IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2014/0167
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50506312
Dated: 9 June 2014

Appellant:	**PATRIZIA CIALFI**
1st Respondent:	**INFORMATION COMMISSIONER**
2nd Respondent:	**THE CABINET OFFICE**
Heard at:	**FIELD HOUSE, LONDON**
Date of hearing:	**5 DECEMBER 2014**
Date of decision:	**22 DECEMBER 2014**

Before

ROBIN CALLENDER SMITH
Judge

and

Suzanne Cosgrave and Marion Saunders
Tribunal Members

Attendances:

For the Appellant: Ms P Cialfi did not attend but submitted written representations.
For the 1st Respondent: Mr C Knight, Counsel instructed by the Information Commissioner
For the 2nd Respondent: Mr R Dunlop, Counsel instructed by the Cabinet Office

IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2014/0167
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Subject matter:

FREEDOM OF INFORMATION ACT 2000

Absolute exemptions

- Confidential information s.41
- Prohibitions on disclosure s.44

DATA PROTECTION ACT 1998

Confidentiality of information s.59

Cases:

Friends of the Earth v Information Commissioner & Department for Trade and Industry (EA/2006/0039) and *Ofcom v Morrissey & Information Commissioner* [2011] UKUT 116 AAC.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 9 June 2014 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. In this appeal the Information Commissioner features both as the Respondent – as the statutory regulator – and also as the relevant public authority. For clarity "Commissioner" is used to refer to the Information Commissioner in his role as a statutory regulator and "ICO" is used to refer to the Information Commissioner in his role as a public authority.

2. Ms Patrizia Cialfi (the Appellant) complained to the Commissioner about the handling of two information requests she had made to the Cabinet Office.

3. In respect of the first request the Commissioner decided that the Cabinet Office did hold one document that fell within the scope of the Appellant's 27 October 2011 request. The Commissioner did not order the Cabinet

Office to take any particular steps as there was evidence that the Appellant already had the document.

4. She had asked for information about any involvement or association between the Cabinet Office and the organisation Common Purpose. The Cabinet Office told her it did not hold any such information but, because there was then further correspondence from the Appellant disputing that assertion, the Cabinet Office had treated that as a further request for correspondence held about Common Purpose which it deemed vexatious under the provisions of section 14 (1) FOIA.

5. In relation to this request the Commissioner found that the Cabinet Office had been incorrect to rely on section 14 (1) FOIA – the "vexatiousness" provision – and ordered the Cabinet Office to issue a fresh response to the Appellant's request.

6. In Decision Notice FS50435121, which was dated 28 January 2013, Information Commissioner had investigated whether the Cabinet Office retained any information - such as training records - from the National School of Government (NSG), responsibility for which had been transferred to the Cabinet Office on 1 April 2011 for the last year of its existence. The NSG provided training and development services to the civil service as a whole and used Common Purpose as a sub- contractor to deliver senior leadership training. The Cabinet Office stated that the transfer had been solely to manage the closure of the NSG. Its successor organisation, Civil Service Learning, became operational on 1 April 2011.

7. The Information Commissioner accepted that the NSG transfer to the Cabinet Office was purely temporary and a transitory provision. He had accepted that, on the balance of probabilities, the Cabinet Office did not hold any information within the scope of the Appellant's requests on this point. He concluded that the Cabinet Office had not been involved in any projects or activities involving Common Purpose.

8. Then, on 29 January 2013 the Appellant requested from the ICO copies of the letters received from the Cabinet Office during the Commissioner's investigation into case FS50435121.

9. The ICO refused that request on the basis of section 31 (1) FOIA and – to the extent that the information constituted personal data about the Appellant – section 59 of the Data Protection Act 1998 (DPA).

10. This request was repeated on 28 March 2013. The ICO wrote to advise the Appellant that it would now be handled as a new request for information.[1]

11. On 29 April 2013 the ICO told the Appellant that he was refusing to disclose the requested information on the basis of section 44 (1) (a) FOIA in conjunction with section 59 of the DPA. On 1 May 2013 the Appellant complained to the ICO about the handling of her request. The ICO treated that complaint as a request for an internal review. On 30 May 2013 the ICO responded explaining it was upholding the original response on the same basis although it did provide some further detail about its reasons. The ICO also explained it had identified a small amount of the Appellant's personal data within the correspondence and arranged for that to be sent to the Appellant separately.

12. When the Appellant received that further information she requested a "review". The ICO advised her of her right to make a complaint to the Commissioner under section 50 FOIA. It is that appeal which is before the Tribunal in this matter.

The relevant law

13. The duty to provide the requested information in section 1 (1) (b) FOIA does not arise where the information is exempt under provisions contained in Part II FOIA. Those exemptions fall into two classes: absolute and

[1] "I am sorry if this proposal seems rather bureaucratic, in respect of the precise timing of your request, but it is often the case that when circumstances change, certain exemptions under the Acts can cease to apply." ICO letter to Appellant dated 27 March 2013 (page 56 of Open Bundle).

qualified exemptions. If the information is subject to a qualified exemption, it is only exempt from disclosure if – in all the circumstances – the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

14. Section 44 (1) (a) is an absolute exemption where "information…. if its disclosure (otherwise than under this Act) by the public authority holding it is prohibited by or under any enactment."

15. Section 59 (1) DPA provides:

> No person who is or has been the Commissioner, a member of the Commissioner's staff or an agent of the Commissioner shall disclose any information which –
>
> (a) has been obtained by, or furnished to, the Commissioner under or for the purposes of the information Acts,
>
> (b) relates to an identified or identifiable individual or business, and
>
> (c) is not at the time of the disclosure, and has not previously been, available to the public from other sources unless the disclosure is made with lawful authority.

16. Section 59 (2) DPA sets out a series of "gateways" which give "lawful authority" that allow – but which do not compel – the disclosure of information in certain cases. Section 52 (2) provides:

> For the purposes of subsection (1) a disclosure of information is made with lawful authority only if, and to the extent that –
>
> (a) the disclosure is made with the consent of the individual or of the person for the time being carrying on the business,

(b) the information was provided for the purpose of its being made available to the public (in whatever manner) under any provision of the information Acts,

(c) the disclosure is made for the purposes of, and is necessary for, the discharge of –

(i) any functions under the information Acts, or

(ii) any EU obligation,

(d) the disclosure is made for the purposes of any proceedings, whether criminal or civil and whether arising under, or by virtue of, the information Acts or otherwise, or

(e) having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest.

(3) Any person who knowingly or recklessly discloses information in contravention of subsection (1) is guilty of an offence.

(4) In this section "the information Acts" means this Act and the Freedom of Information Act 2000.

The Information Commissioner's Decision of 9 June 2014

17. The Disputed Information in question was the correspondence received from the Cabinet Office in relation to the Appellant's earlier information requests in relation to Common Purpose.

18. Section 44 (1) (a) of FOIA applied to information if its disclosure was prohibited by or under any enactment. Section 59 DPA operated to maintain, where appropriate, the confidentiality of information provided to the Commissioner in his role as regulator for both FOIA and the DPA.

19. The Commissioner had received the Disputed Information in the course of his investigation of a complaint under section 50 FOIA and this was solely as the result of his role as regulator of FOIA.

20. Section 59 DPA set out three criteria in relation to the confidentiality of that information and he maintained that he was correct to conclude that section 59 (1) was properly engaged. He had then gone on to consider section 59 (2) and concluded that none of the exceptions or "gateways" to provide "lawful authority" were met.

21. On that basis he had found that section 44 (1) (a) had been correctly applied and that the withheld information was exempt from disclosure under the provisions of section 59 DPA.

The appeal to the Tribunal

22. The Appellant set out her position clearly and cogently in her Grounds of Appeal and in subsequent written material sent to the Tribunal ahead of the appeal hearing itself.

23. Her position was and remains that section 44 (1) (a) FOIA had been incorrectly applied by the Commissioner.

24. She challenged the idea that it could be in the public interest for correspondence between two public authorities about a data subject (in this case herself) to be withheld from her. She asked the Tribunal to examine the material that was being withheld and which had been redacted and to order disclosure of it to her.

25. She maintained that, even if the First Tier Tribunal did not have power to override section 59 DPA, then the Upper Tribunal had the power to strike out its effect. This was on the basis that section 59 completely neutralised the intent of FOIA in terms of the rights of the data subject, guaranteeing that public authorities could always communicate secretly on issues relating to the data subject.

26. She stated in particular:

> It cannot be right that if a public authority chooses to apply one law to process a request for information, FOIA, then that public authority

should use clauses of the same law to call in and then apply another law, DPA, to refuse to provide information that belongs to the requester.

The public authority has split my request into issues for FOIA and DPA. However, BOTH are aspects of MY case and refers to MY information, which, for this case, is being denied to me.

If the public authority is going to say something about a request to the Commissioner…. then honesty, transparency and accountability must be followed.

Conclusion and remedy

27. The Tribunal was provided in advance of the hearing with an agreed bundle of material which included the information being withheld from the Appellant.

28. The Tribunal reminded itself of the recent guidance for the approach to be taken by courts and tribunals in respect of any closed material procedure.

29. In *Bank Mellat v HMT (no.1)* [2013] UKSC 38, which was not a case about FOIA, Lord Neuberger said at paragraphs 68-74 that:

i) If closed material is necessary, the parties should try to minimise the extent of any closed hearing.

ii) If there is a closed hearing, the lawyers representing the party relying on the closed material should give the excluded party as much information as possible about the closed documents relied on.

iii) Where open and closed judgments are given, it is highly desirable that in the open judgment the judge/Tribunal (i) identifies every conclusion in the open judgment reached in whole or in part in the light of points made or evidence referred to in the closed judgment and (ii) says that this is what they have done.

iv) A judge/Tribunal who has relied on closed material in a closed judgment should say in the open judgment as much as can properly be

said about the closed material relied on. Any party excluded from the closed hearing should know as much as possible about the court's reasoning, and the evidence and the arguments it has received.

30. In *Browning v Information Commissioner and Department for Business, Innovation and Skills* [2013] UKUT 0236 (AAC) the Upper Tribunal issued similar guidance about the use of closed material and hearings in FOIA cases, noting that such practices are likely to be unavoidable in resolving disputes in this context:

    i) FOIA appeals are unlike criminal or other civil proceedings. The Tribunal's function is investigative, i.e. it is not concerned with the resolution of an adversarial civil case based on competing interests.

    ii) Closed procedures may therefore be necessary, for consideration not only of the disputed material itself, but also of supporting evidence which itself attracts similar sensitivities.

    iii) Parliament did not intend disproportionate satellite litigation to arise from the use of closed procedures in FOIA cases.

    iv) Tribunals should take into account the Practice Note on Closed Material in Information Rights Cases (issued in May 2012). They should follow it or explain why they have decided not to do so.

    v) Throughout the proceedings, the Tribunal must keep under review whether information about closed material should be provided to an excluded party.

31. The closed bundle in this appeal contained the disputed information. There was nothing additional in the closed bundle and it was necessary for the Tribunal to see the disputed information in order to reach its decision.

32. The Tribunal has considered carefully and rigorously the Appellant's points and concerns – already expressed in the Grounds of Appeal and in her other representations – and concluded that to disclose it to the Appellant would not be lawful for the reasons which follow below.

33. Although the Tribunal cannot refer to every document in this Decision, it has had regard to all the material before it.

34. The Tribunal heard oral submissions on arguments that had been served in advance of the appeal hearing on the Appellant and which she had acknowledged both receiving and considering.

35. As was pointed out by Counsel for the Information Commissioner at the appeal hearing, the only authoritative guidance on the meaning and application of section 59 DPA was the decision of the Tribunal in *Friends of the Earth v Information Commissioner & Department for Trade and Industry* (EA/2006/0039). The ICO's office has two functions. Firstly there is the range of functions with which the ICO is trusted or empowered to carry out and secondly the range of information which he is likely to receive.

36. The Appellant sought correspondence which had been provided to the ICO precisely for the purposes of an investigation he was conducting under FOIA into the Cabinet Office. That particular correspondence – the Disputed Information – cannot otherwise be obtained and is not publicly available otherwise the Appellant would not be requesting it.

37. The Friends of the Earth judgement clearly states that the activities of a public authority – which must include compliance with its regulatory obligations by corresponding with the ICO – falls within the definition of "relates to an identified… business".

38. An example of disclosure which is lawful and does not constitute a criminal offence in the context of this legislation is the disclosure of the Disputed Information to the Tribunal for the purposes of this appeal. That is lawful by virtue of section 59 (2) (d) DPA.

39. The Appellant has made three distinct arguments in support of her request

    (1) The information requested is her personal information and is being withheld from her.

(2) The reliance by the Cabinet Office on s44 (1) (a) FOIA exemption was in error.

(3) There is a public interest in the information supplied by the Cabinet Office to the ICO being made available to the Appellant on grounds of openness, transparency, honesty and accountability. Further the Appellant believes the Disputed Information would demonstrate that the public authority, the Cabinet Office, had lied to the ICO.

40. If she is correct on her first point i.e. that the Disputed Information relates to her i.e. is personal information then the Tribunal has no jurisdiction in that regard. Section 40(1) FOIA makes it very clear that personal information of the Appellant as the data subject is exempt information under FOIA. Without revealing what the Disputed Information contains the Tribunal also considered the Appellant's second and third arguments in relation to any / all of the Disputed Information which is not the personal data of the Appellant.

41. In relation to the Appellant's second point, the Upper Tribunal has made it clear that in a section 44 FOIA case such as this the Commissioner has no jurisdiction to call into question the reasonableness of the Cabinet Office's reliance on the prohibition…. and this Tribunal has no jurisdiction to do so either: *Ofcom v Morrissey & Information Commissioner* [2011] UKUT116 AAC. So the Tribunal has considered the operation of both s44 FOIA and s59 DPA in relation to the request and the Disputed information.

42. The Tribunal understood the Appellant's argument to be that she should receive the information from the Commissioner so that she can assess the validity of what the Cabinet Office told the ICO during the course of the investigation. In that sense the Appellant is submitting that disclosure is "necessary" in the public interest within the meaning of section 59 (2) (e) DPA:

> "...having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest."

43. It is in the Tribunal's opinion that there is some but very little weight in Appellant's expressed public interest to see the information provided in confidence by the Cabinet Office to the ICO which having been considered by the ICO produced a decision in favour of the Appellant. The public interest against disclosure is that for the effective regulation of the Information Acts the law as drafted recognises in section 59 of DPA the need for such information to be expressly precluded from disclosure. To make this information available routinely would defeat the whole purpose of the confidentiality of the disclosure by public authorities to the ICO.

44. Irrespective of the public interest in the disputed information being disclosed, there is no reason why the Appellant could not have made the request for the same information to the Cabinet Office as the originators of the disputed information instead of to the ICO.

45. It is therefore not "necessary" for the ICO to provide the information in circumstances in which that information could be sought under FOIA from the Cabinet Office. The Appellant might not have been successful with such a request but the Cabinet Office is the obvious starting point for the request and it seems clear section 59 DPA disclosures in these circumstances would not be potentially a criminal offence.

46. The effectiveness of the ICO's investigatory functions depends on the cooperation of public authorities and the provision by them of prompt and full responses to issues raised in the course of any investigation.

47. Unfortunately that quite valid and proper rationale has been characterised by the Appellant as concealing "lies and deceit" on behalf of the Cabinet Office while suggesting that the ICO is the "government's gatekeeper for maintaining secrecy". The Appellant seems to ignore the fact – in making those comments – that the ICO ruled against the Cabinet Office's reliance on section 14 FOIA i.e. of a vexatious request and in favour of the Appellant.

48. The Tribunal is satisfied, for all these reasons, that the absolute exemption in section 44 FOIA applies to the disputed information.

49. Our decision is unanimous.

50. There is no order as to costs.

Robin Callender Smith

Judge

22 December 2014