



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

EA/2013/0104

ON APPEAL FROM:

Information Commissioner's Decision Notice: FS50483396

Dated: 8 May 2013

Appellant: GREG BURKE
Respondent: THE INFORMATION COMMISSIONER
Second Respondent: CRAIGAVON BOROUGH COUNCIL

Heard at: Field House

Date of hearing: 4 December 2013

Date of Decision: 23 January 2014

Before

Annabel Pilling (Judge)
Narendra Makanji
Dave Sivers

Subject matter:

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

Representation:

For the Appellant: Greg Burke
For the Respondent: Mark Thorogood
For the Second Respondent: Joseph McDonald

Decision

For the reasons given below, the Tribunal refuses the appeal and upholds the Decision Notice of 8 May 2013.

Reasons for Decision

Introduction

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 8 May 2013.
2. The Decision Notice relates to a request made by the Appellant under the Freedom of Information Act 2000 (the 'FOIA') to the Craigavon Borough Council ('the Council') for correspondence held concerning Lough Neagh Rescue originating from or to four named individuals.
3. The Council refused to provide the requested information on the basis that it was exempt under section 40(2) FOIA (personal data). It also considered that the request was vexatious under section 14(1) FOIA.
4. The Commissioner agreed with the Council that the information was exempt under section 40(2) FOIA and the Appellant appeals against his decision. The Commissioner did not consider the application of section 14(1) FOIA.

Background

5. Lough Neagh Rescue (LNR) is a company limited by guarantee and a registered charity, operating lifeboats out of Ardboe and Kinnego in Northern Ireland. LNR receives funding from a variety of sources, including funding from local councils that border the Lough, one of these being the Council, private donations, fundraising activities, the Rivers Agency and the Loughshores Area Based Strategy.

6. It is of relevance to this Appeal that a number of the LNR volunteers are employees of the Council.
7. It is also of relevance that there has been internal controversy surrounding the management and day to day running of LNR.

The appeal to this Tribunal

8. The Appellant appeals against the Commissioner's decision. The Tribunal joined the Council as the Second Respondent.
9. The Tribunal was provided in advance of the hearing with an agreed bundle of material, and written submissions from the parties. We were also provided with a small closed bundle which was not seen by the Appellant, and which contains only the disputed information. The disputed information provided by the Council to the Commissioner for the purposes of his investigation amounted to only four documents. The Council conducted a search and found a number of additional documents relevant to the request. The disputed information provided by the Council to the Tribunal amounts to 268 documents.
10. After the hearing the Tribunal sought confirmation from the Council that the four named individuals were volunteers with LNR. The Appellant had asserted that only one of the four named individuals was a member of LNR "as determined by the Charity Commission of N. Ireland". The Council confirmed that the four named individuals were volunteers with LNR. We accept that evidence. This confirmation was received during the holiday period. This is the reason for the delay between the hearing and the date of this decision.

The legal framework

11. 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.
12. Section 3(2) of FOIA provides-

"For the purposes of this Act, information is held by a public authority

if-

(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority.”

13. 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.

14. 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)).

15. The exemption provided for in section 40 FOIA is an absolute exemption, and therefore not subject to the public interest test in section 2(2)(b). The relevant parts provide as follows:

“(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) [personal data of which the applicant is the requestor], and

(b) either the first or the second condition below is satisfied.

(3) The first condition is-

(a) in a case where the information falls within any of the 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...”

16. The exemption in section 40(2) is therefore engaged if it is shown that

disclosure of the personal data of a third party would contravene one of the data protection principles set out in Schedule 1 of the Data Protection Act 1998 (the “DPA”).

17. The data protection principles regulate the way in which a “data controller” (in this instance, the Council) 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.”

18. 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.*

19. The conditions in Schedule 2 are:

- (1) The data subject has given his consent to the processing.*
- (2) The processing is necessary –*
 - (a) for the performance of a contract to which the data subject is a party, or*
 - (b) for the taking of steps at the request of the data subject with a view to entering into a contract.*
- (3) The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.*
- (4) The processing is necessary in order to protect the vital interests of the data subject.*
- (5) The processing is necessary –*
 - (a) for the administration of justice,*

(b) for the exercise of any functions conferred on any person by or under any enactment,

(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or

(d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

(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 expectations of the data subject.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.

20. It follows that personal data can only be disclosed if to do so would be 1) fair, 2) lawful and 3) at least one of the required conditions met.

Is the information “held” by the Council?

21. This was not an issue raised either by the Council at any stage or by the Commissioner in his Decision Notice. The Commissioner in his role as independent regulator of FOIA has properly raised it before the Tribunal.

22. Information is only “held” by a public authority for the purposes of FOIA if it is held “otherwise than on behalf of another person.” In other words, this means that when information is solely held by a public authority on behalf of another person it is not held by the public authority for the purposes of FOIA.

23. The disputed information, in the main, consists of email correspondence to, from or copied to some of the individuals named in the request, volunteers of LNR. A large number of these form part of a chain of correspondence, or emails that have been forwarded only. There is a high proportion of duplication. Some of the emails are to or from the Appellant himself, and he has been copied into a significant proportion of the remaining emails.

24. We agree with the Commissioner's argument that the Council only "hold" the disputed information in its own information management system on behalf of the LNR volunteers who happen to also be Council employees; not because the information was retained by the public authority for its own purposes. As such, those emails are not information held by the Council for the purposes of FOIA. Having considered the disputed information carefully, we are satisfied that the Council does not hold documents numbered 1-254, 263, 264, 266 and 267 for the purposes of FOIA.

Is the disputed information "personal data"?

25. The Appellant submits that the disputed information is not personal data for the following reasons;

- (i) the Council and LNR are inextricably linked and should be regarded as a sole identity;
- (ii) the named individuals were sending or receiving emails at their place of work during work time

26. We agree with the Commissioner that the fact that the emails were sent or received via the individuals' workplace email addresses or during work time is not determinative, or even indicative, of whether they relate to an individual's professional or personal capacity.

27. We have had the opportunity to examine carefully the content and context of the email correspondence forming the remaining disputed information in this case.

28. Although there are links between the Council and LNR in terms of the funding arrangements and practical support, they are separate legal entities and the Council has no responsibility for the day-to-day running or management of LNR. We disagree with the Appellant that the individuals' work with LNR and their work as a Council employee "are inextricably linked". We therefore draw a distinction between each individual's professional or official capacity with the Council and the voluntary work undertaken for LNR.

29. We are satisfied that the remaining disputed information is personal data; it is correspondence sent to or received by named individuals from which they can clearly be identified. Given that the Appellant, at least, knows the identity of

the individuals, any redaction would be meaningless.

Would disclosure of the personal data of the named individuals be fair?

30. 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 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....”

31. The Commissioner identified the key considerations in assessing it whether it would be fair for the disputed information in this case to be disclosed:

- (i) whether the information is sensitive personal data;
- (ii) the possible consequences of disclosure of the individuals identified;
- (iii) whether the information relates to the employee in their professional role or to them as individuals;
- (iv) 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

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

² [2008] UKHL 47

was obtained; whether the information has been or remains in the public domain; and the FOIA principles of transparency and accountability; and

- (v) 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.

32. The remaining disputed information, that is documents 255 – 261, 262, 265 and 268 are not held on behalf of the LNR volunteers but are emails involving the Council itself.
33. Documents 255-261 appear to us to be the only parts of the disputed information that relate to an individual's professional or official capacity with the Council. Documents 262, 265 and 268 contain references to LNR but in a personal context.
34. As employees of a public authority, there would be an expectation, or acceptance, that some information about their professional life could be disclosed under FOIA.
35. The Commissioner properly identifies that there will be occasions when the requirement to demonstrate accountability and transparency in the spending of public funds, or the activities of a public authority, will outweigh the rights of the individuals and he referred us to the case of *House of Commons v Information Commissioner and Brooke, Leapman and Ungeod-Thomas*³ (the MPs' expenses case). We have already indicated that we are satisfied that the information relates to individuals acting in their private rather than professional or official capacity. Having considered all the emails, we agree with the Commissioner that the disputed information in this case would not inform the public in any way as to the activities of the Council.
36. Within the papers there is information that at some stage the identities of the four individuals were briefly in the public domain as the subjects of a request for information under FOIA and their names revealed on a publicly accessible website. The disputed information has never been in the public domain.

³ [2008] EWHC 1084 (Admin

37. It is clear that the Appellant has links with LNR and there is correspondence to, from or copied to him within the emails we have seen.
38. The Appellant submits that the request for information is as much about exonerating individuals involved in the dispute and exploring the facts surrounding the Council and their potential knowledge of involvement of the data subjects in the charity's difficulties. In particular, he submits that there is a "plausible suspicion" that one side of a charitable dispute was served by these data subjects and this "*potentially*" "*may have been*" accomplished with the knowledge and permission of their employers. In conclusion he argues that the disputed information may serve to allow conclusions to be drawn that either supports or debunks perceptions around the potential involvement of the Council or the data subjects in a long running dispute.
39. The Appellant has not had sight of the disputed information and appears to make assumptions about the contents.
40. We are aware that each of the four named individuals has explicitly refused consent to disclosure. This has been repeated and the particular concerns of the individuals identified. There has been on-going tension between factions within LNR. The situation has been described as very complex and acrimonious. The Council submits that some parties have expressed fears regarding their physical safety as the situation took a sinister turn when a post appeared on the same publicly accessible website referred to above detailing allegations of perceived faith linked to employment with the Council via part of LNR.
41. We have had the benefit of being able to examine the disputed information in detail. We agree with the Commissioner that whilst there is a general public interest in public bodies being open and transparent, disclosure of the disputed information in this case would not inform the public in any meaningful way as to the activities of the Council.
42. We therefore agree with the Commissioner that disclosure of the disputed information held by the Council that falls within the scope of the request would not be fair and would be a breach of the first data protection principle.
43. The exemption in section 40(2) FOIA is engaged and the Council entitled to withhold the disputed information.

44. The Appellant has indicated that he would be prepared to make undertakings in respect of the use to which he could put the disputed information and to limit any disclosure by him. This is not possible under the FOIA regime and information disclosed without restriction.

45. We therefore refuse this appeal and uphold the Decision Notice of 8 May 2013. Our decision is unanimous. We do not need to go on to consider section 14(1) FOIA.

Annabel Pilling
Judge

23 January 2014