

FREEDOM OF INFORMATION ACT 2000

Heard on Papers
on 22nd June 2006

Decision Promulgated

11th July 2006

Before

CHRISTOPHER RYAN – DEPUTY CHAIRMAN
DAVE SIVERS – LAY MEMBER
SUZANNE COSGRAVE – LAY MEMBER

Between

A

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

We have decided to dismiss the Appeal.

Reasons for Decision

1. In 2004 the Appellant's son (for reasons of confidentiality we will refer to him simply as X) attended a school in Powys, Wales. On 1 April 2004 the head teacher of that school wrote a letter to Powys County Council (the Council) to request additional funding to enable the school to provide additional teaching support that X required.
2. On 10 January 2005 the Appellant made a request to the Council under the Freedom of Information Act 2000 (FOIA) that he be provided with a copy of the letter. Although the Council complied with that request the copy provided had certain sections redacted because the Council believed that the redacted passages contained information that it was

entitled to withhold as being exempt under various provisions of FOIA. The reasons for exemption included the statement that the material withheld included personal information relating to a number of third parties, which the Council was entitled to treat as exempt under section 40 FOIA. The Appellant believed that all of the information should have been disclosed to him and subsequently complained to the Information Commissioner under FOIA section 50.

3. In the course of the Information Commissioner's investigation of the Appellant's complaint the issues under consideration were narrowed. This was achieved in two ways. First, part of one redacted passage was disclosed to the Appellant by the Council and, in respect of another part, a summary was provided to the Appellant. This was done under the direction of the Information Commissioner, but the Council appears to have been a willing participant in the attempt to allay the Appellant's concerns about the head teacher's letter. The second narrowing of issues arose because the Information Commissioner rejected some of the grounds on which the Council had relied. The Council has not appealed from that part of the Information Commissioner's decision. The only ground that survived, and which we have to consider, is one based on FOIA section 40.
4. We should add that the Information Commissioner also considered FOIA section 41. This creates an absolute exemption from disclosure in respect of information obtained by a public authority, the disclosure of which would constitute an actionable breach of confidence. However, he concluded that, in the light of his conclusion under section 40, it was not necessary for him to consider whether or not section 41 applied. That conclusion was not challenged by the Appellant in his grounds of appeal and we have not considered it further in view of our own conclusion (see below) that the section 40 exemption applies.
5. FOIA section 40 is a complex provision. It appears to have been designed to ensure that the interests of those requesting information from a public authority do not undermine, unnecessarily, the interests of those individuals whose personal information might find itself into the public domain as a result of the public authority complying with such a request. It provides that, in relation to information about any individual (other than the person making the request), the information is exempt from disclosure if it constitutes "personal data" about that individual and one of two conditions is satisfied. The two conditions are set out in sub sections 3 and 4 of section 40 and are as follows:

"(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 under this Act would contravene –

- (i) any of the data protection principles, or
- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relates to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data)."

6. The Information Commissioner rejected the Appellant's complaint in a Decision Notice dated 7 March 2006. He did so quite shortly, in the following terms:

"The information withheld by the Council under section 40 of the [FOIA] does, in the Commissioner's view, constitute personal data about third parties. The Commissioner considers that the release of this information to a member of the public would contravene at least one of the data protection principles set out in the Data Protection Act 1998"

7. On 14 March 2006 the Appellant launched an appeal to this Tribunal from the Decision Notice. Having considered the Grounds of Appeal and the Reply that was subsequently filed by the Information Commissioner, the Tribunal issued a direction to the effect that an unedited version of the head teacher's letter should be disclosed to the Tribunal and that, given that both parties had indicated that they did not require a hearing, the matter should thereafter be disposed of on the basis of the documents already filed. The parties were given the opportunity to apply for any further directions that they considered necessary, but neither did so.
8. For obvious reasons we have to explain our reasons for reaching a decision on this Appeal without revealing the very information that the Council originally withheld. However, we can disclose the following information, which may help to put our decision into context:
 - a. The first redacted passage formed part of a sentence in the head teacher's letter which dealt with the concern of two unnamed teachers at having X back in class with no support. It is clear from the unedited version that we have seen that the redacted words contained personal information about the two teachers.
 - b. The second redacted passage consisted of four sentences spread over two paragraphs. As we have mentioned above a summary was provided to the Appellant. The summary read:

"There is a current legal claim against the school following an injury to a teacher in 2000 caused by another child. The claim raises, in part, the issue of how the school should have dealt with that child and has wider implications for the school."

It is evident from our reading of the unedited version of the head teacher's letter that the summary is accurate. It is complete in all respects, except that, as the Appellant was informed when the summary was sent to him, it did not include any information in respect of one sentence of the redacted passage. However, we can again state, on the basis of our having read the unedited version, that the sentence in question contained personal information about someone who was not the Appellant and was not X.

9. In order to consider the facts of the case under FOIA section 40 we must first decide whether the third party personal information withheld from the Appellant, and referred to above, constituted "personal data" about those third parties.
10. The definition of "personal data" is set out in section 1(1) of the Data Protection Act 1998 ("the 1998 Act"). The relevant part of the definition provides that the expression 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 likely to come into the possession of, the data controller". The "data controller" for these purposes was the Council. The word "data" is itself defined as "information which –

- (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
- (b) is recorded with the intention that it should be processed by means of such equipment,
- (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system,
- (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68, or
- (e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d);"

11. As to the "personal" element of the definition, we find, as a fact, that each of the third parties concerned are either identified in the redacted passage that refers to him or her, or are identifiable from a combination of information in those passages and other information in the Council's possession. The Appellant has suggested in his grounds of appeal that it is necessary for the third party to be named in order for the information about him or her to fall within the definition. We reject that argument; it is quite clear from the definition that this is not a requirement.
12. We also find that the information in question fell within sub-paragraph (e) of the definition. The Appellant has argued in his grounds of appeal that, in order to qualify for exemption, the information needed to have been "held by structured reference to an individual". However, it is clear that, in the case of a public authority, even unstructured data is capable of falling within the definition.
13. The information will thus be exempt from disclosure if its release would, in the words of FOIA section 40(3)(b) quoted above, "contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relates to manual data held by public authorities) were disregarded". We must therefore consider the data protection principles, as they are set out in section 4(4) and Schedule 1 of the 1998 Act and without the gloss provided by section 33A(1).
14. The data protection principles set out a number of principles regulating the way in which a "data controller" (in this case the Council) should "process" personal data. The word "process" is very widely defined but it is sufficient, for the purposes of this decision, to recognise that it would include disclosure to a third party or the public at large.
15. The first Principle provides that personal data shall be processed "fairly and lawfully". It provides that "in particular" personal data, should not be processed (which means, for the purposes of this decision, disclosed) unless (paraphrasing Schedule 2 of the 1998 Act and applying it to the facts of this case):
- i. each of the individuals consents;
 - ii. the disclosure is necessary for the performance of a contract to which the individual is a party, or is a necessary pre-requisite for such a contract;
 - iii. the disclosure is necessary for compliance with any legal obligation to which the Council is subject;
 - iv. the disclosure is necessary to protect the vital interests of the individual;
 - v. the disclosure is necessary for the administration of justice or certain other public functions that do not apply to this case;
 - vi. the disclosure is necessary for the "purposes of legitimate interests pursued by [the Council] 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 [individual].”

16. We find that the disclosure of the personal data in question would have contravened the first principle. It might also have contravened other principles, but we do not consider it necessary to explore that possibility further, in light of our finding on this point. Nor do we consider it necessary to consider whether the personal information in question might fall within the any of sub-paragraphs (a) to (d) of the definition . Our findings lead us to the conclusion that the information in question was exempt from disclosure by the Council to the Appellant under FOIA section 40 and it is not necessary for us to consider whether or not it would also be exempt under any other provisions.

17. The Appellant put forward additional arguments in his grounds of appeal, which we should deal with. They were the following:

- a. The Appellant argued that any element of unfairness to a third party whose personal data were disclosed should be balanced against the unfairness that the Appellant considered that his child would suffer if the information in question was withheld from him. FOIA section 40 creates an absolute exemption and there is therefore no requirement on us, having decided that it applies to the facts of this case, to balance the public interest in disclosure against the public interest in maintaining the exemption. Section 40 requires us to apply the “fair and lawful processing” test imposed by the first data protection principle. The use of the expression “in particular” in the first principle, demonstrates that there is a general obligation to process data fairly, in addition to the requirement to comply with the detailed conditions listed in Schedule 2 to the 1998 Act. However, the Schedule 2 condition quoted in paragraph 15.vi) above, with its reference to the “legitimate interests” of both the data controller and the data subject, incorporates into those conditions a balancing exercise and we believe that we should not, in those circumstances, impose a separate or additional test by reference to the general requirement of fairness. Applying the condition in question, we conclude that any legitimate interest that the Council may have in disclosing the relevant information to the Appellant would not justify disclosure (i.e. the disclosure would be “unwarranted”) in the light of the legitimate interests of the individuals whose personal data would be disclosed as a result.

Further, on our reading of the unedited version of the head teacher’s letter we cannot see that any unfairness could be suffered by X as a result of the redacted information being withheld. Even if there were any degree of unfairness, we do not think that it should outweigh the interests of those whose personal data would be disclosed if the Appellant succeeded.

- b. The Appellant argues that the Information Commissioner failed to apply the provisions of the Data Protection (Subject Access Modification) (Education) Order 2000. It is evident from the terms of the Order that it would only apply to a request under the 1998 Act by X, as the relevant data subject, to have his own personal data disclosed to him. The Order has no application in the present circumstances in which the Appellant is seeking the disclosure of the personal data of certain third parties under the FOIA.

- c. The Appellant also argued that withholding the information operated as an unjustified interference with the Appellant's own right to check the accuracy of information held in relation to X. We consider that this is an alternative presentation of the earlier, fairness, point at (a) above. We add that the redacted information does not relate to X and that we are unable to see how it might prejudice X, even if it were inaccurate in any respect.
- d. Finally, the Appellant has suggested that the grounds put forward by the Council to justify withholding the information in question have changed from time to time and has expressed the view that "this changing picture casts (sic) doubt on the solidity of the conviction in the arguments put forward ..." . It is our opinion that the Information Commissioner investigated the Appellant's complaint with vigour and analytical accuracy. In doing so, and from a position of greater experience of the operations of the Act than the Council can be expected to have acquired, he identified correctly the applicable exemptions under the FOIA. Further we recognise and support the Information Commissioner's attempts to operate an informal resolution process to settle the dispute between the Appellant and the Council. The result has been a narrowing of the issues and the release to the Appellant of some of the information that had originally been withheld. This demonstrates the effective operation of the complaint procedure under FOIA section 50, and we do not consider it to give rise to a legitimate ground of appeal. The Appellant's appeal must be determined solely on the basis of the arguments put before us, without regard to any others that may previously have been considered, dismissed or withdrawn.
18. For the reasons set out above, we have concluded that the information from the head teacher's letter, which the Appellant continues to seek, is exempt information by virtue of FOIA section 40 and that the Council is not required to communicate it to the Appellant under the general right to access information created by FOIA section 1(1).

Signed

Date 11th July 2006

Chris Ryan
Deputy Chairman