



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

**Case No. EA/2013/0254**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50512778**

**Dated: 13th November 2013**

**Appellant:** Larry Simons

**Respondent:** The Information Commissioner ("the ICO")

**Before**

David Farrer Q.C.

Judge

and

Paul Taylor

and

Jean Nelson

Tribunal Members

**Date of Decision:** 4th April 2014

The appeal was determined on the papers.

**Subject matter:** FOIA s.40(5) Whether confirmation or denial by the public authority pursuant to s.1(1) would breach a data protection principle.

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal dismisses the appeal.

Dated this 4th day of April 2014

David Farrer Q.C.

Judge

[Signed on original]

## REASONS FOR DECISION

1. Mr. Simons appeals against a Decision Notice of the ICO dated 13<sup>th</sup>. November 2013 upholding a refusal by the London Borough of Barnet (“LBB”) to confirm or deny that it held information as to the number of complaints made against an individual whose name and address were known to LBB and to Mr. Simons, the requester.
2. Unusually, the background to this appeal needs no further elaboration.

### The Request

3. On 26<sup>th</sup>. July, 2013 Mr. Simons made the following request to LBB –  
*“Subject to the Freedom of Information Act, 2000, I request to be informed about the number of complaints that have been made about ( name and address supplied in the request but omitted here) and to be provided with a breakdown of how many different residents those complaints came from.”*
4. LBB responded on 1<sup>st</sup>. August, 2013, refusing to confirm or deny that it held such information. It cited the exemption provided by FOIA s.40(2) and the release from the obligation to confirm or deny that it held the information provided by s.40(5). It confirmed its refusal on 16<sup>th</sup>. August, 2013, following an internal review.
5. On the same day Mr. Simons complained to the ICO, pointing out that the wording of the request had been designed to obtain answers that contained numbers but no identifying information, thus preventing LBB from *“hiding behind the DPA”* (the Data Protection Act, 1998). He repeated this point in correspondence.
6. The Decision Notice of 13<sup>th</sup>. November, 2013 upheld LBB`s refusal to confirm or deny. It confined itself to considering the request for the number of complaints and made no finding as to the “breakdown” of the number of different residents. Nor does the Tribunal.

7. Mr. Simons appealed to the Tribunal.

8. His grounds of appeal reiterated his argument that he requested only numbers, not identities so that no question of data protection could arise. He appeared to suggest that LBB was denying that complaints had been received, which was precisely what LBB was refusing to do. As in his complaint, he accused LBB of hiding behind the DPA. He further invoked the public interest.

### Our decision

9. So far as material, s.40 (5) of FOIA provides: -

(5) *The duty to confirm or deny –*

- - - -

(b) *does not arise in relation to other information (i.e., other than data subject information) if or to the extent that either -*

(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. - - -*

The first data protection principle, quoted here so far as material, is set out in Schedule 1, Part 1 to the DPA –

1 *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 . . .*

10. "Data" are, for present purposes, information recorded either in a computer or in a manual filing system (DPA s.1(1)).

"Personal data" are defined in DPA s.1(1) as –

*“ . . . 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;”*

11. Mr. Simons` case evidently rests on the argument that a reply to his request giving simply the numbers of complaints and complainants could not amount to the processing of personal data because the numbers which he expressly requested are not personal data. That is plainly wrong.

12. As to (a), the data subject cannot, of course, be identified from such data alone. However, the data controller, for the purposes of (b), was LBB which certainly possessed other data, namely his/her name and address, which permitted identification of the data subject. Identification of the individual in the Request inevitably provides the data controller with data satisfying (b), if it did not possess them already.

13. That, of itself, disposes of this argument but it is fair to add, as a practical consideration, that Mr. Simons also possessed such data so that disclosure of the numbers by LBB would expose the data subject to publication of the volume of complaints, if there were complaints, made against him/her, coupled with identification by anybody to whom Mr. Simons chose to reveal his/her name.

14. If the definition in DPA s.1(1) did not have the effect stated in paragraph 12, the first data protection principle and FOIA s.40(2) and (5) would be dead letters in a case such as this. The protection afforded to a data subject could be

circumvented by a simple request to omit his/her name and address when providing other, perhaps highly sensitive, personal information relating to him/her to a requester who knew both already.

15. Mr. Simons has not advanced any other argument against the Decision Notice, save a reference to the public interest. Nevertheless, the Tribunal, like the ICO, will deal briefly with the other matters arising from his request.

16. Since this is a request for personal data of a third party, s.40(5) entitles LBB to refuse to confirm or deny, if either response would breach a data protection principle, usually, as here, the first principle. That raises the question whether a yes or no response would involve the processing of such personal data. Clearly, it would indicate that the data subject either had or had not attracted complaints to LBB, the local authority. In either case that would be a provision, that is a processing, of personal data, favourable or not.

To deny that you hold information as to an event, where you must hold such information, if it occurred, amounts to a denial that it occurred.

17. Would such processing be fair? No local resident would reasonably expect the local authority to publish the information that he/she is or is not the subject of complaints from neighbours and, if complained of, by how many. Fairness could in some rare circumstances require that such information be circulated, for example in a case involving extreme and perhaps dangerous conduct. There is no evidence of that here. Processing in this case would not be fair.

18. We need not, therefore, consider “lawfully” nor the further requirement for satisfaction of a Schedule 2 condition ( though satisfaction appears highly improbable).

19. Save in so far as it is engaged in the concept of fairness, the balancing of public interests does not arise here since the application of s.40(5) does not engage an exemption. The provision is independent of s.40(1) and (2), which provide for an absolute exemption anyway..

20. For these reasons we dismiss this appeal.

21. Our decision is unanimous.

Signed

David Farrer Q.C.

Tribunal Judge

4<sup>th</sup> April 2014