



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

Case No. EA/2015/0163

ON APPEAL FROM:

**Information Commissioner's
Decision Notice No: FS50575446
Dated: 6 July 2015**

Appellant: Dr. Venketesh Dubey

First Respondent: The Information Commissioner

Second Respondent: Bournemouth University

Heard at: Bournemouth Magistrates Court

Date of hearing: 26 November 2015

Date of decision: 31st December 2015

**Before
CHRIS RYAN
(Judge)
and
JEAN NELSON
ANDREW WHETNALL**

Attendances:

The Appellant appeared in person.

The First Respondent did not appear and was not represented:

The Second Respondent was represented by Andrew Sharland of counsel:

**Subject matter: Absolute exemptions
- Personal data s.40**

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

REASONS FOR DECISION

Summary conclusion

1. We have decided that Bournemouth University (“the University”) was entitled to refuse the Appellant’s request for information on the basis that disclosure would have released into the public domain the personal data of various individuals in a manner that would have breached the data protection principles established under the Data Protection Act 1998 (“DPA”). The information requested was therefore exempt information under section 40(2) of the Freedom of Information Act 2000 (“FOIA”)

Background information

2. In August 2013 the Appellant received notification from the Deputy Vice-Chancellor of the University, his employer, that a complaint of academic misconduct had been made against him by a third party. The complaint was said to arise out of the publication of academic articles in which the Appellant had been named as author. Ultimately the complaint was dismissed by the University’s Appeal Board in October 2014.
3. The Appellant was dissatisfied with several aspects of the University’s disciplinary processes. These included:
 - a. a delay between the apparent receipt of the complaint in August 2012 and the date, in August 2013, when the Appellant was told that an initial review had led to the conclusion that there might be a case to answer and that an internal investigation was therefore to be instigated;
 - b. the anonymity accorded to the complainant and the University’s refusal to provide the Appellant with a copy of the original complaint;
 - c. the pursuit of the investigation in the face of the Appellant’s repeated assertion that the original complaint was unfounded,

- malicious and being pursued by an individual who had no direct connection with the subject matter of the complaint;
- d. the changing scope and focus of the investigation from time to time and the pursuit by the investigation team of issues which the Appellant considered were irrelevant or inappropriate;
 - e. the selection of members of the investigating team who the Appellant considered lacked independence or appropriate expertise;
 - f. the Appellant's perception that the complainant was given preferential treatment and that the whole process amounted to harassment and victimisation.
4. The University, for its part, has maintained that the conduct of the investigation, at each stage, complied with its own Policy and Procedure on investigations of alleged misconduct and, subject to a point of procedural clarity noted by its Appeal Board, was both fair and impartial. It is obviously not for this tribunal to review the procedures, investigations or outcome of the disciplinary proceedings.

The Appellant's attempts to obtain information

5. On 27 November 2014 the Appellant submitted two documents to the University designed to find out more about the complaint made against him. The first was a subject access request under section 7 of the DPA, seeking, among other things, a copy of all complaints made against him and of all disciplinary investigations that related to him. The materials subsequently provided to him (under cover of a letter dated 9 January 2015) did not include copies of any complaints. These were said to contain the personal data of third parties (the complainant in each case and other individuals named in, or identifiable from, the materials) and the University thought that they should therefore be withheld. The request was not pursued further by the Appellant. Even if it had, this tribunal would not have any jurisdiction to review the way in which the request had been handled.
6. The second document was a request for information under FOIA. It was in the following terms:

"I would be grateful if you could provide to me a copy of all complaints received between April 2012 and September 2013 from students in relation to University employees.

Please note that I am happy to receive copies of the complaints which have the complainants' identity and contact details redacted and the member of staff's identity redacted."

The Appellant subsequently clarified his information request, stating that he wanted information relating to all complaints and not just those submitted by students.

7. The information request was refused by the University by letter dated 24 December 2014. The University stated that complying with the information request would lead to the release into the public domain of personal data of the relevant complainants and other individuals. This, it was said, would breach the rights of those individuals, as enshrined in the DPA. The requested information should therefore be treated as exempt information under FOIA section 40(2).
8. The University also relied on other provisions of the FOIA to support its refusal, as it is entitled to do. By the time the matter came to be considered by this Tribunal those additional grounds were:
 - a. The information request was vexatious within the meaning of that word for the purposes of FOIA section 14.
 - b. Disclosure would lead to the disclosure of confidential information received from third parties who would, as a consequence, have an actionable claim for breach of confidence against the University. The information was therefore exempt under FOIA section 41.
 - c. An authorised person, in the form of the University's Vice Chancellor, had issued an opinion, which was reasonable, to the effect that disclosure would, or would be likely to, prejudice the effective conduct of public affairs in that it would have the effect of discouraging those wishing to complain about the University's staff. This, it was said, rendered the requested information exempt under FOIA section 36 and the public interest in maintaining that exemption outweighed the public interest in disclosure.

Because of the conclusion we have reached in respect of FOIA section 40 it has not been necessary for us to consider these alternative grounds in detail.

The Appellant's complaint to the Information Commissioner and the Decision Notice

9. The Appellant complained to the Information Commissioner about the University's refusal to comply with his information request and, following an investigation, the Information Commissioner issued the Decision Notice which has given rise to this appeal on 6 July 2015. The Decision Notice recorded that the Appellant did not dispute that any data identifying an individual should be redacted and recorded the Information Commissioner's own view that the privacy rights of an individual who invokes a complaints procedure require particularly careful treatment. Neither of those points has been seriously challenged in this Appeal.
10. The Decision Notice also recorded the Appellant's agreement to the redaction of personal data contained within the complaints and the University's claim that it was not possible to redact the information necessary to anonymise each complaint without rendering the document meaningless. This, it was said, was because it would be

necessary to redact, not only individuals' names but also a great deal of detail which, if left in when the material was released to the Appellant (and hence, into the public domain), would have enabled people to identify the individuals either from the material itself, or by cross-referencing that material with other information accessible to a member of the public.

11. The Information Commissioner addressed this issue by obtaining copies of each complaint falling within the scope of the information request and performing his own redaction exercise on a sample. He considered each sample document through the eyes of a notional third party, who would take all reasonable steps to identify the relevant individual or individuals but would begin without any prior knowledge. He gave this fictional construct the title of "motivated intruder" and acknowledged that the terms of the information request itself would tell him or her that the material under consideration:

- i. related to a complaint; that had been
- ii. made against an employee of the University; and had been
- iii. received between April 2012 and September 2013.

The Information Commissioner also took into account that the Appellant had stated that he was not seeking a summary of the complaints but specifically required the release of each complaint in its original form and to know the date it had been received. This, he recorded, "*made the process of removing any individual's 'fingerprints' from the information more difficult*".

12. The Decision Notice concluded:

"The Commissioner has found that the complaint records contain a number of direct and indirect identifiers and agrees with the University that in some cases they include a 'great deal of background information and details of specific events and conversations'. Consequently, information that could lead to the identification of an individual is distributed throughout these records. It is the Commissioner's view that the way the identifiers are embedded within the information prevents an appropriate balance being struck that would allow for the proper protection of personal data on the one hand while permitting the disclosure of meaningful information, on the other. In other words, the Commissioner considers that the redaction of the personal data including both direct and indirect identifiers, would strip the information of any material value."

13. The Information Commissioner decided that, in those circumstances, the University would not have been able to provide an anonymised version of each of the complaints and had accordingly been entitled to reject the information request in respect of them all.

The Appeal to this Tribunal

14. On 28 July 2015 the Appellant lodged a Notice of Appeal to this Tribunal in which he asked that, in light of the seriousness of the circumstances surrounding his information request, the University be directed to comply with it. He also asked the Tribunal to take appropriate action against the University for having, in his view, blocked access to the requested information which, he argued, constituted an offence under FOIA section 77.
15. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based. This Tribunal has no jurisdiction to consider whether a breach of FOIA section 77 has occurred. That is a matter for criminal courts alone to determine and we will make no further reference to it.
16. At an early stage the Tribunal Registrar ordered the University to be joined as a Respondent to the Appeal. As a result, both the Information Commissioner and the University filed written Responses to the Appeal, to which the Appellant filed a Reply. The Appellant opted to have his appeal determined after a hearing, rather than on the papers, as he was entitled to do. The Information Commissioner opted not to be represented at the hearing but the University was represented by Mr Sharland of counsel and the Appellant represented himself.
17. The Tribunal Registrar also directed that any witness evidence should be provided to the Tribunal in advance of the hearing. The Appellant did not submit any evidence but the University submitted two witness statements, one by Deborah Wakely, its Head of Legal Services and Corporate Governance, and a second by Jane Forster a legal services manager in the University's legal team. Each witness was made available at the hearing to answer questions. Finally, the Registrar directed that the Tribunal should be provided with copies of the withheld information in a closed bundle, which would not be made available to the Appellant for the obvious reason that to do so would have had the effect of pre-judging the Appeal.

The law relevant to our decision

18. FOIA section 40 provides an exception to the obligation to communicate information in these terms:

“(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
 - (b) in any other case, that the disclosure of the information to a member of the public, otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the [DPA] (which relate 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 [DPA] the information is exempt from section 7(1)(c) of that Act (data subject’s right of access to personal data).

The parties’ arguments and our conclusions on each

19. The Appellant’s Grounds of Appeal challenged the Information Commissioner’s acceptance of the University’s claim that anonymisation was not possible without depriving the requested information of all meaning. He stressed in argument that the University’s task in this respect was made simpler because, as he had made clear from the outset, he was only interested in the date when each complaint was received, the subject matter of the complaint and the original form in which it had been presented to the University.
20. The Appellant also made it clear in his Grounds of Appeal and his submissions during the hearing that he believed that the University had, or might have, altered the original complaint documentation to make it more difficult to redact information without rendering the document meaningless. He presented no information to support his allegation but relied on two instances which he said demonstrated that the University had tampered with documents in the past. First he relied on the delay in commencing the investigation into the complaint against him and suggested that the date of the original complaint had been altered. Secondly he relied upon two drafts of a report on the investigating team’s interview with the individual who complained about him. The discrepancy was explained by Ms Wakely in her witness statement. The explanation was rational and credible in its own right

and was supported by Ms Wakely's calm and authoritative responses to questions put to her by the Appellant during the hearing. Ms Forster explained in her witness statement that she had been responsible for reviewing all the complaints that came to light as a result of a search conducted after the information request had been received. She had seen no evidence of University staff having tampered with the documents either before or after her initial review of them. That evidence was again tested by the Appellant putting questions to Ms Forster during the hearing. Her answers were clear and she gave every sign of being an entirely truthful witness who took care in her responses to assist the Tribunal without any partiality towards her employer.

21. We have ourselves examined the withheld information in the closed bundle and could see no sign that any documentation had been altered or was anything but a copy of a genuine original document.
22. Our conclusion on this part of the case, therefore, is that the Appellant did not come near to demonstrating that the University was either in the habit of falsifying documents or that it had done so in the present case. Both allegations are therefore rejected.
23. It became clear to us during the hearing that the Appellant's interest in any of the complaints other than the one against himself was very limited. All his submissions were directed towards the unfairness he believes he suffered while it was being investigated and he informed us during the hearing that he would only be interested in any other complaints falling within the scope of the information request if they suggested that other members of the academic staff had experienced difficulties similar to his own. We have nevertheless carefully considered all the documents included in the closed bundle which recorded each of a total of 20 complaints falling within the scope of the information request. Without undermining the confidentiality of the material, we record that the gist of the bundle contents was that each complaint was quite different from each of the others, in both content and manner of presentation, that the only one touching on the issue of academic publication was the one directed at the Appellant and that they covered a variety of issues, both large and small, arising on various courses run by the University or the assessment processes connected with them. Our review of them convinced us that the University had been right to say that the only way of achieving the required level of anonymisation would be to redact so much information about the date, subject matter, course and other background information (as well, of course, as individual's names) that the document would have been meaningless. The Appellant's suggestion that the anonymisation process was made easier by the fact that he only sought the three categories of information identified in paragraph 19 above would not have reduced the scope of the redaction exercise to any significant extent.

24. The Appellant argued that, even if complying with the information request would lead to the public disclosure of the personal data of one or more individuals, this was justified by the seriousness of the subject matter. That, of course, is an argument that can only apply to the complaint against the Appellant himself. As to that, the Appellant did not try to address the detailed terms of FOIA section 40 and the provisions of the DPA to which it cross refers. He simply relied on the perceived unfairness of the complaints procedure to which he had been subjected and argued that it gave rise to such serious issues that third party data rights (in particular any right to anonymity enjoyed by the individual who made the original complaint) should not stand in the way of disclosure.
25. It is, of course, the case that in certain circumstances an interference with an individual's rights in their own personal data may be overridden by a public interest in disclosure. This arises from the interplay between FOIA section 40(2) and the data protection principles set out in Schedule 1 to the DPA. The first principle, as it applies to this case, is that the disclosure of the personal data should be fair and lawful and in particular should only occur if the condition set out in part 6 of Schedule 2 to the DPA is satisfied. That is to say, that disclosure would be necessary for the purposes of the Appellant's "*legitimate interests*" (which it clearly would, given the seriousness of the complaint against the Appellant) and would not be "*unwarranted...by reason of prejudice to the rights and freedoms or legitimate interests*" of the individual who would be publicly identified as a result of a disclosure under FOIA.
26. We have concluded that disclosure would be unwarranted. In reaching that conclusion we have taken into account the public interest in having the requested information disclosed. Disclosure would contribute to the Appellant's wish to investigate how the complaint against him was pursued by the University. But the contribution would be quite limited, for the self-evident reason that it would disclose to him only the terms of the complaint and not any other material created subsequently. Secondly, the Appellant's concern relates to a process which is regulated by the University's own publicly-available Policy and Procedure on Misconduct in Academic Research and led, in his case, to a decision that he had not been guilty of misconduct.
27. We should mention that when the Appellant reached this stage of his submissions during the hearing he produced recording equipment and sought to play what he said was a recording of a conversation between himself and the Dean during which, the Appellant said, the Dean could be heard saying that he had not himself been aware of the progress of the investigation into the Appellant's conduct. The Tribunal chair ruled that the evidence could not be admitted. The Appellant had been given an opportunity by the Registrar to introduce evidence in the form of a witness statement, on condition that it was filed in advance of the hearing. No witness statement describing the circumstances of the

conversation and exhibiting a transcript or electronic media recording the conversation had been filed. In those circumstances it was not appropriate that the University's legal team should be ambushed by new evidence introduced without warning during the hearing, particularly as it had no chance of verifying the provenance of the recording.

28. Against the public interest factors in favour of disclosure we set:

- a. the specific request, incorporated in the complaint letter regarding the Appellant, that anonymity should be maintained;
- b. the University's assurance that the confidentiality provisions of its own Policy and Procedure would be adhered to; and
- c. the importance of maintaining confidentiality in any complaint procedure in order to ensure that individuals are not discouraged from coming forward in the future and that mistakes and errors are thus brought to light and properly investigated.

We conclude that these factors outweigh those in favour of disclosure and would render such disclosure unwarranted.

Conclusion

29. We conclude, therefore, that disclosure of the requested information would constitute processing of personal data and that this would breach data protection principles and that the exemption in FOIA section 40(2) therefore applies. The University's refusal to comply with the information request was therefore justified.

30. It is not necessary, in these circumstances, to consider whether the requested information also fell into any other exemption or whether the University could have rejected the Appellant's request, in any event, under FOIA section 14.

31. Our decision is unanimous.

Postscript

32. We should add that the University argued that the exercise we have undertaken in the preceding paragraphs in respect of FOIA section 40(2) was unnecessary because, insofar as the information request related to the complaint made against the Appellant himself, it fell to be considered under DPA section 7 and not FOIA section 1. The terms of FOIA section 40(1) make that very clear, so far as the Appellant himself is concerned, but the University argued that the position of any third party whose personal data rights might be affected by disclosure also fell to be considered under that subsection. The effect, of course, would be that the rights of such third parties would be determined under the DPA, if disclosure had been requested by another person identifiable from the document, but under the FOIA, if the requester had been a third party. In the former case this Tribunal would not

have jurisdiction to review how the relevant public authority had handled the information request (although there might be redress through the Courts under DPA section 7(9) or from the Information Commissioner under DPA section 40).

33. The argument that FOIA section 40(1) creates an absolute exemption in respect of all personal data contained in information sought under a subject access request was raised by the University for the first time at the hearing. It had not been raised in any previous written submissions and neither of the parties submitted a skeleton argument. The Appellant had not therefore been given prior notice of it. The Decision Notice itself made it clear that it did not take into account the Appellant's own personal data but was less clear on whether it also applied to the personal data of third parties identifiable from the complaint against him. Shortly before the hearing the Information Commission provided the Tribunal with a document that sought to clarify his position. Our understanding of his approach, as set out in that document, is that it was only the personal data of the Appellant contained within the relevant complaint information which had been excluded from consideration in the Decision Notice (on the basis that it fell within section 40(1)) but that the personal data of the individual who submitted the complaint against the Appellant had been taken into consideration (applying the provisions subsection (2) to (4) inclusive).

34. Against that background we are reluctant to make a ruling on the point without having heard full argument from both sides, although the University's argument is certainly attractive. The outcome of the Appeal would be the same if, instead of applying section 40(2), we had decided that the relevant part of the information request ought not to form part of the FOIA appeal process. It is not therefore essential that we determine the point at this stage and we have therefore addressed the case as it had been presented up to the start of the hearing - on the basis of FOIA section 40(2).

.....

Judge
31 December 2015