



**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER:
Information Rights**

Tribunal Reference: EA.2015.0088

Appellant: Evelyn Magee
Respondent: The Information Commissioner
Date of Paper Hearing: 18th September 2015
Date of decision: 8th October 2015

Before
Melanie Carter
Judge
and
Melanie Howard and Nigel Watson
Tribunal Members

1. This appeal arises from a request for information by Evelyn Magee (“the Appellant”) under the Freedom of Information Act 2000 (“FOIA”) to Down District Council¹ (“the Council”) dated 14 February 2014. This request related to a complaint about an alleged dog attack on 9 May 2012. The attack involved two dogs belonging to the Appellant, and a dog belonging to an employee of the Council. The Council had investigated the incident, and in consequence pursued enforcement action under Article 28(2)(b) of the Dogs (Northern Ireland) Order 1983. The Appellant accepted a caution. The Appellant requested copies of the handwritten statements prepared for the Council by two witnesses to the incident. She had already received typed copies of the witness statements during the course of the enforcement proceedings.

¹ As a result of local government reform in Northern Ireland, Down District Council ceased to exist on 31 March 2015, and was succeeded by Newry, Mourne and Down District Council which is now the relevant public authority for the purposes of this appeal. For simplicity, the Commissioner refers throughout this Response to ‘the Council’.

2. The Council responded on 26 March 2014, confirming that it held information within the scope of the request, but withholding it on the basis that it was exempt from disclosure under sections 30(1)(b) and 40(2) FOIA.
3. The Appellant complained to the Commissioner on 9 September 2014. The Commissioner investigated the complaint, and issued his Decision Notice on 12 March 2015. The Appellant appealed to the Tribunal on 31 March 2015.

Relevant law

4. Section 40 FOIA provides that a public authority is entitled to refuse to provide information requested where it comprises 'personal data', and to disclose it would be unfair:

40 Personal information.

(1) Any information to which a request for information relates is exempt information if

it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if -

(a) it constitutes personal data which do not fall within subsection (1), and

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

(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 than 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

5. Schedule 1 of the Data Protection Act 1998 outlines the data protection principles, referred to in section 40(3)(a)(i) FOIA. Paragraph 1 of Schedule 1 sets out the "First Data Protection Principle";

1 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.

6. Insofar as relevant to the present case, Schedule 2 provides:

1 The data subject has given his consent to the processing.

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 interests of the data subject.

7. Section 21 FOIA provides that a public authority is entitled to refuse to provide information requested where it is reasonably accessible to the requestor by other means:

21 Information accessible to the applicant by other means.

(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

The Grounds of Appeal

8. The Tribunal understands the Grounds of Appeal to be:
- (a) Ground 1 : The Commissioner erred in concluding that the individuals did not consent to their personal data being disclosed , in circumstances where the Council had not contacted them to ascertain whether they would consent;
 - (b) Ground 2: The Commissioner erred in concluding that the individuals had a reasonable expectation that their personal data would not be disclosed, in circumstances where that data is already within the Appellant's possession and they have appeared in open court; and
 - (c) Ground 3: There is a reasonable suspicion of wrongdoing, as the Appellant is concerned that the typed statements she already has in her possession differ from the handwritten statements she has requested, and there is therefore a public interest in the handwritten statements being disclosed in order to confirm/dispel that suspicion of wrongdoing.

Conclusions

9. The Tribunal noted that the Council had not relied upon section 21 FOIA at time of refusal. Nevertheless, it agreed with the Commissioner that this exemption did apply such that there was no obligation on the Council to make disclosure and this appeal should not be upheld.
10. The Appellant's right, under FOIA, is to receive confirmation of whether the Council holds the information she has requested, and if it does to have that

information communicated to her: section 1 FOIA. There is no right under FOIA to the disclosure of documents. The information requested is readily accessible to the Appellant. She has no separate and additional right to request that information in a different document.

11. The Appellant had available to her copies of the two typed witness statements given to her in the enforcement proceedings. The Tribunal, wholly independently of the Council and the Information Commissioner, was able to confirm again that information in the handwritten versions of the witness statements are an accurate reflection of what is contained in the typed statements she already has. In these circumstances, the information is already reasonably accessible to her and the exemption at section 21 applies.

12. Whilst, given this conclusion, it was not necessary to go on to consider section 40 FOIA the Tribunal wished to indicate that in its view the information was also exempt from disclosure on this further basis. This exemption applies if to make disclosure would be a breach of a Data Protection principle, in this case the First Data Protection Principle. In this regard, the Tribunal was told by the Commissioner that there was an error in the Decision Notice in that the Council had apparently sought consent to disclosure from the two witnesses. As the Council had not heard back from the two individuals, it proceeded to make its own decision that, in the absence of consent, it would not be appropriate to make disclosure in the circumstances. This addressed the Appellant's first ground of appeal.

13. In relation to the second ground of appeal, the Tribunal agreed with the Commissioner that disclosure to the public further to a FOIA request would not be in the reasonable expectation of the two witnesses. Although it is correct that, in any given case, if proceedings reach the stage of a public hearing then those individuals may give evidence in public and their identities and the contents of their statements may become public. There may be myriad circumstances in which that will not occur, however. For example:
 - (a) The proceedings may be dropped, or otherwise resolved without the case proceeding to a public hearing;
 - (b) The individual may withdraw their evidence;
 - (c) The individual may not be called to give oral evidence;

- (d) The individual may be called to give oral evidence, but only be called upon to repeat a part of the content of their statement, or they may wish to vary their evidence once under oath;
 - (e) The part of the hearing in which the witness gives their evidence may be held in camera.
- 14. Disclosure under FOIA of written statements of evidence would effectively deprive witnesses of their ability to choose to withdraw their evidence, or to vary it, or to seek special measures from the court to protect their identity. The Commissioner maintains and the Tribunal agreed that individuals reasonably expect that they will not be deprived of those opportunities, and that it may cause them distress if the public authority to whom they have provided their assistance were to deprive them of those opportunities.
- 15. As to the Appellant's arguments:
 - (a) The fact that typed copies of the statements are provided to a defendant, as a party to the proceedings to whom evidence must be disclosed in advance, does not affect the conclusion that the data subjects would not expect those statements to be disclosed to the wider public under FOIA; and
 - (b) It is not clear precisely what hearings took place in the enforcement proceedings brought against the Appellant by the Council; when those hearings took place; whether either of the data subjects appeared formally in those hearings (as opposed to attending the public gallery) and if either of them appeared formally what the purpose of their appearance was and whether any/all of the evidence in their written statements was given orally. The Tribunal understands, however, that the outcome of the proceedings was that the Appellant accepted a caution, and that a trial was not therefore held. It appears that the witnesses will not have given evidence. On that basis, the fact that, in this case, the data subjects *would* have given evidence had the Appellant not accepted a caution, does not affect the conclusion that they would not expect their statements to be disclosed the wider public in circumstances where they *have not* actually done so.
- 16. The Tribunal agreed therefore with the Council and the Commissioner that in this case, the two data subjects would reasonably expect that their personal data should not be disclosed to the wider public, and that to disclose it may cause them distress.

17. The Tribunal noted the assertion by the Appellant that there had been some collusion and possibly improper action by the Council in the preparation of the statements, but was of the view that there was wholly insufficient evidence to substantiate this. The mere fact of the statements being typed up as opposed to being left handwritten could not reasonably be taken as indicator of any difference between the two versions; nor was the import of the overheard conversation sufficient to amount to a reasonable basis for any suspicion. In these circumstances, there was no legitimate interest in insisting on seeing the handwritten statements. Finally, insofar as a condition in Schedule 2 Data Protection Act would be required to support disclosure under FOIA, this was not met as there was no consent to disclosure from the witnesses and paragraph 6 of that Schedule could not be relied upon given that disclosure was not necessary (the Appellant having been told that the handwritten versions were an accurate reflection of the typed versions which she already had).

18. In light of the above findings, the Tribunal decided unanimously to reject the appeal.

Judge Melanie Carter

Date of promulgation: 9th October 2015