



Information Tribunal Appeal Number: EA/2014/0201

Information Commissioners Ref: FS50547904

Freedom of Information Act 2000 (FOIA)

Between

MARTIN WOOD

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

BRACKNELL FOREST BOROUGH COUNCIL

Second Respondent

BEFORE

INFORMATION TRIBUNAL JUDGE

DAVID FARRER Q.C

and

LAY MEMBERS

ANDREW WHETNALL

and

DAVE SIVERS

Date of Decision: 18 July 2015

Date of Promulgation: 22 July 2015

Representation:

The Appellant appeared in person.

For the First Respondent Mr Mark Thorogood, ICO Solicitor

The Second Respondent Mr Robin Hopkins

Abbreviations :

MW	The Appellant.
The ICO	The Information Commissioner.
THE COUNCIL	The Second Respondent
The DN	The ICO's Decision Notice dated 14th December, 2014.
FOIA	The Freedom of Information Act, 2000
DPA	The Data Protection Act, 1998

Decision

The Tribunal finds that the requested information, in so far as it was withheld when the DN was issued, is personal data to which FOIA s.40(2) applies and is therefore not disclosable. This appeal is therefore dismissed

Subject Matter

FOIA s.40(2) Whether the requested information is personal data. Whether, if it is personal data, disclosure would breach the first data protection principle.

Reasons for Decision

The Background

1. On 2nd. January, 2014 the Bracknell News apparently reported that two unnamed Bracknell Forest councillors had failed to pay the council tax due from them. It evidently added further details, which may or may not have been accurate.
2. MW is a local resident and a reader of the Bracknell News.

The Request

3. On the day of the report, 2nd. January, 2014, he made the following requests to the Council -

“ Under the Freedom of Information Act, please can you supply the relevant information on -

(1) The two Bracknell Forest Councillors, their NAMES or their wards that they represent that have failed to pay their council tax as by 2/01/2014 printed in Bracknell News.

*(2) Is there any **liability orders** been made by the council against its councillors to **retrieve** said monies by deduction from wages? If so can you release the information?*

*AND (3) under the same FOI request I would also like to know has any councillor applied to the council for a **tax reduction** or a **tax discount**. If so can you please release the information?”*

4. On 10th. January, 2014 MW again requested -

“Please provide the names of all councillors referred to in the council’s response to the request from Bracknell News in relation to Council Tax reminders.”

It is agreed that this is effectively the same request as request 1 of 2nd January, 2014.

5. The Council refused request 1 by email on 4th. February, 2014, relying on FOIA s.40(2). It maintained that position following an internal review.
6. The reply to request 2 was that there had been no liability orders. Request 3 was answered in the negative by the Council in an explanatory email to the ICO dated 29th July, 2014. The disputed information is therefore limited to the names and the wards of the councillors referred to as failing to pay council tax when due.
7. Before any review of the DN and the cases presented to the Tribunal it is necessary to refer to an unusual procedural complication which arose in the course of the appeal.
8. At an early stage of the oral hearing it appeared to the Tribunal that the Council may have been treating the request as referring to different councillors in a different financial year from those featured in the Bracknell News. The email of 29th. July, 2014 made clear that its refusal related to two councillors to whom reminders had been sent and who had then paid the tax due. This presumably occurred in the financial year ending 5th. April, 2014. The relevant extract of the Bracknell News had not been exhibited by any party. If the information requested did not match the information refused by the Council, hence the information considered in the DN, then the request would require fresh consideration by the Council and the appeal could not proceed. Brief consideration was given to the appropriate order for the Tribunal to make if that were so but we decided that further evidence should be submitted by all parties, if they chose, as to the scope of requests 1 and 2 of 2nd. January, 2014. It was contemplated that MW would serve a copy of the Bracknell News report which would probably resolve any uncertainty. Accordingly, directions were given as to service of evidence on this issue and a timetable was set.

9. The Council served brief evidence and MW made a short written submission which did not include the report and took the matter no further. We extended time to allow him to serve the report but it was not forthcoming.

10. The Tribunal therefore ruled as follows as to the scope of the request and the further conduct of the appeal -

“Further Direction

1.1. *There will be a further oral hearing, estimated length half a day, at a venue and on a date to be determined.*

1.2. *The Appellant having failed to produce the newspaper article to which his requests of 2nd. and 10th. January, 2014 refer, despite an extension of time granted by the Tribunal, the Tribunal rules that the scope of these requests is limited to information relating to the two councillors and the year referred to by Mr. Simon Bull of Bracknell Forest Borough Council in his email to Deborah Clark of the ICO dated 29th. July, 2014 at point 1(a) and (b).*

The relevant passage from the email referred to in paragraph 2 identified the scope of the request as reasonably understood by the Council. It read as follows -

“Point 1 a) Both councillors paid on receipt of the first reminder letter. No further reminder letter or action was required. No court proceedings or debt recovery was necessary.

b) Mitigating circumstances. In both cases (there) were administrative errors on the part of the councillor or their (sic) banks, which led to the reminder letter being issued. Neither councillor were (sic) disbarred from voting and participating in budget matters as their errors were corrected as soon as they came to light on receipt of the first reminder letter and payment made.

So this decision, like the DN, relates to information as to the names of those councillors and/or the wards that they represent. In the event, no further oral hearing took place and MW, having been reminded of his right to conclude the appeal with such a hearing, agreed that the appeal should be decided on the basis of the written submissions and other material before the Tribunal. Once the scope of the request was defined, it was indeed hard to see what further oral submissions could add to the arguments on either side. No oral evidence was contemplated.

The DN

11. The ICO concluded that both the names of the councillors and the wards that they represented were personal data.

12. He went on to consider whether disclosure would breach any of the data protection principles set out in Schedule 1 Part II to the Data Protection Act, 1998. Focussing on the first data protection principle, he considered whether processing would be fair. He took account of the Council's evidence as to councillors' expectations as to publicity as a consequence of the advice which the Council gave to all councillors. Neither councillor had made any public pronouncement on council tax issues. In both cases the need for the reminder arose from an error and the reminder was promptly heeded. He had regard to the results of comparable cases in Bolton and Cornwall. He decided that disclosure would be unfair.

13. MW appealed.

MW's case before the Tribunal

14. MW's case was contained in two emails to the Tribunal dated respectively 7th. August and 12th. December 2014. In the former he referred to various issues raised by the Council at an early stage of the ICO's investigation which were not considered in the DN. His case as to the s.40(2) exemption may be summarised as this : Councillors are elected by the residents of their wards and those residents are entitled to know if their councillors break the law or fail to conduct their affairs in accordance with codes of conduct expected of those elected to serve on the Council. They should enjoy no advantage by comparison with other council tax payers. The Council was providing them with unjustified protection. His purpose in making his request was not research but disclosure of the names or wards for the reasons given. He submitted an extract from the Council's information on late payments of Council Tax taken from its website.

The case for the ICO

15. The ICO largely adopted the DN. He referred to his decisions, in cases involving Bolton and Cornwall councils, upholding reliance on the s.40(2) exemption in similar circumstances. In the Bolton case (*Haslam v ICO and Bolton Council EA/2014/0029*) the Tribunal had upheld his decision to dismiss the complaint. The conduct of the two councillors in the present appeal was less blameworthy than the failings of the councillors in that case.

Our reasons

16. MW's concerns are sincere and understandable, whatever the extenuating circumstances of this case. However, his request must fail for a reason that he identified in his email of 12th. December, 2014, regardless of other considerations of fairness.

17. He does not dispute that his request involves the personal data of the councillors. Indeed, their names are clearly personal data and the wards that they represent are data from which they could readily be identified by anyone who consulted the Council's website (see DPA s.1 - definition of "personal data")

18. FOIA s.40(2) provides that information constituting personal data other than exempted by s.40(1), hence personal data of anybody other than the requester, is exempt if

"(b) either the first or second condition below is satisfied"

19. S.40(3)(a) sets out the part of the first condition relevant to this and almost every other case involving this exemption. So far as material it reads -

". . .that the disclosure of the information to a member of the public other than under this Act would contravene

(i) any of the data protection principles,"

20. The second condition relates to restrictions on the data subject's rights of access to his personal data and is therefore irrelevant to this appeal.

21. The data protection principles are set out in Schedule 1 Part 1 to the DPA. The first data principle is the first and generally, as here, the only port of call. It 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.”

These are not sensitive personal data.

22. Compliance with a Schedule 2 condition is therefore an essential ingredient of fair and lawful processing, here disclosure to the public.

23. Condition 6(1) of Schedule 2, to which MW evidently referred in his December email requires that

“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.”

None of conditions 1 - 5 in Schedule 2 could possibly apply.

24. Condition 6(1) is intended to cater for persons conducting a course of research for whom access to the data is essential, though it is qualified by consideration of the interests of the data subject. “Interests pursued” plainly imports a requirement for a continu-

ing course of study or inquiry, not, as MW frankly acknowledges in his email, the opportunity to name the councillors on one occasion, in a letter to the local paper. The issues of necessity and prejudice to the councillors' interests do not require consideration.

25. Whatever view the Tribunal takes of the more general considerations of fairness, the use of this exemption must therefore be upheld. No Schedule 2 condition is satisfied. Disclosure of the councillors' personal data is therefore unfair, regardless of the considerations advanced by the Council, the ICO and MW. The Tribunal should add that, on the particular facts of this case, as set out by the Council, there was a strong case for saying that disclosure would have been unfair in the general sense adopted in the DN.

26. The same decision based on the failure to satisfy a Schedule 2 condition would have applied equally to a similar request relating to other councillors. To that extent the decision on the scope of this request does not affect the outcome of this appeal.

26. The Tribunal therefore dismisses this appeal.

27. This decision is unanimous.

David Farrer Q.C.

Tribunal Judge

18th. July, 2015