



Neutral Citation Number

IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2015/0191

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50575487

Dated: 20 August 2015

Appellant: Dennis West

Respondent: Information Commissioner

Public Authority: London Borough of Hillingdon

Heard at: Fox House, London

Date of hearing: 9 December 2015

Date of decision: 26 January 2016

Before

Angus Hamilton

Judge

and

Rosalind Tatam

and

Nigel Watson

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

Cases considered:

DECISION OF THE FIRST-TIER TRIBUNAL

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

REASONS FOR DECISION

Introduction

- 1 The Information Commissioner's Response in this case correctly sets out the relevant law:
- 2 A person requesting information from a public authority has a right:
 - to be informed by the public authority whether it holds the information (s. 1(1)(a) FOIA) and
 - to have that information communicated to him if the public authority holds it (s. 1(1)(b) FOIA)
- 3 These rights are subject to certain exemptions and for the purposes of this case the relevant exemption is s40(2) FOIA which provides that *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 second condition below is satisfied*
- 4 Section 40(3) FOIA sets out the first condition which states that:
 - (a) *in a case where the information falls within any of the paragraphs (a) to (d) of the definition of 'data' in section 1(1) of the Data Protection Act 1998, that the disclosure of information to a member of the public otherwise than under this Act would contravene:*
 - (i) *any of the data protection principles*

- 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'. Reliance on the Data Protection Principles under s. 40(3)(a)(i) is not however a qualified exemption but an absolute exemption (s. 2(3)(f) FOIA). Consequently, the public interest balancing exercise does not apply to the exemption based on personal data and reliance on the Data Protection Principles although there are other factors to be considered in relation to this exemption which flow from the Data Protection Principles. The issue becomes 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.

- 6 'Personal data' is defined as *'data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller and includes any expression of opinions about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.'* (s. 1(1) Data Protection Act 1998). Processing includes disclosure of the information or data.(s. 1(1) Data Protection Act 1998).

The Request & the Decision Notice

- 7 The appellant wrote to the London Borough of Hillingdon (LBH) on 8 January 2015 and requested the following information:

'All council reports with regard to [redacted address] being used as

commercial premises including the Council's actions, if any, to stop the constant commercial use of this property.'

- 8 LBH responded on 5 February 2015 confirming that it held the requested information but declining to provide it. LBH relied on the exemption at s. 40(2) FOIA asserting that the sought information contained the personal data of the person living at the address (the 'data subject') and that disclosure would be unfair and in breach of the Data Protection Principles.
- 9 The appellant sought an internal review but LBH upheld its original decision. The appellant then complained to the Commissioner on 17 March 2015. The Commissioner concluded, after an investigation, that information relating to whether a residential property was being used for commercial purposes was the personal data of the individual living at that property. The Commissioner further concluded in his Decision Notice of 20 August 2015 that disclosure of the sought information would be unfair and in breach of the Data Protection Principles. The Commissioner therefore found that the absolute exemption in s. 40(2) FOIA was engaged,

The appeal to the Tribunal

- 10 The appellant submitted an appeal on 25 August 2015. The Tribunal examined the Grounds of Appeal and considered that the appeal raised two principal issues. First, that the sought information did not contain any personal data as it would only disclose whether a residential property was being used for commercial purposes and, secondly, that there was a clear public interest in establishing whether the data subject was engaged in any criminal activities or whether he was avoiding business rates and higher utility charges. It should be noted at this point that the Commissioner identified a third potential issue (that there was no risk of distress to the data subject as a result of disclosure - p5 Response to Appeal) but for the reasons given below the Tribunal did not find it

necessary to consider this point.

Evidence

- 11 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.
- 12 The Tribunal considered, from the Appellant, the Notice and Grounds of Appeal. We considered, from the Commissioner, the Decision Notice and the response to appeal. There were no submissions from the public authority and the Tribunal understood that they had not been joined as a party to the proceedings.

Conclusion

- 13 In relation to the s.40 – the personal information exemption – the Tribunal considered first of all whether the sought information contained personal data. The Tribunal had the benefit of being able to consider the contents of the sought information (contained within the 'closed bundle' from LBH) and was wholly satisfied that it contained personal information namely the name and address of a living person and information relating to the use of his property and visits from LBH officials.
- 14 The Tribunal then went on to consider whether the sought information could be redacted in a manner so that all personal data was removed from it. The Tribunal however noted that 'personal data' was defined as '*data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.*' The Tribunal's analysis was that if a redacted report was disclosed to the appellant he would then become a data controller and would as a close neighbour of the data subject, inevitably be in possession of other

information from which the data subject could be identified. Thus even with redaction the sought information would still contain personal data. The Tribunal also considered that there was merit in the Commissioner's assertion that if the sought information was anonymized to prevent identification of the data subject then this would remove the value of the sought information for other members of the public – it would effectively be rendered meaningless – and disclosures under FOIA have to be considered as disclosures to the 'world at large' rather than to a specific individual or group (p5 Commissioner's Response to Appeal).

- 15 The Tribunal then went on to consider whether, given that the sought information contained personal data, it could still be disclosed fairly and whether it could be disclosed satisfying at least one of the conditions in Schedule 2 of the Data Protection Act 1998 - and thus in accordance with the Data Protection Principles.
- 16 The Tribunal first considered the issue of 'fairness'. The Tribunal considered that this was an issue that had not been adequately addressed by the appellant despite the emphasis on its importance in the Commissioner's Decision Notice and Response to Appeal. The appellant asserted that the ongoing trading at the property meant that the use was 'in the public domain', but no evidence on this point was furnished. The Tribunal found the Commissioner's analysis in relation to the issue of fairness set out at paragraphs 26-35 of his Response to Appeal to be compelling.
- 17 The Tribunal accepted the contention that the *'data subject would have a reasonable expectation that his engagement with the Council regarding his use of his private home and his response to any allegations and alleged evidence of wrongdoing would not be disclosed to the world at large. This is especially the case given that such investigations could lead to action being taken by the Council. Accordingly, there would be a reasonable understanding that the information provided would be held in confidence especially as the data subject had no choice but to engage*

with the Council concerning these complaints. It is important to emphasise, for the appellant's benefit, the disclosure under FOIA is considered to be a disclosure to the world at large. Notwithstanding any knowledge the appellant may have this would inform the general public of important personal information about the data subject.' (p6 Response to Appeal).

- 18 Further following the analysis of the Commissioner, which again was not coherently challenged by the appellant, the Tribunal concluded that the appellant's arguments concerning the avoidance of business rates and higher utility bills and alleged criminal misbehavior (in relation to which the appellant had produced no clear evidence – merely assertions) were not sufficient to outweigh the data subject's strong right to privacy in this matter. The Tribunal also agreed with the Commissioner's analysis that there was no pressing social need for the sought information to be disclosed in this case even if they hypothetically were to refer to commercial activities at the property. The Tribunal noted from the 'closed bundle' of information provided by LBH that the appellant had been provided with an overview of its actions in relation to the appellant's complaints without disclosing the sought information to the world at large and this was perfectly sufficient to enable the appellant to consider whether there were grounds for pursuing any further action. Consequently, the Tribunal considered that the disclosure of the sought information would not be 'fair'.

- 19 As a result of the Tribunal's conclusion that the sought information containing the data subject's personal data could not be fairly disclosed the Tribunal did not find it necessary to go on and consider whether the personal data could be disclosed in a manner that satisfied at least one of the conditions in Schedule 2 to the Data Protection Act 1998. This point is, however considered by the Commissioner at p 7-9 of his Response in relation to the third issue identified by the Commissioner from the appellant's Grounds of Appeal (see paragraph 10 above).

20 The appeal was therefore unanimously dismissed.

Signed:

Angus Hamilton DJ(MC)

Tribunal Judge

Date: 26 January 2016