



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

Appeal No: EA/2014/0081

BETWEEN

JANET TREHARNE OAKLEY

Appellant

and

INFORMATION COMMISSIONER

Respondent

Before

**Brian Kennedy QC
Jacqueline Blake
Gareth Jones**

Representation:

For the Appellant: Janet Treharne Oakley

Date of Decision: 22 August 2014

Date of Promulgation: 26 August 2014

DECISION

The Tribunal refuses the Appeal.

We direct that the requested information should not be disclosed and the Closed Bundle should remain confidential.

Introduction:

[1] The appeal is brought under section 57 of the Freedom of information Act 2000 ("FOIA"). The Tribunal and the parties worked from an open Trial Bundle ("OB") indexed and paginated and from a smaller Closed Bundle ("CB") also indexed and paginated.

[2] The impugned decision under appeal is the Decision Notice ("DN") from the Respondent dated the 31 March 2014: Reference FS50525753.

Background to the Appeal:

[3] The background to the appeal is helpfully summarised by counsel on behalf of the Respondent in his Response to the Notice of Appeal dated 14th May 2014, thus;

a) The Request

On 19 November 2010 (not 20 December 2010, as stated in error in the DN), the Appellant submitted a request to the Powys Teaching Health Board ("PTHB") for the following information:

"... all documents... other than medical case notes, involving my late father [name of late father] and my subsequent complaint on his treatment.

This will include interviews with staff (redacted), emails, memoranda, files and handwritten notes.

And obviously including communication between [named individual A] and [named individual B], or their offices."

b) The PTHB responded on 15 December 2010. It explained that it had not considered documents that fell within the scope of the Appellant's previous request for information. Therefore, it had only reviewed documentation held from the close of the previous FOIA request (11 February 2009) to the date it received her current request. The PTHB disclosed some information, but withheld one document relying on section 41 FOIA. Following an internal review, the PTHC wrote to the Appellant on 23 March 2011. It confirmed that it had identified further information that fell within the scope of her request. It confirmed that it was withholding some of these documents, relying on section 41 and section 40(2) of FOIA.

c) The withheld information is as follows:

(i) redactions made to the documents number 1 and 11 (the names of individuals within an email);

(ii) redactions made to document 254 (the name and contact details of the sender of an email and the names of the recipients); and

(iii) documents numbered 9 and 10 in their entirety (information concerning the Appellant).

d) On 30 March 2011, the Appellant contacted the Commissioner to complain about the way that her request for information had been handled. She expressed concern about both the PTHB's record-keeping and its reliance on the exemptions cited. She also requested a brief description of the content of the documents so that she could make a more informed decision. The descriptions were duly provided to the Appellant.

e) The Commissioner began an investigation and wrote to the Appellant on 17 November 2011. He indicated that he considered the information in documents 9 and 10 fell to be considered under the Data Protection Act 1998 (“DPA”). The Appellant confirmed that if she received these documents under the DPA 1998, she would not pursue her FOIA complaint. The PTHB and the Commissioner then both made determinations on these documents under the DPA. The Commissioner’s determination was made under reference RFA0424841. This determination was communicated to the Appellant.

f) The Commissioner heard nothing further from the Appellant concerning the FOIA complaint. He therefore closed that file.

g) On 20 November 2013, the Appellant contacted the Commissioner, asking whether a decision notice had ever been issued in respect of her FOIA complaint. The Commissioner confirmed that it had not, and that he would now proceed to issue a decision notice in respect of her complaint.

The Decision Notice:

[4] The Commissioner issued the DN on 31 March 2014.

a) The Commissioner found that documents 9 and 10 fell under the exemption in s.40(1) (at [42]-[45] of the DN), because:

(i) the information contained in documents 9 and 10 identified the Appellant;

(ii) any decision as to whether or not an individual is entitled to be provided with their own personal data should be made in accordance with the DPA;

(iii) the PTHB should therefore have considered this information as a subject access request under section 7 of the DPA rather than under section 41 FOIA; and

(iv) the Commissioner has already undertaken a DPA assessment under his case reference RFA0424841 and the outcome has been communicated to the parties involved.

b) The Commissioner also found that the redacted information in documents 1, 11 and 254 fell under the exemption in s.40(2). The Appellant has not appealed this part of the DN.

The Legal Framework:

[5] a) Section 40(1) FOIA provides in relevant part:

“(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

b) Personal data is defined in action 1(1) of the Data Protection Act 1998 (DPA) as follows: *“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, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual.”*

Section 40(1) is an absolute exemption. If the information is the personal data of the person making request, it is exempt from disclosure under FOIA and falls to be considered under the DPA instead.

The Appellant's Grounds of Appeal and the Commissioner's Response:

[6] The Appellant has expressly limited her appeal to the withholding of documents 9 and 10 (and any other documents in this category), rather than the redacted names and contact details in documents 1, 11 and 254. She states:

"I am asking this tribunal to grant me a redacted version of documents 9/10 and any others that might come into this category.

I do not require to know the names if [sic.] anyone involved, just the process of how my complaint was dealt with internally by Powys Health Board."

Accordingly, the Commissioner's Response addresses what the Commissioner has identified as her main grounds of appeal to the DN.

Ground 1: Criticisms of the ICO's process

The Appellant makes a number of criticisms of the conduct and process of the ICO. These do not fall within the jurisdiction of this Tribunal. The Tribunal may only consider whether the exemptions were correctly applied. The following arguments in the Appellant's grounds of appeal do not fall within the Tribunal's jurisdiction:

"The lack of a Decision Notice is why I have not been able to bring this case to a tribunal before, as the ICO had closed the case without informing me and only reopened it with a new case number when I enquired why I never had one."

"I do not think that the ICO should advise health boards on how to change and apply their choice of exemption, or offer the fact that the board should consider a 'legal advice' determination as a defence. Especially in a case of which may involve an ICO stakeholder.

Because I received no information on how I might rephrase my request more successfully, or consider other routes.

Technical advice to one party, while not explaining the loss of a public interest via a DPA contrived by the ICO, to the other parties is unfair. The following DPA which the ICO suggested was contrived as I had no knowledge that my personal information was within my father's files.

I also do not think it is right for the ICO to have switched my case to a DPA request – without explaining the consequences of losing the FoI public interest determination – as I had based my FoI request on this presumption."

"And I also do not think it fair that my case was closed without consulting me, especially since I did not agree that I did not want a Decision Notice. In fact it is on record that I asked for one and I had assumed that there would be no confusion about it.

Just because, according to the ICO employee, the case was ‘old and growing whiskers’, it does not mean that the ICO should dump a [sic.] unfinished case, nor treat the requestor with courtesy by telling them that they are doing so.”

Ground 2: Criticisms of the PTHB’s process

The Appellant makes a number of criticisms of the conduct and process of the PTHB. These also do not fall within the jurisdiction of the Tribunal. The Tribunal may only consider whether the exemptions were correctly applied. Accordingly the following arguments in the Appellant’s ground of appeal do not fall within the Tribunal’s jurisdiction:

“The comment made by an ICO stakeholder and Information Act advisory expert, employed by Powys Health Board on an external contract, was that she was mulling over withholding the medical records as I was ‘merely looking out for something else to complain about and that is why I am reluctant to let her have the notes’

This is not legal advice on an FoI request. It’s a personal comment about my motivations for wanting to find out how my father died. And this supposed motivation given as a reason or the advisor not Powys Health Board – to retain his medical records.”

Ground 3: The public interest favours disclosing documents 9 and 10

The Appellant argues:

“The information, if received as requested, could not be used for any other purpose than to highlight how the complaints system works. Any public guesses as to the parties involved could involve libel because there is no way of my knowing whether Powys employed one – or 21 - advisors...”

... my opinion is the public should be aware that records have been withheld – and roughly what they contain, so that, if they wish, they may mount a legal challenge obtaining them”

“I would ask that the Tribunal evaluate the request in the term of ‘public interest’ [sic.]. It is the provision of present and future safe healthcare against the privacy of those using blocking strategies. And if there is no problem to the quality of advice given to Powys Health Board in these files in that it was sound and proper advice – especially retrospectively (four years later and with no compensation legal or financial aspects involved) then it should be released.

If, on the other hand, the ‘advice’ was dubious, then the public should be allowed to know what they face when trying to make sense of an untimely death.

Keeping secret files like these does not lead to the present, or long term, safe health of the nation. Therein lies the public interest, for the public are potential patients who may die as a result of ‘protected’ but continuing negligence healthcare.”

“I realise that privacy in these sections are ‘set in concrete’ but the public interest test should be applied in cases where not to do so would increase the likelihood of NHS negligence and the requestor is not asking for names to be divulged.”

This Commissioner says this argument is irrelevant claiming Section 40(1) is an absolute exemption. Documents 9 and 10 reveal the personal information of the Appellant. Therefore, argues the Commissioner they are not disclosable and the public interest does not apply here.

The Tribunal unanimously agree with the Commissioners position in his response to the grounds of appeal as set out above.

The Issues:

[7] a) In her reply to the Commissioners' Response, the Appellant confirms that she seeks

to appeal the DN only in so far as it concerns documents 9 and 10 response §§33 - 45.

b)The Commissioner's decision in respect of documents 9 and 10 is at §§42 - 45 of the DN. In brief the, the Commissioner found that the information contained in documents 9 and 10 was exempt under section 40(1) FOIA and this is the focus of this appeal.

Reasons:

[8] The Commissioner made further written submissions on the claim of absolute exemption in this case. He argues that the disputed information in this case is absolutely exempt even where it may also contain some personal data about third parties. He refers us to the case of *Fenney v the Information Commissioner (EA/20008/0001)* which concerned a request relating to a police investigation into allegations against Mr Fenney and complaints he had made about certain police officers. In that case the Tribunal agreed with the Commissioner that the information requested was Mr. Fenney's personal data. It rejected Mr. Fenney's argument that some of the information was not personal data about him but was principally about the police officers in question. The Tribunal in that case noted: *"There is no basis for arguing that the DPA intended that the only data subject to be considered when assessing a document incorporating data on more than one individual is one whose data is more extensive or more significant. If information incorporates the personal data of more than one person the data controller is not required to attempt an assessment as to which of them is the more significant and to then recognise the rights to protection of that individual and ignore any others - - - The file recording how the complaint lodged by the Appellant was handled includes his personal data for the purposes of DPA section 1 and therefore falls with FOIA section 40(1). The structure of the FOIA in this respect is quite clear and is intend to avoid overlap with the DPA. The information is therefore treated as covered by an absolute exemption and fleas out of the machinery for disclosure set out in the FOIA and must be treated as a data subject request under DPA."*

[9] The Commissioner argues that the information in documents 9 and 10 "relates" to the Appellant herein, in that it is concerned with her request for information to the Trust and the Appellant can be identified from the information. Accordingly, he argues that the information contained in documents 9 and 10 constitute personal data about the Appellant and are therefore exempt from public disclosure under section 40(1) FOIA being an absolute exemption to which no public interest test applies. This Tribunal accepts this argument

[10] The Tribunal had the benefit of hearing the Appellant at an oral hearing on the 28th July 2014. The Tribunal outlined the grounds of appeal as referred to above and explained the

Commissioners reasoning, the appellant conceded that she could see the merits in the Respondents case and offered no further evidence or submissions in rebuttal. The Tribunal carefully explained the arguments made and indicated that we were in unanimous agreement with the Commissioners DN and the reasons given therein and further as set out above.

[11] The Tribunal explained that while they were sympathetic to her interest in seeing the disputed information, and it may well be that it would be reasonable for the Data Controller to release the withheld information to the appellant in the circumstances of this case, we have no jurisdiction to direct or compel the Data Controller to do so. We explained that we can only consider the appeal in relation to the DN under appeal and we explained why we regarded the DN to be correct and that we too adopt the reasoning that the disputed information constitutes personal data relating to the requestor, as we find it does, then the information is absolutely exempt under section 40(1) as we find it is and as determined by the Commissioner for these reasons set out above.

[12] In the factual circumstances outlined above and for the reasons given the Tribunal unanimously refuses this appeal

Signed:

Brian Kennedy QC

22nd August 2014.