



IN THE FIRST-TIER TRIBUNAL

Case No. **Appeal No. EA/2013/0280**

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notice No: FS50496334

Dated 17th December 2013

BETWEEN

Mr Jonathan Corke

And

The Information Commissioner

Respondent

And

The Cabinet Office

Second Respondent

Determined on 9th June 2014 at Field House

Date of Decision 15th July 2014

Date of Promulgation: 16 July 2014

BEFORE

Fiona Henderson (Judge)

Mike Jones

And

Dave Sivers

Subject matter: FOIA– s40(2) (Personal Data)

South Lanarkshire Council v Scottish IC 2013 UKSC 55

Decision: The Appeal is refused

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision FS50496334 dated 17th December 2013 which concluded that the National Archives had correctly applied s 40(2) FOIA (personal data) to the disputed information.

The Information Request

2. Jimmy Savile was a disc jockey and television presenter who led a campaign in the 1980s to raise money for the Stoke Mandeville Hospital where he was a volunteer. The Government made a £500,000 contribution to the Hospital in 1982 as a result of his lobbying. Following the death of Jimmy Savile it has become evident that he was a prolific sexual offender who abused vulnerable people over many decades including at Stoke Mandeville Hospital. Mr Corke made a request to the National Archives on 22nd February 2013 asking (insofar as it is relevant to this appeal) for the full disclosure of PREM 19/878/1¹. PREM 19/878 is described on the National Archive website as:

“Records of the Prime Minister’s Office: Correspondence and Papers 1979-1997. PRIME MINISTER. Communications with Jimmy Savile concerning tax deductions for charitable donations following his fund raising for Stoke Mandeville hospital”.

3. The request² was refused on 10th April 2013 with the National Archives relying upon s40(2) Personal Data and s41(1) FOIA (information provided in confidence). After a review the Appellant complained to the Commissioner who following an investigation issued Decision Notice FS50496334 upholding the refusal of the disputed information in this case on the grounds of s40(2) FOIA. In light of his decision in relation to this exemption, the Commissioner did not go on to consider s41(1) FOIA.

The Appeal

4. The Appellant appealed on 21st December 2013 and indicated that he was content for the case to be determined upon the papers. Following their application dated 18th

¹ PREM 19/878 is substantially available to the public. The disputed information concerns an undated letter to Margaret Thatcher from Jimmy Savile and a telephone message from Jimmy Savile dated 5th February 1980 (both withheld) along with certain redactions from documents within that file.

² Insofar as it relates to the withheld material in this case.

February 2014, the Cabinet Office were joined by the Tribunal as Second Respondent, as they were the public authority with direct interest in the information which had been transferred from them to the National Archive.

Personal Data

5. S40(2) FOIA provides :

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),³ 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 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, ...

6. Personal data has the same meaning as in section 1(1) of the Data Protection Act. It is not disputed that the withheld information is personal data relating to a living individual (pursuant to s1(1) of the Data Protection Act) 1998. The withheld information has been summarised by the Commissioner as concerning communications between the data subject and Jimmy Savile in which the data subject expressed their support for the fundraising effort.

7. The Tribunal has considered whether the 2 documents held in their entirety could be anonymised. We are satisfied that they could not. Their significance is derived from the data subject whose views are expressed, in the absence of this identity the documents have lost their essence. Additionally having had regard to the content of the withheld material we are satisfied that this would provide part of the mosaic of information pointing towards the identity of the data subject whose name had been removed.

³ Personal data of which the applicant is the data subject

The Data Protection Principles

8. We have considered whether disclosure would be in breach of any of the data protection principles. The data principles are set out in Schedule 1 of the DPA and insofar as they apply in this case are:

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...

Schedule I Part II gives assistance in interpreting fairness:

1(1) In determining for the purposes of the first principle whether personal data 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....

Whether disclosure would be fair

9. In relation to the reasonable expectations of the data subject Mr Corke argues that:
- a) the data subject whose personal data has been redacted cannot have an expectation that it would not be disclosed if they were acting in a work/official capacity.
 - b) He contends that if as the Commissioner states the data subject is “*unlikely ... to be aware of the existence of this information and so clearly would have no expectation that it would be disclosed*” this assumes the data subject has forgotten this information exists and had no idea that Jimmy Savile was using the correspondence to lobby the Prime Minister on this issue. He argues that the ICO ought to have considered whether the data subject was persuaded to provide correspondence backing his cause knowing it would be provided to the Prime Minister.
 - c) In light of the high profile investigations into Jimmy Savile the data subject could no longer reasonably expect that this information would not be disclosed.
10. We have had regard to the withheld material and are satisfied that it was written in a private capacity, it was addressed to Jimmy Savile and not the government. The data subjects details were provided to Mrs Thatcher by Jimmy Savile, the contents of the letter do not support the contention that the data subject was persuaded to provide the correspondence or knew it would be used by Jimmy Savile to lobby the government. We are also satisfied that the data subject would not expect that details of their

personal correspondence would be disclosed into the public domain. The correspondence dates back to 1980, prior to the Freedom of Information Act, when there would not have been an expectation that information which was provided to the government by a third party would be made available to the public. There is no evidence before us that this individual's support for Jimmy Savile's campaign was ever expressed publicly and the fact that this does not appear to have been publicised by Jimmy Savile himself lends support to the contention that this was because it was understood to be private.

The consequences of disclosure upon the data subject

11. The Appellant asks the Tribunal to consider whether the data subject's connection to Jimmy Savile was already in the public domain and he prays in aid the fact that a reference to Prince Charles was originally redacted from the same file even though it was in the public domain that he had been the patron of Jimmy Savile's fundraising appeal for Stoke Mandeville. He argues that the consequences of disclosure would be reduced if a connection was already in the public domain.
12. In addition to the reasons set out in the closed schedule, we are satisfied that the disclosure of private correspondence contrary to the expectation of privacy as set out above would be distressing. We also take into account the recent information that has come to light about Jimmy Savile means that disclosure of correspondence would be likely to be more distressing at the date of the information request than it would have been at the date that the correspondence took place. We also agree with the Commissioner's observations in relation to the prominence then and now of the data subject in concluding that the sensitivity of the information had not been reduced in the time that has elapsed.
13. For the reasons set out above we are satisfied that disclosure would be unfair.

Legitimate public interest in the disclosure of this information.

14. Additionally for the reasons set out below we are satisfied that disclosure would breach condition 6(1) as set out in Schedule 2 which provides:

“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 of legitimate interests of the data subject”.

15. The Appellant has argued that disclosure would be warranted and further the legitimate interests of the public because:
 - a) it is important to reveal dealings between those in authority and Jimmy Savile.
 - b) Jimmy Savile’s lobbying led the then government to give £500,000 of public funds to the hospital. The details of the lobbying should be made public to enable the decision to be fully scrutinised.
16. The Tribunal agrees that these are legitimate public interests, but takes into account that the majority of the file has already been disclosed, showing that Jimmy Savile lobbied the government both for tax changes and donations of public funds, and the outcomes of that lobbying. The Cabinet Office argues that the withheld information does not show that the data subject lobbied or had contact with the government on Jimmy Savile’s behalf, and that their involvement was as a private individual. We have viewed the withheld material and we accept this.
17. We have considered whether the legitimate aims of transparency and accountability could be achieved by something less than disclosure of the withheld material. Whilst we agree that the issue of lobbying requires transparency, our finding is that it is not the data subject who was lobbying directly, neither are we satisfied that they were aware that their correspondence would be used to lobby. The person lobbying was Jimmy Savile, and the extent, content and context of his lobbying has been disclosed.
18. We have had regard to the chronology as set out in the open material. Pursuant to the letter dated 21st February 1980 from the Private Secretary to the Chancellor of the Exchequer, the decision to change the covenant system followed *“The Goodman Committee on Charity Law and Voluntary Organisations having weighed the pros and cons, came down in favour of shortening the period and the National Council of Social Service has endorsed their recommendation. We have already decided to make the change in the coming Finance Bill “.*

The lobbying by Jimmy Savile took place in early February 1980 by which time, we are satisfied from the publicly available chronology as set out above, the decision had already been made.

19. Those documents that are dated, date from February 1980. The decision to donate to the Stoke Mandeville Appeal was taken in late 1981/early 1982. In the disclosed information the issue appears first to be raised by Jimmy Savile some 11 months after the correspondence that is the subject of this appeal was before the Prime Minister. The Appellant relies upon the phrase "*in all walks of life*" in support of his contention that this correspondence may have had a material impact upon the decision. That people from all walks of life were supportive is evident from the widespread support from the general public and the fact that the Prince of Wales was Patron of the Appeal. We are not satisfied that the phrase is a reference to the data subject and in light of the chronology we are not satisfied on a balance of probabilities that the correspondence from the data subject played any role in the Prime Minister's decision to provide the donation.
20. We are satisfied that the disclosure of the withheld information does not amount to a pressing social need⁴ and in light of our findings relating to fairness as set out above would be unwarranted.

Conclusion

21. For the reasons set out above we are satisfied that this appeal should be refused⁵. The Tribunal has provided a closed schedule to the decision which refers directly to the content of the closed material, this should not be disclosed without an order of the Upper Tribunal.

Dated this 15th day of July 2014

Fiona Henderson
Tribunal Judge

⁴ South Lanarkshire Council v Scottish IC 2013 UKSC 55

⁵ In light of our findings relating to s40(2) FOIA which dispose of this appeal we have not gone on to consider s41 FOIA.