



**Neutral Citation Number**

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

**Case No. EA/2014/0303**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50548334**

**Dated: 6 NOVEMBER 2014**

**Appellant:** David Perrin

**Respondent:** Information Commissioner

**Additional Party:** East of England Ambulance Service

**Heard at:** Fox House, London

**Date of hearing:** 16 September 2015

**Date of decision:** 27 November 2015

**Before**

Angus Hamilton

Judge

and

Henry Fitzhugh

and

Melanie Howard

**Subject matter:** s 40 (personal information) Freedom of Information Act 2000

**Cases considered:**

Bromley and ors v Information Commissioner & the Environment Agency  
EA/2006/0072

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal dismisses the appeal for the reasons set out below.

## **REASONS FOR DECISION**

### Introduction

- 1 In January 2014 the appellant engaged in correspondence with the public authority in relation to an investigation which was carried out by the public authority and which involved the appellant. One of (several) questions asked by the appellant was **‘what ‘hearing’ is being referred to in the email dated 21 May 2008?’** This led to a detailed response from the public authority dated 15 January 2014. This response rejected the appellant’s requests for information on the basis that, first, the disclosure obligations under FOIA were limited to recorded information and the appellant’s requests appeared to relate to ‘what people know or believe’ and secondly the appellant’s requests had become vexatious within the meaning of s.14 FOIA. The response of 15 January 2014 was signed by an unnamed ‘FOI Officer’. This prompted a request from the appellant for the name of the officer and an indication as to whether the wording of the response was solely theirs and if not who helped them write it.
  
- 2 On 6 February 2014 the public authority declined to provide that information on the basis that it constituted personal information which was exempt from disclosure under s. 40(2) of FOIA. The public authority explained that it only released the names of **‘Directors and senior staff unless there is a strong public interest in releasing the names of more junior staff’**.
  
- 3 Following an internal review, the public authority withdrew its reliance on the ‘vexatious’ provisions of FOIA (s. 14). It also clarified that it held no information in relation to the ‘hearing’ the appellant had asked about and had reached this conclusion after an electronic search of its IT systems. The public authority maintained its decision to withhold the name of the

unidentified FOI officer under s.40 FOIA although the public authority did clarify that the response had been approved by two named senior member's of the public authority's staff. The appellant then complained to the Commissioner. The Commissioner determined that the scope of his investigation was to check whether the public authority was correct to maintain that it held no information that could identify the 'hearing' asked about and whether the public authority was correct to rely on the personal information exemption in relation to the unnamed FOI officer.

- 4 In a Decision Notice dated 6 November 2014 the Commissioner determined that he was satisfied on the balance of probabilities that the information which might have identified the 'hearing' that the appellant asked about was not held by the public authority. The Commissioner reached this conclusion after considering the explanations that the public authority had provided as to the searches it had carried out. The Commissioner also concluded that the name of the FOI officer was exempt from disclosure under s40(2) of FOIA.
- 5 It is worth mentioning at this point that many of the exemptions in FOIA are 'qualified' exemptions. For all qualified exemptions in accordance with s2(2) of FOIA it is also necessary to consider whether:

*'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.'*

This Tribunal has described this as the 'public interest balancing exercise'. The public interest balancing exercise does not apply to the exemption based on personal information (s.40) although there are other factors to be considered in relation to this exemption which flow from the Data Protection Principles contained in the Data Protection Act 1998. In relation to the personal information exemption the issue is whether disclosure would be 'fair and lawful' and whether, in relation to non-sensitive personal data, it was in accordance with at least one of the conditions in Schedule 2 of the DPA 1998 and, in relation to sensitive personal data, in accordance with at least one of the conditions in Schedule 3 DPA 1998.

### The appeal to the Tribunal

- 6 The appellant submitted an appeal on 3 December 2014. A great deal of the grounds of appeal relate to the history of the grievances which Mr. Perrin has with the public authority. In relation to the issues which this Tribunal was able to consider it would appear that Mr. Perrin was asserting that a person who is empowered to refuse the disclosure of information under FOIA ought not to be a 'junior' member of staff. In relation to the information which the public authority asserted that it did not hold Mr. Perrin appeared to claim that the searches carried out were not thorough enough.

### The questions for the Tribunal

- 7 The Tribunal concluded that the questions to be answered were, first, whether the Commissioner was correct on the balance of probabilities to conclude that the public authority did not hold the information which might identify the 'hearing' and secondly, in relation to the personal information exemption (s.40) the Tribunal had to consider whether the disclosure of the FOI officer's name (a form of 'processing' as defined by the Data Protection Act 1998) could or could not be seen as fair and lawful and in accordance with the Data Protection Principles set out in the Data Protection Act 1998 (DPA).

### Evidence

- 8 All parties agreed that this matter should be considered 'on the papers' only and we heard no live evidence or oral submissions. No parties or representatives attended the hearing.
- 9 We considered, from the Appellant, the Notice and Grounds of Appeal and supporting documents and the appellant's final submissions. We considered, from the Commissioner, the Decision Notice, the response to

appeal and the final submissions. There were no submissions from the public authority and the Tribunal understood that they had declined to be joined as a party to the proceedings. The Tribunal did however find it necessary to adjourn their consideration of this matter in order to obtain clarifying information from the public authority about the identity and position of the FOI officer which the public authority eventually provided.

### Conclusion

- 10 The Tribunal first considered whether the Commissioner was correct to conclude on the balance of probabilities that the information sought in relation to the 'hearing' was not held by the public authority.
- 11 The Tribunal noted (and this did not appear to be disputed by the appellant) that the Commissioner had asked the public authority a detailed range of questions concerning the nature and scope of the search which the public authority had carried out. A copy of the questions and the responses was provided to the Tribunal to inspect and the Tribunal was satisfied that the questions posed by the Commissioner were thorough and detailed. This procedure, the Commissioner pointed out in his submissions, was in accordance with The Tribunal's decision in *Bromley and ors v IC & the Environment Agency* which mandates an enquiry into '**the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted**'. Having considered the detailed response provided by the public authority the Commissioner was satisfied, on the balance of probabilities, that the information sought by the appellant was not held by the public authority.
- 12 Conversely, the appellant did no more than assert that he doubted that the searches had been thorough. There was no analysis or critique by the appellant as to nature and detail of the questions put by the Commissioner to the public authority regarding the searches carried out or indeed of the searches themselves. The Tribunal considered that the

bald assertion made by the appellant that the searches were not sufficiently thorough did not undermine the Commissioner's careful analysis and assessment. Consequently, the Tribunal was satisfied that on the balance of probabilities the public authority did not hold the information sought.

- 13 In relation to the s.40 – the personal information exemption – the Commissioner submitted that the disclosure of the FOI officer's name would not be 'fair' in accordance with the Data Protection Act 1998. In reaching this conclusion the Commissioner took into account the FOI officer's junior role and the fact that this would give rise to an expectation on the part of that individual that his or her name would not be disclosed. The Commissioner's assessment of the pertinent authorities (which was not challenged and which the Tribunal accepted was correct) in relation to the disclosure of public sector employees' personal data was that there was a 'sliding scale' of protection depending on employees' seniority so that senior 'decision makers' should have an expectation that they would be identified and that expectation diminished the more junior an employee was. The Commissioner also took into account that the FOI officer had not consented to the disclosure of their name and indeed was concerned about the potentially distressing consequences of his or her name being disclosed.
- 14 The appellant's contention on this issue appeared to the Tribunal to be two-fold – first that the function of refusing FOIA requests should not have been delegated to a junior member of staff and, secondly, at least by implication, that if the public authority chose to delegate this function to an employee who was nominally a junior member of staff by reference, for example, to their pay grade, then effectively that employee had seniority thrust upon them by reason of being given that decision-making role and their expectation in relation to not being identified was consequently significantly diminished.

- 15 As already mentioned the Tribunal did not have available to it at the start of the hearing any information in relation to the name, job title or seniority of the FOI officer in question and the public authority had to be asked to provide this and the Tribunal had to reconvene to consider the information. The Tribunal were satisfied after considering the provided information that the FOI officer was, objectively, a junior employee. The information provided by the public authority was done so on a 'closed basis' for obvious reasons and consequently the Tribunal cannot provide any further analysis on this point.
- 16 The Tribunal then went on to consider the point made by the appellant that, by being made a FOIA 'decision-maker', the FOI officer lost his or her objectively junior status. The Tribunal felt that the clear answer to the appellant's point was that the FOI officer in question was clearly the drafter of the 15 January 2014 response but it was checked and approved by more senior members of staff who had been identified to the appellant. The Tribunal felt that the evident implication was that these more senior members of staff had reserved the power to check and, if appropriate, amend the response drafted by the FOI officer. Consequently, in the view of the Tribunal, it was they and not the more junior member of staff who were the real FOIA decision-makers. Thus, in the view of the Tribunal, the junior status of the FOI officer remained undisturbed and the Commissioner was consequently correct that the disclosure of a such a junior member of staff's personal data would not be 'fair' within the meaning of the Data Protection Act 1998.
- 17 The appeal was therefore unanimously dismissed.

Signed:

Angus Hamilton DJ(MC)

Tribunal Judge

Date: 27 November 2015

Promulgated: 2 November 2015