i), ii) and iii), or in disclosing the information sought by request vi) (qualifications and refresher courses). The Trust could have disclosed the job description and confirmed that XY satisfied the person specification for that role. To reveal details of qualifications would not add to that information. The issue of “refresher courses” is complex; some professional bodies require continuing professional development, for others it is optional not compulsory. An individual may choose to attend a particular course to improve prospects for promotion, for interest or to address an area where assistance is needed.
22. The Appellant is dissatisfied with the role XY has played in her employment with the Trust so far as it relates to himself. We agree with the Commissioner that this is a private interest and has no bearing on our consideration whether there is a legitimate public interest in either the confirmation or denial, or disclosure.
23. The Appellant has identified his concerns surrounding XY’s suitability and reliability for this specific employment and the Trust’s dealings with her. He submits that the information should be disclosed in order to ensure that the Trust is accountable for public money it spends, to expose misconduct and to ensure that there is adequate scrutiny of its decision making processes.
24. The Commissioner concedes that there is always some legitimate public interest in the disclosure of information concerning public officials because they are paid with public funds and, in principle, work on behalf of the public. However, in this particular case there is no

evidence that the Appellant's dissatisfaction with XY is symptomatic of a wider public concern with either this individual or with the Trust.

25. We agree with the Commissioner that this limited and general public interest in the disclosure of information concerning public officials is greatly outweighed by the expectations of XY and the distress likely to be caused to her in respect of the Trust's handing of a request for her personal data, both sensitive and non-sensitive.
26. We agree with the Commissioner that if the Trust were to confirm or deny whether it holds information falling within the scope of request i), ii) and iii) this would reveal personal data, both sensitive and non-sensitive, about XY and would be unfair, thus in breach of the first data protection principle. We find that section 40(5) FOIA is engaged.
27. In respect of request vi), for the same reasons, we consider that to disclose this personal data of XY would breach the first data protection principle. We find that section 40(2) FOIA is engaged.
28. In respect of request v), this is a request for personal information of which the Appellant is the data subject and falls within the exemption at section 40(1) FOIA. The Appellant would have to make a subject access request under the DPA for this information to be disclosed.
29. We therefore amend the Decision Notice of the Commissioner to reflect our findings in respect of section 40(5) FOIA.

Annabel Pilling
Judge

31 December 2013

Amendments made under Rule 40 of the Tribunal Procedure (First Tier Tribunal) (General Regulatory Chamber) Rules 2009 on 9 January 2014. Amendments made to the first line of paragraph 16, line 10 of paragraph 21 and to line 4 of paragraph 25.