



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

**Case No. EA/2014/0085**

**ON APPEAL FROM:**

The Information Commissioner's  
Decision Notice No: FS50521496  
Dated: 11 March 2014

**Appellant: DAVID ROWLANDS**  
**Respondent: INFORMATION COMMISSIONER**  
**On the papers 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

**Written representations:**

For the Appellant: Mr David Rowland

For the Respondent: Ms Michele Voznick, Solicitor for the Information Commissioner

**Subject matter: FOIA 2000**

Absolute exemptions

- Personal data s.40

**Cases:**

*Wagh v Information Commissioner and Doncaster College (EA/2008/0038).*

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal upholds the decision notice dated 11 March 2014 and dismisses the appeal.

**REASONS FOR DECISION**

**Background**

1. On 6 August 2013 Mr David Rowland (the Appellant) made an information request to the London Borough of Redbridge (the Council) during correspondence.
2. He asked six questions about a named person who had been the Chief Executive of Redbridge Homes Limited (RHL), a former provider of social housing to the Council, in respect of an internal investigation and employment tribunal proceedings. RHL had been the Council's "arm's length management organisation (almo)", managing the Council's housing stock.
3. The questions were:
  - (1) Was a substantial amount paid to [named person]?
  - (2) Was it paid in order to avoid [an] Industrial Tribunal?
  - (3) Did lawyers from the Council authorise any payments to her or to her lawyers?

- (4) Did [named person] have her own lawyers?
  - (5) At the time that the annual payment for legal services was negotiated was it known that [named person] or anyone else from RHL would be seeking to negotiate a departure from RHL?
  - (6) If, as the second paragraph of your letter says, the company has lawyers why do they need to be paying for the Council's lawyers?
4. The Council replied stating that the information in (1), (2) and (4) was exempt from disclosure under section 40 FOIA. In respect of (3) the Council stated that it was not aware of the lawyer being permitted to authorise payments. In respect of (5), no information was held and – for (6) – the Council stated that a response had already been provided in previous correspondence.
5. Following an internal review the Council continued to maintain that (1), (2) and (4) was information withheld under section 40 FOIA.

#### The complaint to the Information Commissioner

6. In his complaint to the Commissioner, the Appellant accepted that the investigation would be restricted to those three section 40 FOIA refusals.
7. The Commissioner determined that (1) and (2) were not valid requests for information because they sought an opinion from the Council rather than seeking recorded information. Had the Commissioner not taken that course he considered that those two items would be exempt from disclosure under section 40 (2) FOIA.
8. In relation to (4) the Commissioner concluded that the requested information constituted the named person's personal data. He considered whether disclosure of that information would breach the data protection principles – in particular the first data protection principle – and took into account factors including the reasonable expectations of the named individual and the consequences of disclosure.

9. The Commissioner considered that information relating to an internal investigation or disciplinary hearings carried a strong expectation of privacy. In this case it would be unfair and would breach the first data protection principle to disclose the information because:

- (1) The expectations of the named individual were in the context of a settled matter when there was no employment tribunal hearing. The information had not been made public then and the likely expectation was that the information would not be made public in the future.
- (2) The Commissioner gave particular weight to the fact that the employment dispute had been settled without a public hearing. To disclose the information in the context of that resolution of the dispute would be likely to cause distress to the named individual.
- (3) While there was some weight to be attached to the legitimate interest in disclosure of the information to the public that was outweighed by the damage and distress that disclosure would create.

#### The appeal to the Tribunal

10. In his Grounds of Appeal and subsequent comments on the Information Commissioner's submissions the Appellant made the following points:

- (1) He did not accept the argument put forward about (1), (2) and (4) on the ground that the type of information which the Council did not want to disclose was not covered by section 40 FOIA.
- (2) His use of the word "substantial" to describe the amount of money awarded to the former chief executive should not allow the Council to avoid answering the question. He believed that it was clear that the Council would have recorded information on the matter. He was simply trying to avoid the risk that the Council would seize on the slightest inaccuracy if he had named a specific figure.
- (3) He did not believe the matter was settled as far as Council Taxpayers were concerned. There had been allegations of wrongdoing by the chief executive and the fact that there was no tribunal simply meant that evidence of misbehaviour was not made known to the public. Because there had been no tribunal hearing that meant the public would not know what was happening. That suggested strongly that payment had been made, an employment tribunal avoided and the chief executive simply spared embarrassment rather than being distressed. Why, he asked, would someone be "distressed" as a result of receiving a large sum of money when she could have gone to a tribunal?

- (4) “Personal data” could be categorised under a number of headings, none of which obviously applied to the chief executive in this case. He was Council Taxpayer and might have contributed to any payments made to chief executive to compromise the action. That gave him a legitimate interest. He did not have any prejudice to the rights and freedoms the chief executive so the processing of personal data could not be unwarranted.

### The questions for the Tribunal

11. Was the approach adopted by the Council and Commissioner in respect of the information requests – and in particular section 40 FOIA – correct?

### Conclusion and remedy

12. Under FOIA, a public authority is required to communicate information requested from it in certain circumstances and unless an exemption applies. Section 40(2) FOIA provides an exemption for personal data where disclosure of the information would contravene one of the data protection principles set out in the Data Protection Act 1998 (DPA).

13. Of relevance is the first data protection principle, which states:

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...

14. Therefore, disclosure of data under the DPA must be done (1) fairly, (2) lawfully and (3) meet at least one of the conditions in Schedule 2. In assessing what is “fair”, the Tribunal is assisted by the decision in *AB v A Chief Constable* [2014] EWHC 1965 (QB).

15. This explains, at Paragraph 75, that disclosure of data under the DPA involves an assessment of fairness as a balancing of interests as follows:

... There is no definition of fairness in the 1998 Act. The Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, to which the 1998 Act gives effect, contains a reference to protecting privacy rights, as recognised in article 8 of the European Convention on Human Rights and in general principles of EU law: recital 10. However, I cannot accept Mr Lock QC's submission that the

duty of fairness under the Directive and the 1998 Act is a duty to be fair primarily to the data subject. The rights to private and family life in Article 8 are subject to the countervailing public interests set out in Article 8(2). So it is here: assessing fairness involves a balancing of the interests of the data subject in non-disclosure against the public interest in disclosure.

16. For a disclosure of personal information to be fair one of the conditions in Schedule 2 of the DPA must also be satisfied. Paragraph 6(1) of Schedule 2 states:

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 interests of the data subject.

17. It follows that disclosure must be fair to the affected parties. This includes consideration of the reasonable expectations of the data subjects which is assessed in the light of the relevant context.

18. In considering Mr Rowland's specific arguments

- (1) The information requested in his requests numbered (1), (2) and (4) was in each case in the opinion of Tribunal, the personal data of a third party and hence section 40(2) FOIA was engaged
- (2) The request (1) phrased "Was a substantial amount paid to [named person]?" was, in the Tribunal's opinion, a request for an opinion and hence not a valid request for information held. If we are wrong on that point then our arguments concerning the balance of public and private interest in relation to Schedule 2 paragraph 6(1) would also apply.
- (3) The Appellant's third point (see (10(3))) were considered by the Tribunal to be the arguments in support of his legitimate interests as a third party in relation to the data. These we accepted were in regard to the request (1) transparency and accountability of public bodies to the public and in their dealings with employees and use of public i.e. taxpayers funds; in relation to (2) transparency and accountability of public bodies and in relation to (4) transparency and accountability of public bodies and accountability in relation to use of taxpayers funds,

on the assumption that knowing if the named individual had used his/her own lawyers would have indicated costs being met by the public body. The Appellant suggested, but provided no evidence of alleged wrongdoing or misbehaviour, by the named individual. However the ICO's counter arguments related to the reasonable expectations of the individual and the consequences of disclosure. The Tribunal, like the Commissioner, takes the view that whilst there is a public interest in disclosure it is not sufficient to outweigh the prejudice to the rights of the individual, for example his/her right to privacy in relation to an employment dispute with his/her employer which had been settled without a public hearing and the strong expectation of privacy relating to disciplinary hearings. The Tribunal also notes and agree with the inference drawn by the ICO that the fact a data subject challenged his/her dismissal resulting in a settlement prior to a public hearing as being indicative that there was no conclusive finding of wrongdoing and that The Tribunal considers that the Condition 6(1) in Schedule 2 is therefore not met.

19. The context of this case – particularly when third party personal information is requested for disclosure under FOIA and would be effectively disclosed to the world at large – is very similar to an existing Tribunal case: *Waugh v IC & Doncaster College* (EA/2008/0038).
20. In that case, it would have been unfair and not lawful to disclose personal third-party information about a former Principal of Doncaster College who had left his position by agreement with his former employers.
21. The Tribunal finds that the Commissioner was correct to conclude, in considering the application of the first data protection principle, that the expectations of the individual affected here outweighed the legitimate interests of the public in the information being revealed.
22. For these reasons, the Appellant's appeal must fail.
23. Our decision is unanimous.

24. There is no order as to costs.

Robin Callender Smith  
Judge  
22 December 2014