



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

EA/2014/0161

ON APPEAL FROM:

**Information Commissioner's Decision Notice: FS50535498
Dated: 25 June 2014**

**Appellant: DAVID YOUNG
Respondent: THE INFORMATION COMMISSIONER**

Date of hearing: 16 October 2014

Date of Decision: 31 October 2014

**Before
Alison Lowton
Annabel Pilling (Judge)
Rosalind Tatam**

Date of Promulgation: 5 November 2014

Subject matter:

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

Representation:

For the Appellant: David Young

For the Respondent: Mark Thorogood

Decision

For the reasons given below, the Tribunal refuses the appeal and upholds the Decision Notice dated 25 June 2014.

Reasons for Decision

Introduction

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 25 June 2014.
2. The Decision Notice relates to a request made by the Appellant under the Freedom of Information Act 2000 (the 'FOIA') to the Dartford Borough Council ('the Council') for information broadly concerning the employment details of staff in the benefits section of the Council.
3. The Council 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 Council. He concluded that the Council had correctly relied upon the exemption set out at section 40(2) and did not require the Council to take any further steps.

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. 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. The only part of the Appellant's original request for information which is outstanding is the exact date a named individual took up a specific managerial position. The Appellant has been informed that this was in January 2008 but has not been provided with the precise date during that month that the individual had been formally appointed.
8. 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.
9. 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.
10. The exemption provided for in section 40 FOIA is an absolute exemption.
11. 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

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

² [2008] UKHL 47

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....”

12. 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”).

13. 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 the disclosure of the information.

14. 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.*

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

16. 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.*

17. There is no dispute that the disputed information in this case is personal data.
18. The only potentially applicable condition in Schedule 2 is paragraph 6(1). The Upper Tribunal³ has recently considered the meaning of “necessary” in this context; it does not mean “essential or indispensable” but “connotes a degree of importance or urgency that is lower than absolute necessity but greater than a mere desire or wish.”
19. The Appellant submits that the personal data should be disclosed for the following reasons:
- (i) That as Benefits Manager the individual obtains information about members of the public “without any consideration of what is fair to them”,
 - (ii) That claimants should know who the Benefits Manager is “at the time their personal information is being handled”
20. Notwithstanding the reasonable expectations of the individual or any distress caused to them by disclosure, it may still be fair to disclose the requested information if there is a more compelling public interest in releasing the information. In this case, we have been told that the individual did not consent to the information being disclosed but were provided with no evidence on this. Nor did the Council identify how or why the individual would be at risk should the information be disclosed. These are matters we should take into account when deciding whether the disclosure of the information would be fair.
21. However, to comply with the first data protection principle, the fairness of any disclosure specifically includes a requirement that at least one of

³ *Farrand v Information Commissioner* GIA/105/2014

the Schedule 2 conditions be met. There is nothing before us that would make us satisfied that the disclosure of this personal data is “necessary” “for the purposes” of any “legitimate interests” being “pursued” by the Appellant.

22. As no Schedule 2 condition is met, we must conclude that to disclose this personal data of the individual would breach the first data protection principle. We therefore find that section 40(2) FOIA is engaged.

23. We refuse this appeal and uphold the Decision Notice. Our decision is unanimous.

24. We consider that this appeal has been a regrettable expenditure of public money in light of the personal data provided to the Appellant in respect of the individual being formally appointed in January 2008.

Annabel Pilling

Judge

31 October 2014